

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION**

ESW HOLDINGS, INC.,
Plaintiff,

v.

ROKU, INC.,
Defendant.

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6-19-CV-00044-ADA

AMENDED NOTICE OF TRIAL PROCEDURES

In anticipation of trial on April 5, 2021, the Court notifies the parties of the following trial procedures, which the Court employs to maximize safety and social distancing during trial:

- Jury Selection will begin at 1:30 pm on Thursday, April 1, 2021 in the United States District Court, 800 Franklin, Waco, Texas 76701. Public parking is available at 9th and Franklin Avenue.
- The United States Courthouse in Waco is large enough to permit the jury venire panel to remain at least six feet apart at all times.
- In its jury summons, the Court informed prospective jurors that (1) jury selection will be conducted in the district courtroom, which is large enough to accommodate this jury panel with recommended social distancing; (2) they should bring a face covering; (3) if selected, jurors will be distanced more than six feet apart at all times; (4) all rooms will be cleaned and disinfected before their arrival, and hand sanitizer will be available; (5) bathroom breaks will be lengthened to ensure physical distancing; and (6) no one should report for duty if they feel ill, have any flu-like symptoms, are experiencing shortness of breath, have a fever, are coughing or sneezing, have been asked to self-quarantine by any hospital or health agency, or have had close contact with anyone who has been diagnosed with COVID-19. Jurors have also completed and returned a form addressing their ability to participate, which included questions regarding COVID-19. The Court has excused jurors who sought to be excused based on COVID-19-related concerns.
- Before entering the building, panel members will be instructed to wear a face covering. The Court expects to take panel members' temperatures, and anyone with a fever will be excused from service. The Court will provide gloves for those who would like them, along with hand sanitizer.
- Before voir dire begins, the Court will give each panel member a clear face shield and will instruct the jurors to wear the shields and N-95 masks throughout voir dire. When answering questions, jurors may remove their masks, but not their face shields, if the attorneys would like to see the jurors' faces.

- The Court will provide the parties an opportunity to do a general and individual voir dire at the Court's discretion. The Court will provide the parties with a diagram of the room that identifies the jurors and their seat assignments.
- If necessary, the Court, counsel, and the court reporter may step out of the room to conduct any bench conferences and resolve any motions to strike.
- After six jurors are selected, the Court will dismiss the remaining panel members from service in this case.
- To eliminate the need to leave the building to eat lunch, the Court will enter a jury-sequestration order and will provide the jurors' lunch. The jurors will be able to maintain social distancing during lunch.
- During trial, the jurors will sit in the jury box at least six feet from one another. Jurors will have the option of wearing face shields or N-95 face masks. The parties will sit facing the gallery and will wear masks or shields while not speaking. Witnesses will testify from the witness stand and will not wear masks, but the witness will be separated from others in the courtroom by a plexiglass barrier. If necessary, bench conferences may be moved to chambers.
- Although seating will remain available to the public in the courtroom, an audio feed will be made available to public.
- The parties will further abide by the COVID-19 Protocol below:

COVID -19 SAFETY PROTOCOL

In order to provide a safe environment for all parties and other trial participants, the Court has approved the following COVID-19 safety protocol.

1. Safety Procedures Applicable to Party Participants (Parties, Counsel, Support Staff, and Party-Affiliated Witnesses) Who Enter the Courthouse

All party-affiliated trial participants (both from in-state and out-of-state, including attorneys, staff, witnesses, and party representatives) shall be expected to adhere to CDC guidelines. For party-affiliated trial participants:

(A) Use of PPE by Party Participants

All party-affiliated trial participants are encouraged to use an N95 mask or a generally equivalent mask to be worn at all times in all shared spaces except by (1) the questioning and/or presenting attorney during his/her questioning, opening statements, and closing arguments, while maintaining an at least 10-foot distance from all other persons; (2) a witness while testifying in the witness box surrounded by plexi-glass or other similar protective barrier. Such persons are encouraged to wear face shields while they are not wearing masks, and that the parties provide a suitable microphone and amplification system for those individuals.

