

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

**PERSONALIZED MEDIA
COMMUNICATIONS, LLC,**

Plaintiff,

v.

GOOGLE LLC,

Defendant.

Civil Action No. 2:19-cv-00090-JRG

JURY TRIAL DEMANDED

DEFENDANT GOOGLE LLC'S MOTION TO CONTINUE TRIAL



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Defendant Google LLC (“Google”) respectfully requests that the Court issue an order continuing the jury selection date currently scheduled for October 1, as reset by the Court on September 1. Google’s counsel and at least one critical witness have conflicts with this new date. Google’s counsel, Mark Mann, has a significant role in *MV3 Partners LLC v. Roku, Inc.* (No. 6:18-cv-00308, W.D. Tex.), including handling jury selection set for the same day—October 1. And Dr. Dan Schonfeld, a crucial expert witness in this case, is also testifying in the same *MV3* trial. They cannot participate in both trials at once.¹ Accordingly, Google would be severely prejudiced by the new trial date. PMC has indicated the new trial date is not feasible for them as well, as their invalidity expert in this case is also testifying in *MV3*. Dkt. 355.

But even beyond these conflicts, due to the COVID-19 pandemic, good cause exists to continue the trial from October in light of the totality of the circumstances. This disease can cause severe health and safety issues and even death for those in particularly vulnerable groups. The risk of trial attendees and their contacts contracting COVID-19 and facing serious health risks, including death, is immeasurably more severe than any harm that would befall the parties to this litigation if trial were continued. Delaying the trial until more information is available or until travel and live attendance is safer will substantially mitigate these severe risks.

Proceeding with trial under the current schedule also unfairly prejudices Google. While PMC has indicated its witnesses are currently planning to attend in person, at least one of Google’s witnesses will likely not be able to attend trial in person, which may ultimately be true for other witnesses as well. PMC has indicated that it intends to take full advantage of the current pandemic and these genuine health, safety, and hardship concerns. PMC will not stipulate to witnesses appearing remotely due to COVID-19 concerns. And it has also indicated it intends to

¹ As noted below, Google’s lead trial counsel, Charles Verhoeven, also has a *Markman* hearing scheduled on September 25—the same date as the final pretrial conference in this case.

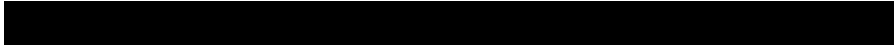


affirmatively argue to the jury that any Google witness who appears remotely did so not because of the legitimate safety concerns of COVID-19, but instead because the case must not be important to Google. Dkt. 341, 1. This would all be extremely prejudicial and unfair to Google. And even if PMC is precluded (as it should be) from taking advantage of the situation to suggest that the absence of a Google witness is not due to safety concerns, the jury may nonetheless draw that same conclusion or reach other negative impressions. In contrast, PMC will suffer no prejudice from continuing the trial for a few more months. PMC seeks only money damages. And it does so on patents that started issuing a decade ago stemming from applications filed decades ago.

Accordingly, Google requests that jury selection be continued for 90 days, at which point the COVID-19 situation can be reassessed. At a minimum, if the trial is not continued, Google requests that all witnesses on both sides should only appear remotely, to provide additional safety to court personnel, jurors, and witnesses and to avoid the prejudice from an uneven presentation at trial. *Sunoco Partners Marketing & Terminals L.P. v. Powder Springs Logistics, LLC et al.*, No. 17-1390-LPS-CJB, Dkt. 583 at 3 (D. Del. July 02, 2020) (Stark, C.J.) (taking the physical and staff limitations of the court and the duty to ensure the safety of the jurors into consideration when deciding that *all witnesses* would appear for trial remotely). As the Chief Judge of the District of Delaware recently held, there is concern “that if it left to the discretion of each party to determine which witnesses will testify in the courtroom, witnesses may feel pressured to conceal symptoms and/or coronavirus-related concerns and come to Court when it would be best if they did not.” *Id.*

