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Litigators of the Week: Kirkland Duo Keeps Up Trial Streak With Defense Win for Samsung in $4B Patent Case

By Ross Todd
February 23, 2024

Adam Alper and **Michael De Vries** of **Kirkland & Ellis** have made a habit of trying—and winning—high-stakes cases as co-lead counsel.

Last week the pair extended their tandem win streak to seven trials in a row by securing perhaps their biggest win to date. After a weeklong trial in Waco, Texas, federal jurors found that their client Samsung did not infringe two semiconductor patents held by Demaray LLC, which was seeking more than $4 billion in damages.

Litigation Daily: Who was on your team and how did you divide the work?

Adam Alper: We believe strongly that our greatest strength as trial lawyers is the team mentality we bring to winning jury trials. This trial was no different. Our trial presentation to the jury during this one-week trial was shared with three different lawyers in addition to Mike and me, all of whom are some of the best trial lawyers at the firm.

Akshay Deoras conducted five separate examinations covering key technical aspects of the case, including crosses of a named inventor and one of Demaray's technical experts, and directs of a key Applied Materials technical fact witness, and our technical expert.

Courtesy photos

(L-R)Adam Alper and Michael De Vries of Kirkland & Ellis.

Sharre Lotfollahi conducted crucial cross examinations of one of the stakeholders in Demaray's business, and one of Demaray's damages experts, as well as the direct examination of our damages expert.

Kat Li not only handled evidentiary matters at the trial, but also multiple key fact and expert witness examinations, including two crucial examinations on the final day of evidence presentation in which we recalled an Applied Materials fact witness on the last day of testimony to rebut Demaray's use of a surprise document with our technical expert the night before.

As he frequently does in our cases, Mike cross examined the first witness in the trial—a named inventor and chief executive of the plaintiff, Demaray LLC. This was a critical cross and Mike used it to establish our case themes out of the gates and expose key holes in the plaintiff's story. Mike also crossed Demaray's lead-off damages expert, as well as putting on our corporate representative fact witness. Although Mike and I co-lead all our cases, I handled the opening and closing in this one, as well as voir dire, technical cross examinations, and the lead off direct examination of an Applied Materials fact witness.

Mike De Vries: I agree. Akshay, Sharre, and Kat are highly skilled trial attorneys who have repeatedly demonstrated their expertise in front of juries. They were critical to our performance at this trial, and in our many others before this one. And, Adam and my work as co-leads throughout our cases remains a unique strength of our practice, and continues to produce exceptional results.

What were your key trial themes and how did you drive them home with the jury—especially in a case where the plaintiff was able to point to a separate settlement agreement involving the same patents?

De Vries: Responding to a case where the other side explicitly leaned in at trial on the idea that the case is about an aggrieved individual fighting against a large corporation required careful treatment. From the start, the plaintiff presented itself as the named inventor and namesake of the company (Demaray LLC), who sat through large portions of the trial (including *voir dire*) along with his wife, who plaintiff also introduced. From the outset of the case, however, we were able to show the jury that the plaintiff was a corporation, not an individual, and that many others—including Demaray LLC's other fact witnesses—stood to gain from the case against our client. And as in every case, maintaining credibility with the jury at every stage of the case is of paramount importance. And as we always do, we fought hard in every moment of the trial to rightfully earn the jury's trust, which is crucial in combating this type of theme from a plaintiff suing a large company.

Alper: The technical aspects of our case were very important, but we knew we needed to tell a straight-forward story of what happened for the jury to effectively respond to the plaintiff's themes as Mike said, e.g., plaintiff's argument that it was fighting against a giant company that was abusing the patent system by using plaintiff's technology without permission. We countered by telling our own story, that the plaintiff had for years said its technology was unrelated to computer chip manufacturing equipment at issue, and only

changed its tune once it met a patent monetization specialist, two months before filing the lawsuit. We also shifted the focus of the trial to the company that manufactures the equipment that was accused of infringement, Applied Materials, who had independently developed the technology at issue including before the patents issued.

To advance that theme, we called three technical fact witnesses from Applied Materials as the first three witnesses of our case-in-chief, rather than reflexively calling our corporate representative from the named defendant as our first witness. In addition, to respond to plaintiff's heavy reliance on another settlement agreement to suggest that our client clearly infringed and should pay, we actually turned that fact around on plaintiff by presenting that agreement as evidence that plaintiff pursued huge damages demands on unsupportable claims, which aligned with our explanation of what happened, and helped to explain both that the plaintiff's claims were wrong substantively and that its damages claim was wildly excessive."

Here the plaintiff's damages ask was $4 billion. As the defendant, did you avoid talking numbers? Or did you use the size of the plaintiff's ask to make the case that this was an overreach?

De Vries: We made the strategic decision to be the first ones to tell the jury about the amount of plaintiff's damages demand—in the cross examination of the named inventor and chief executive of the plaintiff, who testified he did not have that information. We went on to repeatedly ask about the damages demand in successive cross examinations of plaintiff's witnesses, including in the cross examination of plaintiff's lead-off damages expert, who agreed he did not tell the jury how much the damages are that he said were owed. In response, we asked if that was because he was embarrassed about saying the number. Though he said no, we believed it was crucial to let the jury know from the very start and throughout the case that plaintiff's damages demand was a huge overreach.