A mask is not required while a trial participant is eating or drinking, provided that he or she does so in a responsible manner and keeps at least a 6-foot distance from all other persons.

(B) Social Distancing by Party Participants

All party-affiliated trial participants shall endeavor to adhere to social distancing requirements, including keeping an at least 6-feet of distance from other trial participants and limiting Courthouse elevator occupancy to a maximum of two (2) riders at a time.

2. Safety Procedures for the Jury and Other Non-Party Participants

(A) Distribution and Use of Personal Protective Equipment (PPE)

A variety of PPE be made available free of charge to all jurors and Court personnel, including:

- N95 or generally equivalent masks;
- Face shields;

- Disposable gloves; and
- Personal hand sanitizer bottles, of at least 60% alcohol by volume.

All jurors and non-party trial participants are required to use an N95 or generally equivalent mask at all times in all shared spaces except (a) as permitted by the Court, and (b) a mask is not required while an individual is eating or drinking, or, while deliberating, provided that he or she does so in a responsible manner and keeps at least a 6-foot distance from all other persons.

(B) Pre-Entry Health Assessments

a. Temperature Checks

Consistent with existing protocols, the Courthouse personnel will perform a temperature check on all individuals entering the Courthouse through no-contact thermal imaging. Any person exhibiting a temperature greater than 100.4⁰ will not allowed in the building.

b. COVID-19 Safety Questionnaire

Self-assessment health signage is already posted conspicuously around the Courthouse. Such signs direct any person who fails the self-assessment not to enter the building.

In addition to the self-assessment health signage around the Courthouse building, jurors and non-party trial participants are required to (i) complete a written COVID- 19 self-assessment form on the first day they enter the Courthouse, which form would be submitted in confidence to the Court's personnel, and also (ii) promptly inform the Court of any material changes in the self-assessment before they return to the

Courthouse on any subsequent day in connection with the trial. The assessment would include the following questions:

- In the last three weeks, have you been diagnosed with COVID-19?
- Are you currently experiencing new or worsening signs of any of the following symptoms not otherwise attributable to a condition other than COVID-19 (such as pregnancy, dehydration, rigorous exercise, etc.): difficulty breathing or shortness of breath; loss of the sense of taste or smell; gastrointestinal discomfort including vomiting or diarrhea; fever; cough; fatigue; headache; or muscle or body aches; or runny nose?
- In the last two weeks, have you been in close contact with someone who was diagnosed with COVID-19 or whom you believe likely has COVID-19? You have been in close contact if you have (a) been within 6 feet of someone who has COVID-19 for a combined total of 15 minutes or more over a 24-hour period *or* (b) provided care at home to someone who is sick with COVID-19 *or* (c) had direct physical contact (e.g., hugged or kissed) with someone who has COVID-19 *or* (d) shared eating or drinking utensils with someone who has COVID-19 *or* (e) been sneezed on or coughed on by someone who has COVID-19.

(C) Social Distancing

All jurors and non-party trial participants be instructed to adhere to social distancing requirements, including keeping an at least 6-feet of distance from other participants and limiting Courthouse elevator occupancy to a maximum of 2 riders at a time.