LEGAL STANDARD

A district court has broad discretion to grant a motion to continue trial for good cause. *Clinton v. Jones*, 520 U.S. 681, 706 (1997); *Currington v. XTO Energy, Inc.*, No. 1:12-CV-589, 2014 WL 12616683, at *1 (E.D. Tex. May 30, 2014) (quoting *Betzel v. State Farm Lloyds*, 480 F.3d 704, 707 n.2 (5th Cir. 2007)); Fed. R. Civ. P. 16(b). In deciding on requests for a continuance



of trial, the Fifth Circuit assesses “the totality of the circumstances, including such factors as the amount of time available, the moving party’s role in shortening the time needed, the likelihood of prejudice from denial of the motion, the facts of the particular case, the complexity of the case, and all of the demands on counsel’s time and the court’s.” *Wade v. Donahoe*, No. 13-cv-5442, 2015 WL 151455, at *1 (E.D. La. Jan. 9, 2015) (citing *United States v. Stalnaker*, 571 F.3d 428, 439 (5th Cir. 2009)); *see also United States v. Allen*, No. 2011-cv-027, 2012 WL 3763910, at *4–5 (D.V.I. Aug. 30, 2012) (continuing criminal trial where “there is a potential for the spread of the virus during transport and/or court hearings; and the virus can present with many medical complications in adults”); *IQ Prod. Co. v. Onyx Corp.*, 48 F. App’x 107 (5th Cir. 2002) (citing *United States v. Olaniyi-Oke*, 199 F.3d 767, 771 (5th Cir.1999) (the Court may postpone trial due to witness availability where the movant shows, among other factors, that the witness would tender substantial evidence and that denial of the continuance would “materially prejudice the movant”).

ARGUMENT

I. THE OCTOBER 1 JURY SELECTION DATE PRESENTS CONFLICTS FOR BOTH PARTIES’ EXPERTS AND GOOGLE’S COUNSEL

The Court has reset jury selection from October 19 to October 1 and has indicated to the parties that it intends to start trial on October 5. While moving jury selection to October 1 will not solve any of the issues or prejudice from proceeding in October due to the COVID-19 pandemic as discussed below, proceeding on October 1 will create further issues. As discussed in the September 1 status conference with the Court, Google’s counsel, Mark Mann, has a conflict on October 1. Mr. Mann already has another jury selection scheduled in *MV3 Partners LLC v. Roku, Inc.*, (No. 6:18-cv-00308, W.D. Tex.). After jury selection in the *MV3* case on October 1, evidence will begin on October 5. The scheduled trial in *MV3* is a “hard setting” according to the trial staff and Judge. Mr. Mann is handling multiple roles in that matter, including jury selection,

[REDACTED]

examination of witnesses, and oral arguments. The same is true of his roles in this case. Google's expert Dr. Dan Schonfeld is also an expert in *MV3*. Dr. Schonfeld is a critical witness in Google's case, offering opinions regarding, among other issues, non-infringement, non-infringing alternatives, and lack of written description and enablement. Further, Google's lead counsel in this matter, Mr. Charles Verhoeven, has a Markman hearing via Zoom scheduled in *Huawei Technologies Co., Ltd et al v. Verizon Communications, Inc. et al* (No. 6:20-cv-00090, W.D. Tex.) on September 25, which is the same day as the newly scheduled final pretrial conference in this matter. Thus, the new pre-trial conference, jury selection, and trial dates would be extremely prejudicial to Google, depriving it of critical chosen counsel and an essential expert.

Further, after expressing it opposed any trial continuance on the September 1 status conference, PMC today provided notice to this Court that its invalidity expert, Dr. Samuel Russ, is also scheduled to testify in *MV3*. Dkt. 355. Accordingly, both parties seem to agree: the current trial setting of October 5 is not feasible. Google will respond separately to PMC's notice, but the Court has already indicated it will, for now, have no more than one jury trial per month. The Court has already set another trial to commence on October 5 with jury selection on October first, *Solas OLED Ltd. v. Samsung Display Co., Ltd. et al.*, 2:19-cv-00152-JRG. To keep with the Court's expressed intent to have these two trials set for the same day by moving both cases to October, in addition to potential scheduling problems for the parties here (Mr. Mann's conflict due to the *MV3* case will go into the week of October 12 as well), there could be a domino effect of scheduling problems in the *Solas* case too. Google's requested 90 day continuance would avoid these logistical problems altogether, and, as discussed below, is further justified due to the severe health concerns associated with proceeding in-person with trial in October 2020 altogether.