It seems like things got testy at times during the trial. The court found that one of Demaray's attorneys falsely suggested that Applied Materials, the supplier in this case, had been criminally indicted. That led the judge to halt testimony and ultimately issue a curative instruction telling jurors to disregard that "improper suggestion." You didn't immediately move for a mistrial, but I gather the judge gave you some time to consider that option. Adam, in your closing argument, you ultimately encouraged jurors to question why Demaray brought this all up in the first place. To the extent that you can, walk me through your thinking on all that.

Alper: I think it is fair to say that everyone in the courtroom was shocked by the suggestion included in the question you mention—not only because it had no relevance to anything in the case, but also because it was factually incorrect. But, when it happened, we were faced with a huge strategic decision: ask for a mistrial on the second to last day of trial, and potentially need to start over after having

shown the plaintiff every aspect of our presentation or keep on going to a verdict. Ultimately, though virtually every other defendant would have requested a mistrial in a case seeking what would have been the largest patent verdict in U.S. history by more than $1.5 billion, we chose to keep on going. We were confident in the case we had presented to the jury and thought that a mistrial would have been an "out" for the plaintiff, not for us. Instead, following a lengthy break in the trial proceedings, Mike asked if the court would instruct the jury that the statement was false and improper, and should not be considered. The court did so, and as you mention, that allowed us to make the point I did in closing: that the plaintiff knew it didn't have a case, and that it would resort to anything to get the jury to award it billions of dollars. Ultimately, we used this and similar facts to appeal to the jury's common sense, and confirm another primary theme of the case, which was that our witnesses were the ones who were credibly explaining to the jury what the actual, relevant facts are.

You were trying to preserve defenses concerning the fact that the accused products were made abroad while not coming off to the jury as a company trying to skirt U.S. patent law. How did you strike that balance?

De Vries: At bottom, we believed strongly that plaintiff's damages demand based on use of equipment entirely outside of the United States was not legally sound, and that plaintiff did not have evidence to support such a claim under the law. At the same time, we were confident about our responses to the substantive merits of plaintiff's liability claims and did not want to appear to the jury in any way to be skirting the substantive merits of plaintiff's claims.

As a result, we focused our trial presentation—from opening statement to cross examinations and closing argument—on the substantive merits of our presentations, not on the extraterritoriality flaws in plaintiff's arguments. In contrast, because plaintiff presumably felt the need to elicit evidence about this aspect of its case, plaintiff's cross examinations at times focused heavily on this issue. Ultimately, we believe we were able to strike the right balance between appropriately putting plaintiff to their proof on this key issue, but without creating the incorrect perception that we were running away from the substantive merits of those claims—which of course would render the whole extraterritoriality issue moot if those claims failed before the jury, as they did.

What can others take from Samsung's experience here?

Alper: At bottom, this case resoundingly reaffirmed the key tenets of trial practice that has fueled the string of jury trial wins that Mike and I have been fortunate to have over the last many years: team work, ethics, and credibility. Most importantly, we have learned that winning trials is not about promoting the idea that there is one lead trial lawyer who surpasses all their peers. To the contrary, winning jury trials is about sharing the trial presentation to the jury among a truly elite group of jury trial lawyers—here, Sharre, Kat, and Akshay, and many other amazing attorneys on the trial team who it would unfortunately

be impractical to mention all by name, but who contributed equally to this win along with Mike and me. We are so grateful to work with such an amazing team, who we have worked with on many trial wins over the years. Also, in our practice generally and trial practice, in particular, we are fiercely committed to the honest, ethical practice of law. That is first and foremost the right—and actually the only, way to be—but also is of utmost importance when trying cases to a jury. Especially when the primary theme is that a big company has allegedly done something wrong, evidencing anything other than the utmost of integrity and credibility to a jury will very likely lead to a trial loss. And those types of convictions can carry you to a huge success.

What will you remember most about this trial?

De Vries: For me, this one really caps what Adam and I knew we wanted to achieve together when we started working together nearly 20 years ago now (at separate firms at first, and then together ever since). As you can imagine, defending against what would have been the largest patent verdict in U.S. history presents an immense challenge and requires the utmost trust amongst the team working together on the trial. The team meetings we had leading up to and during the trial—including the conversations we had throughout the trial that I would describe as a mixture of intensely creative brainstorming and coaching in its purest form—are perhaps surprisingly the thing I will remember most, as those are what led to all the truly terrific things that happened before the trial. As I sat there in the moment waiting for the jury's verdict to be read, I thought to myself how important it is to appreciate and enjoy those moments as they are happening, and also that there is probably no better feeling in the world than to work together as a team to achieve a goal especially one as difficult as this one.

Alper: Mike is exactly right—almost 20 years ago, we shared a vision of a practice that would bring us before juries on some of the world's most challenging cases. This was one of them, and it has been a privilege to represent our clients in connection with it. And it has also been fun: there is nothing like being in the thick of trial surrounded by a team of the most talented lawyers and staff around, from the lawyers who took witnesses at trial, to the many others that helped us craft impactful presentations that would resonate with our jury, notwithstanding the incredibly technical subject matter and other key challenges. And ultimately, as we've said before, both Mike and I have tremendous faith in the American jury system's ability to achieve justice. We see it trial after trial, in the way juries respond to the evidence and common-sense presentations of what is right and what is wrong.