3. Additional Proposed Safety Procedures

(A) Procedures For Jury Assembly Room and Jury Deliberation Room

Additional precautions are to be taken in rooms used by the jury during assembly, breaks, and deliberations, on days when such rooms are occupied:

- Availability of hand sanitizer containing at least 60% alcohol by volume; and
- Daily surface cleanings with appropriate disinfectants with activity against COVID-19.¹

(B) Procedures In the Courtroom

Additional precautions are to be taken in the Courtroom each day of trial:

- Use of plexi-glass or other similar protective barrier around the witness stand, as already erected by the Court and used in prior trials;
- Appropriate distancing between counsel's tables, the lectern, the jury box, and the Court;
- Availability of hand sanitizer containing at least 60% alcohol by volume;
- Disinfectant cleaning of the witness box and witness microphone at the conclusion of each witness's testimony performed by party-affiliated staff with appropriate disinfectants with activity against COVID-19;
- Daily surface cleanings; and
- Limit on the number of individuals inside the Courtroom at any particular time as follows:
 - Maximum of 8 party-affiliated trial participants per party including

¹ The Courthouse employs a highly trained cleaning staff that will clean and disinfect each of the rooms and areas identified above on a daily basis.

corporate representatives and technical personnel, but not including any witness presently testifying; and

- Maximum of 6 jurors during trial after jury selection, and a maximum of 20 potential jurors or jurors during voir dire and instructions.

(C) Live Feed

In order to minimize the number of party-affiliated individuals that will be in the Courthouse on any given day and to accommodate any witness that will testify remotely by video but would otherwise be permitted to observe trial, a live video feed of the trial proceedings will be arranged. The parties will work with the Court IT staff to arrange such a stream using the Court's Zoom platform, and individuals or groups of individuals that access the stream will be required to login using a designated link. This live feed may be accessed by the following party-affiliated individuals outside of the Courthouse:

- The parties' outside counsel, staff, and consultants;
- Party in-house counsel disclosed under the Protective Order;
- Witnesses on either party's witness list to the extent permitted under the Protective Order and Pre-trial Order. A fact witness (other than a designated corporate representative) may not observe the testimony of other witnesses until after that witness has completed his/her testimony and been excused by the Court. Expert witnesses and corporate representatives may observe the testimony of other witnesses before they testify—although corporate representatives may be precluded from observing certain sealed testimony because of confidentiality reasons.

The public is permitted to listen to the trial proceedings by telephone. The number to access both voir dire and trial proceedings is **1-(669)-254-5252**, Webinar ID **160 455 8760**, Passcode

622845. Recording of the proceedings in any way is not permitted.

Virtual trial participants and observers should silence electronic devices other than the devices necessary to their remote participation, close unnecessary computer programs or applications (such as email or calendar notifications), and take steps to remove or minimize anything in their remote workspace that might distract from the integrity of the proceedings. Participants and observers who will not be testifying or presenting matters during the proceedings shall mute their microphones and deactivate their cameras. Participants and observers using multiple devices in a single workspace to access the trial should avoid audio feedback issues by using the microphone and speakers on only one device at a time, or by using headphones.

The Court asks all remote participants to do their best to maintain professionalism in order to conduct a fair and efficient trial. Anyone appearing virtually shall dress in the same manner as they would if they physically appeared in the courtroom. If party members, member of the press, or members of the public become disruptive, the Court may further restrict who is able to view the trial. Remote trial participants and observers should conduct themselves in the same way they would if they were physically present in the courtroom.

4. Bench Conferences

There will not be bench conferences in the presence of the jury during trial.

5. Exhibits

The use of electronic exhibits for any exhibit displayed and/or given to the jury unless providing or displaying an exhibit electronically is impractical or restricted under the protective order. For the sake of clarity, any witness, counsel, staff, and the Court

may each have his or her own set of physical exhibits. However, physical exhibits will not be passed to the jury absent approval by the Court.

6. Lunch For Jurors

At the Court's expense, lunch be brought in for all jurors daily in individual boxes or containers with disposable utensils to avoid unnecessary exposure to those outside the Courthouse during lunchtime. Jurors be instructed to increase social distancing beyond 6 feet during eating periods.

7. Costs

Costs for the above that are not borne by the Court will be borne by the parties in equal amounts.

IT IS SO ORDERED.

SIGNED this 30th day of March, 2021.


ALAN D ALBRIGHT
UNITED STATES DISTRICT JUDGE