II. AN OCTOBER TRIAL RISKS HEALTH AND SAFETY, WHEN A LATER



TRIAL DATE COULD SAVE LIVES AND AVOID UNNECESSARY PERIL

A. Attending Trial Will Create a Huge Risk of Transmission of COVID-19

Attending trial in-person in October, so soon after the current peaks in numbers of cases, will subject hundreds of individuals, their families and those with whom they interact, and the public in general to unnecessary and severe health and safety risks, during a time when many experts expect a resurgence. Just being in an enclosed courtroom for a week or more with myriad other people who may or may not have been taking precautions of their own prior to entering the courthouse, creates an unnecessary risk of contracting COVID-19. As the CDC makes clear, “[t]he *more people* an individual interacts with at a gathering and the longer that interaction lasts, the higher the potential risk of becoming infected with COVID-19 and COVID-19 spreading,” and “[t]he *higher the level of community transmission* in the area that the gathering is being held, the higher the risk of COVID-19 spreading during a gathering.”² The CDC describes a “highest risk” category for group gatherings as “[l]arge in-person gatherings where it is difficult for individuals to remain spaced at least 6 feet apart and attendees travel from outside the local area.” *Id.* A trial would combine all of these factors, with many people, coming from all around the United States, in close quarters, including in rooms where the trial teams prepare for trial, for a particularly long period of time where, as detailed below, there is a high level of community transmission.

It is also one thing to have parties, counsel, witnesses, and Court personnel face the severe and life-threatening risks associated with COVID-19, but it is another to require jurors to be subjected to that same risk. As Carl Macpherson, director of the Metropolitan Public Defender, Oregon’s largest public defense agency, put it, “[j]urors are not essential workers. [] Being a juror

² *Considerations for Events and Gatherings*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/community/large-events/considerations-for-events-gatherings.html> (updated July 7, 2020).

[REDACTED]

is already a difficult position to put someone in from our community — and to ask a juror to do that during a pandemic is unfair.”³

COVID-19 can be deadly or life-threatening to even healthy, young individuals with no underlying medical conditions, but it is particularly dangerous for vulnerable groups, such as those with immune deficiencies or those age 65 and older. At least two of Google’s experts fall into those categories of high-risk individuals. [REDACTED]

[REDACTED] Slobodyanyuk Decl. ¶ 1. Due to the health implications, Dr. Ramchandran will, therefore, likely not be able to attend trial in-person. As another example, Google’s state of the art expert is in his late 70s, another particularly vulnerable group. *Id.*, ¶ 2. PMC has witnesses of a similar age. While attending the trial in-person and interacting directly before the jury is crucial, witnesses should not feel duty-bound to expose themselves to the risk of contracting COVID-19 at trial (and from traveling to and from trial) and potentially not surviving it.

Google understands and appreciates that the Court is attempting to minimize the spread of COVID-19 in the courthouse, but there is only so much that can be done. The measures taken at the courthouse, *e.g.*, taking temperatures, wearing masks at times, wearing face shields without masks,⁴ offering hand sanitizer, and keeping jurors an extra seat apart in the jury box, cannot

³ Shaila Dewan, *Jurors, Please Remove Your Masks: Courtrooms Confront the Pandemic*, THE NEW YORK TIMES, June 10, 2020, <https://www.nytimes.com/2020/06/10/us/coronavirus-jury-trial-oregon.html>.

⁴ The “CDC does not currently recommend use of face shields as a substitute for masks.” *Considerations for Wearing Masks*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover-guidance.html> (last updated Aug. 7, 2020)); David Aaro, *Coronavirus: Face shields offer less protection for others than regular masks, study finds*, FOX NEWS, <https://www.foxnews.com/health/face-shields-offer-less-protection-others-regular-masks-study> (last visited Sept. 2, 2020).

resolve that coronavirus lingers in the air for hours, especially in enclosed indoor places like a courtroom, that surfaces can be recontaminated immediately after sanitizing them, that nearly half the people spreading the virus may not show any symptoms, and that talking without masks—which will be non-stop at trial—puts much more of the virus into the air than breathing.⁵ The gallery may be opened to the public without a requirement of masks or social distancing.⁶ If any of those people have COVID-19, there is a high possibility of spreading it to other trial attendees and their families and close contacts. In addition, there is a danger that individuals may feel compelled to hide symptoms of COVID-19 and come to Court anyway, exposing countless people and their families to severe health risks surrounding COVID-19. *Sunoco Partners*, Dkt. 583 at 4.

B. Travel, the High Infection Rate in Texas and California, and the Flu Season Dramatically Increase the Risks Associated With COVID-19

Trial attendees would need to travel from locations all over the country, encountering countless people along the way, and then interact closely with the other traveling trial attendees. The risk of transmission will be compounded when the trial attendees return home to their families and acquaintances, potentially exposing their close contacts, themselves, and many others in the general public to COVID-19.⁷ The number of cases of COVID-19 and related deaths in Texas,

⁵ Mitchell Willetts, *85 kids, counselors infected with coronavirus in YMCA camp outbreak, GA officials say*, THE TELEGRAPH, July 10, 2020, <https://www.macon.com/news/coronavirus/article244158667.html> (reporting that 85 people were infected with coronavirus despite taking precautionary measures); Daniel P. Oran and Eric J. Topol, *Prevalence of Asymptomatic SARS-CoV-2 Infection*, Annals of Internal Medicine, (June 3, 2020), <https://www.acpjournals.org/doi/10.7326/M20-3012>; *'Silent transmission': COVID-19 largely spread by asymptomatic, presymptomatic carriers, study says*, Fox Television, July 11, 2020, <https://fox6now.com/2020/07/11/silent-transmission-covid-19-largely-spread-by-asymptomatic-presymptomatic-carriers-study-says/>.

⁶ Google respectfully requests that, if the trial is not continued, all non-speakers at trial, including jurors, be required to wear face masks and that the attendance in the gallery be limited to ensure at least 6 feet can be kept between people.

⁷ Mercey Livingston, *10 activities that expose you to coronavirus, ranked from most to least risky*, Aug. 20, 2020, <https://www.cnet.com/health/these-risky-activities-could-expose-you-to->

California, and around the United States are also still growing rapidly.⁸ In the United States on September 2, 2020, there were 39,711 new cases and 1,009 new deaths over the previous day.⁹ Texas is among the three states with the highest number of COVID-19 cases per capita.¹⁰ Sadly, on August 17, Texas surpassed 10,000 coronavirus deaths, becoming the first state in the southern part of the United States with so many fatalities, and recently reported the highest daily death tolls of any state outside of the Northeast.¹¹ In East Texas, the death toll surpassed 500 on August 24, and Harrison County specifically ranks as the sixth highest county (out of 29) in East Texas for the number of COVID-19 deaths.¹² Areas like Houston and Dallas, through which trial attendees may travel, are similarly seeing increasing and high numbers of COVID-19 cases.¹³ The governor of Texas has stated we must avoid “COVID-19 fatigue” and continue to follow health officials’ recommendations including staying home as much as possible.¹⁴

coronavirus/ (ranking air travel risk level: high).

⁸ *CDC COVID Data Tracker*, <https://www.cdc.gov/covid-data-tracker/#cases> (last visited Sept. 3, 2020) (showing the rise in COVID-19 cases over the 7 prior days).

⁹ *Cases in the U.S.*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> (last visited Sept. 3, 2020).

¹⁰ Christina Maxouris, *Georgia, Texas and Florida lead the country in coronavirus cases per capita*, <https://www.cnn.com/2020/08/19/health/us-coronavirus-Wednesday/index.html> (updated August 19, 2020).

¹¹ Nicholas Reimann, *Texas Just Reported Its 10,000th Coronavirus Death*, Aug. 17, 2020, <https://www.forbes.com/sites/nicholasreimann/2020/08/17/texas-just-reported-its-10000th-coronavirus-death/#2f32d733713e>.

¹² *More than 23,700 people have contracted COVID-19 in East Texas; death toll passes 500*, <https://www.cbs19.tv/article/news/health/coronavirus/Monday-june-1-confirmed-cases-of-covid-19-in-east-texas-surpass-3000-deaths-top-100/501-bc692e6a-ae6f-4447-9842-317a644ddbfc> (last updated Sept. 3, 2020).

¹³ *Coronavirus (COVID-19)*, <https://www.dallascounty.org/covid-19/> (last visited Sept. 3, 2020); Jordan Ray et al., *Tracking Coronavirus: Interactive maps, charts show spread of COVID-19 across Houston, rest of Texas*, Aug. 31, 2020, <https://www.houstonchronicle.com/coronavirus/article/covid-interactive-map-houston-texas-us-case-virus-15142609.php>.

¹⁴ *Governor Abbott Visits Lubbock To Hold Briefing With Local Leaders, Provide Update On COVID-19 Response*, Aug. 13, 2020, <https://gov.texas.gov/news/post/governor-abbott-visits-lubbock-to-hold-briefing-with-local-leaders-provide-update-on-covid-19-response>.

Because of the recent spike in COVID-19 cases, even courts in states with fewer numbers of COVID-19 cases and deaths are responding to the threat of contracting COVID-19 by continuing all trials. For example, the District of Colorado and the District of Utah just suspended all criminal and civil jury trials.¹⁵ In addition, individual judges have been addressing the recent surges in COVID-19 cases in Texas by postponing trials on a case-by-case basis.¹⁶

Like Texas, California, where a large portion of Google's team is located, is one of the worst states for COVID-19 deaths and cases.¹⁷ At least one Google fact witness on the "will call" at trial list is from California, as are nine fact witnesses on its "may call" list. Slobodyanyuk Decl. ¶¶ 6, 8-11, 13-15, 17-18. Most of Google's counsel and trial team are in California. *Id.* ¶¶ 18-23. The trial would, therefore, bring together individuals from states with some of the largest numbers of cases in the nation.¹⁸

Flu season will also make the COVID-19 situation riskier. Flu activity is most common in the fall and winter and often begins to increase in October.¹⁹ Thus, "[i]f the coronavirus surges in the fall and the flu season is bad, the combination could put hospitals and patients at risk."²⁰ As

¹⁵ Sarah Jarvis, *Coronavirus: The Latest Court Closures And Restrictions*, <https://www.law360.com/articles/1252836/coronavirus-the-latest-court-closures-and-restrictions> (last updated Sept. 3, 2020).

¹⁶ Dani Kass, *COVID-19 IP Catch-Up: All Eyes On Texas*, Law360, Aug. 14, 2020, https://www.law360.com/commercialcontracts/articles/1301187?utm_source=rss&utm_medium=rss&utm_campaign=section.

¹⁷ *CDC COVID Data Tracker*, <https://www.cdc.gov/covid-data-tracker/#cases> (last visited Sept. 3, 2020) (showing California and Texas as the worst two states for cases in the last seven days).

¹⁸ Witnesses and counsel for both Google and PMC would additionally be coming from New York, Connecticut, Massachusetts, Virginia, and elsewhere, further increasing the risk.

¹⁹ *Influenza*, <https://www.cdc.gov/flu/about/season/flu-season.htm> (last visited Aug. 25, 2020); *Why is the flu more common in the winter?*, <https://www.webmd.com/cold-and-flu/qa/why-is-the-flu-more-common-in-the-winter> (last visited Aug. 25, 2020); Hannah Foster, *The Reason for the Season: why flu strikes in winter*, Dec. 1, 2014, <http://sitn.hms.harvard.edu/flash/2014/the-reason-for-the-season-why-flu-strikes-in-winter>.

²⁰ Lisa Lockerd Maragakis, M.D., M.P.H., *First and Second Waves of Coronavirus*, <https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/first-and-second->

one professor of epidemiology stated, “There’s definitely a concern about the flu overlapping with COVID. . . . This could be devastating for the health care system.”²¹ Plus, “there is a risk of getting both [the flu and COVID-19] at once—and having an immune system that is already compromised by the flu while contracting the coronavirus could lead to massive health emergencies.”²²

III. CONTINUING TRIAL WILL NOT PREJUDICE EITHER PARTY, BUT PROCEEDING WITH TRIAL WILL BE HIGHLY PREJUDICIAL TO GOOGLE

This case concerns intellectual property, not civil liberties, personal liberties, or privacy such that delay might have a negative impact on the parties. Instead, here, monetary damages are sought. Plus, the patents at issue in this case originated from applications filed in the 1980s. And they started issuing a decade ago. PMC is not a competitor of Google. There is no rush here.

Further, PMC will not even agree that witnesses with concerns due to COVID-19 can appear remotely. *See* Joint Proposed Pretrial Order, Dkt. 354, 11-12. Rather, PMC is seeking to cynically use this unprecedented pandemic for a litigation advantage. This position itself is manifestly unreasonable and inhumane, inconsistent with the Federal Rules of Civil Procedure, and this Court’s prior rulings and statements regarding remote witness testimony. As discussed earlier, for health and safety reasons, at least one of Google’s experts and likely other fact witnesses will be presented remotely if the case is not continued. PMC’s position only further exacerbates the prejudice Google will suffer if the trial date is not continued.

If the trial were to proceed with the current dates with one or more of Google’s witnesses appearing remotely, as should be allowed as appropriate, and with all PMC witnesses appearing in person, it would be highly prejudicial to Google as well. Regardless of what witnesses say

waves-of-coronavirus (last updated Aug. 14, 2020).

²¹ Lindsay Kalter, *A Great Unknown: When Flu Season and COVID Collide*, <https://www.webmd.com/lung/news/20200810/a-great-unknown-when-flu-season-and-covid-collide> (last updated Aug. 10, 2020).

²² *Id.*

[REDACTED]

during trial, it is unavoidable that the jury will have a different opportunity to interact with and accurately judge the credibility of the witnesses who are attending trial in person compared to those that will only be seen and heard on a screen. Indeed, PMC refused to agree that witnesses would not be disparaged for not appearing in person at trial, instead forcing Google to file a motion *in limine*. See Dkt. 341, 1. It appears PMC seeks to malign Google's witnesses by trying to convince the jury, falsely, that the absence of Google witnesses in person at trial shows Google does not take the proceedings seriously. Or perhaps PMC seeks to take advantage of some potential jurors' views that COVID-19 is being taken *too* seriously by Google and others, or stoke similar emotions on COVID-19 that have resulted in political conflicts throughout the United States. Of course, PMC is fully aware of the magnitude of prejudice that can result from issues surrounding COVID-19, as evidenced by PMC's own motion to preclude any mention that one of its experts went to Wuhan University in China. Dkt. 343, 11-12.

IV. PROCEEDING WITH TRIAL NOW WILL AFFECT THE OUTCOME OF THE LITIGATION

The current mechanisms in place at the courthouse to mitigate COVID-19 health and safety risks also create several issues that could easily affect the outcome of the litigation. For example, several issues arise from symptoms of COVID-19 overlapping with those for flu or the common cold. Currently, those who exhibit cough, fever, or shortness or breadth, common symptoms of COVID-19, are prohibited from entering any courthouse in the Eastern District of Texas. General Order No. 20-04, *In re Targeted Visitor Restrictions* (E.D. Tex. Mar. 18, 2020). These entirely overlap with flu symptoms.²³ And to further complicate the matter, “[b]ecause colds and [the] flu

²³ *The Difference between Flu and COVID-19*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/flu/symptoms/flu-vs-covid19.htm> (last updated Aug. 4, 2020).

share many symptoms, it can be difficult (or even impossible) to tell the difference between them based on symptoms alone.”²⁴ Thus, especially with cold and flu season starting in October, there is a high likelihood that counsel, witnesses, and even jurors will have one or more symptoms of COVID-19 during and throughout trial if it is not continued. Thus, key trial participants may (as they likely should) be prohibited from entering the courthouse during trial, even if the person only had a cough. In addition, trial may be interrupted and prolonged if a participant has any of these symptoms, tests positive for COVID-19, or comes in contact with someone who tested positive. They would likely need to be tested and everyone at trial may need to quarantine at least until the test results came back, and possibly longer if the test result is positive. In other words, if someone has a cough, fever, or other symptoms, the trial might come to a halt.

In addition, proceeding with trial on the current schedule will change the jury selection process and the information that the jury receives from the witnesses at trial. For example, the entire jury pool may be wearing masks upon entering the courthouse, including through *voir dire*. As such, counsel may not be able to see or determine facial expressions or reactions that the jurors make to certain questions during jury selection. As the Court has previously recognized, the jury selection process will also likely take far longer than typical due to additional precautions that are needed due to COVID-19 risks. Also, part of the jury’s job is to determine the credibility of the witnesses. Without a continuance of the trial, the jury will be forced to try to determine the credibility of any remote witness without the benefit of seeing her face-to-face. And, again, the witnesses that do appear (like other speakers at trial) will do so without masks during testimony, increasing the danger to everyone at the trial and anyone who comes in contact with them.

V. A CONTINUANCE WILL ENSURE ADDITIONAL INFORMATION IS

²⁴ *The Difference Between Cold and Flu*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/flu/symptoms/coldflu.htm> (last updated Dec. 30, 2019).

AVAILABLE TO BETTER ASSESS THE COVID-19 RISKS

If the case is stayed for 90 days to reassess the COVID-19 situation, there will be more information available than in October. For example, schools around the country will have been in session for half of the school year. There will also be more information about whether being indoors with and without masks for extended periods of time with the same people causes significant spread and outbreaks of COVID-19. By January 2021, there will also be more information available about community spread of the virus throughout the country and whether mask mandates made any difference in curbing the spread of COVID-19. In other words, by early 2021, it will be more clear how changes taking place in the fall affect the incidence of COVID-19 cases and which measures have better controlled COVID-19 in colder weather.

Another reason to continue trial is because coronavirus experts are optimistic that a vaccine will be available to protect the public from COVID-19.²⁵ At the least, there will be more information about the progress of vaccine developments if the trial is continued for 90 days. The availability of a vaccine could reduce risk to the trial attendees, including vulnerable members, the jury, the Court, witnesses, counsel, and the general public, and to family and acquaintances of the trial attendees. Researchers are currently developing more than 165 vaccines against the novel coronavirus, and 32 vaccines are in human trials, with 2 vaccines already approved for early or limited use.²⁶ In fact, lawmakers have been notified that a coronavirus vaccine could be ready for

²⁵ Matthew S. Schwartz, *Fauci Says He's 'Optimistic' Americans Will Get Coronavirus Vaccine Next Year*, July 31, 2020, <https://www.npr.org/sections/coronavirus-live-updates/2020/07/31/897728431/fauci-optimistic-americans-will-get-coronavirus-vaccine-next-year>.

²⁶ Jonathan Corum et al., *Coronavirus Vaccine Tracker*, <https://www.nytimes.com/interactive/2020/science/coronavirus-vaccine-tracker.html> (last updated August 21, 2020).

[REDACTED]

distribution by the end of the year,²⁷ and the CDC has indicated it might be available for distribution to vulnerable groups as early as November 1.²⁸ As such, it would be highly beneficial for the health and safety of the parties, witnesses, counsel, Court, and general public for the trial to be continued for 90 days when there could be a vaccine available and more information about viable vaccines will be available. At a minimum, with community safety efforts, the COVID-19 risk will hopefully be reduced from current levels after a 90 day continuance.

Plus, the timing of this request makes it ripe for a continuance. Unlike Apple's request to continue trial based on COVID-19 concerns in *Optis Wireless Technology, LLC et al. v. Apple, Inc.*²⁹, this request is being made further in advance of the pretrial conference and when the jury questionnaire has not already gone out. The request here to continue trial based on COVID-19 concerns is three weeks before the new September 24 pretrial conference date, but close enough to the trial date to understand the immediate concerns and risks associated with traveling to and attending trial on that date and to understand that those risks will not be resolved by October.

VI. IN THE ALTERNATIVE, ALL WITNESSES SHOULD APPEAR REMOTELY

If the trial is not continued for 90 days, when there will likely be new developments and better information about COVID-19, in the alternative, Google requests that all witnesses be required to appear remotely on both sides of the case. The Court has allowed witnesses to appear live via video to allow trial to proceed. *Accord* Fed. R. Civ. P. 43(a) ("For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open

²⁷ Matthew S. Schwartz, *Fauci Says He's 'Optimistic' Americans Will Get Coronavirus Vaccine Next Year*, July 31, 2020, <https://www.npr.org/sections/coronavirus-live-updates/2020/07/31/897728431/fauci-optimistic-americans-will-get-coronavirus-vaccine-next-year>.

²⁸ Michelle R. Smith, *CDC tells states: Be ready to distribute vaccines on Nov. 1*, September 2, 2020, <https://apnews.com/71e616bb423c6d3e97fbaa7a97bca7e7>.

²⁹ Case No. 2:19-cv-00066-JRG (E.D. Tex. July 14, 2020), Dkt. 341.



court by contemporaneous transmission from a different location.”).

PMC has indicated that all of its witnesses will appear in-person. In addition to reducing the risk of spread to or from additional people in the courtroom during trial and helping safeguard the health and safety of both parties’ witnesses, having all witnesses appear remotely will eliminate the prejudice to Google resulting from one or more of its witnesses being physically absent from the courtroom due to COVID-19 concerns, while PMC’s witnesses are all physically present. This includes removing the possibility that the jury will draw negative conclusions about Google based on its witnesses’ physical absence from trial, whether from their own opinions and observations or from PMC’s efforts to disparage Google witnesses. *Sunoco Partners*, Dkt. 583 at 3. As stated in *Sunoco*, “[t]he Court is concerned that unless all witnesses can [testify in person], there is a risk of unfair prejudice to the side which has more witnesses who end up being unable to come to the courtroom [due to COVID-19 concerns].” *Id.* This solution would at least minimize that risk.

VII. A LATER TRIAL DATE WOULD ALLOW THE FEDERAL CIRCUIT TO RULE ON GOOGLE’S PENDING PETITION FOR A WRIT OF MANDAMUS

As the Court noted on the September 1 status conference, Google has filed a petition for writ of mandamus with the Federal Circuit seeking to vacate this Court’s Order denying Google’s motion to dismiss or transfer this case for improper venue. Google seeks to stay all non-venue-related aspects of the case until resolution of the venue issues raised in Google’s petition. In addition to being warranted for the reasons discussed above, Google’s requested 90 day continuance would also allow time for the Federal Circuit to rule on Google’s petition, which deals with a threshold issue of proper venue in this matter.



Dated: September 3, 2020

Respectfully submitted,

/s/ Charles K. Verhoeven

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CERTIFICATE OF CONFERENCE

Pursuant to Local Rule CV-7(i), the undersigned hereby certifies that counsel for the parties conducted a meet-and-confer regarding this Motion prior to filing. Specifically, on July 31, 2020 counsel for Google, David Perlson, participated in a telephonic conference with counsel for PMC, Joseph Grinstein, regarding the issues raised herein but the parties were unable to resolve their dispute. Thus, this Motion is opposed.

/s/ Charles K. Verhoeven
Charles K. Verhoeven

CERTIFICATE OF AUTHORIZATION TO FILE UNDER SEAL

Pursuant to Local Rule CV-5(a)(7), the undersigned hereby certifies that this document is being filed under seal pursuant to Paragraph 17 of the Protective Order (Dkt. 86).

/s/ Nima Hefazi
Nima Hefazi

CERTIFICATE OF SERVICE

Pursuant to Local Rule CV-5(c), the undersigned hereby certifies that all counsel of record who have consented to electronic service are being served with a copy of this document via ECF on September 3, 2020.

/s/ Nima Hefazi
Nima Hefazi