

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

INFERNAL TECHNOLOGY LLC, and
TERMINAL REALITY, INC.,

Plaintiffs,

v.

SONY INTERACTIVE ENTERTAINMENT
LLC,

Defendant.

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Civil Action No. 2:19-cv-248
LEAD CASE

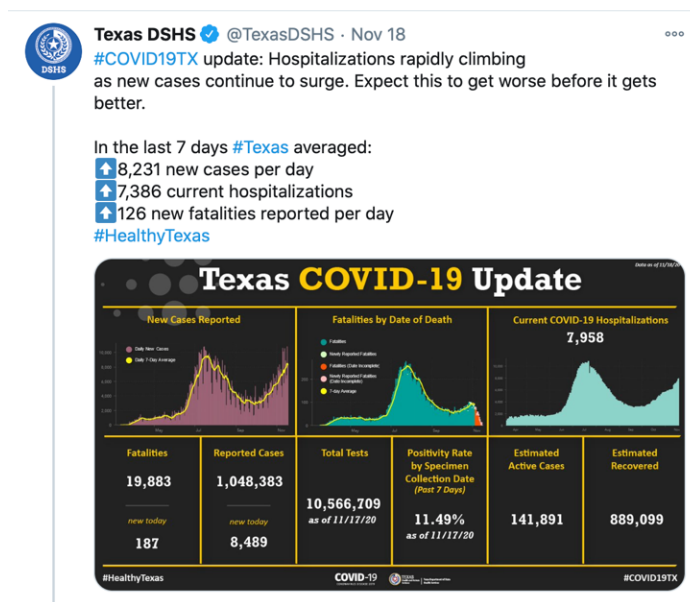
JURY TRIAL DEMANDED

**SONY INTERACTIVE ENTERTAINMENT LLC’S OPPOSED
MOTION TO CONTINUE TRIAL**

A jury trial has been set in this case for December 4, 2020 – two weeks from tomorrow. Defendant Sony Interactive Entertainment LLC (“Defendant”) respectfully requests that the Court continue the trial of this case at least three months, to March 2021. Defendant well understands the Court’s predicament as the Court attempts to maintain its commitment to provide speedy justice in a crowded docket, but the risks of conducting a jury trial during the current surge in COVID-19 have increased dramatically in a very short period of time, and they are set to escalate even further. While timely justice is unquestionably important, Defendant respectfully submits that health and safety should take the higher priority during the present exigent circumstances.

COVID-19 is spreading at its highest rate since the pandemic began, and health experts expect it to get worse in the coming weeks. The East Texas community in particular is experiencing “substantial” increases in COVID-19 community spread and is now categorized as

having “large scale, uncontrolled community transmission.”¹ In fact, Texas health experts are cautioning people to not even gather in-person, or indoors, with their families for Thanksgiving next week.² And, with the increased number of COVID-19 cases comes an increase in hospitalizations and fatalities in Texas and throughout the United States.



The trial of this case will necessarily entail individuals from across the country – from California, Kansas, Illinois, North Carolina, and Texas – traveling to Marshall, Texas, the week following Thanksgiving. Defendant’s fact witnesses and corporate representative reside in California, Defendant’s counsel are in Kansas, Plaintiffs’ technical expert witness is in Illinois, Defendant’s technical expert witness is in North Carolina, and Plaintiffs’ counsel and both

¹ Exhibit A, KLTU NET Health: Substantial community spread of COVID-19 in several East Texas counties, <https://www.kltv.com/2020/11/19/net-health-substantial-community-spread-covid-several-east-texas-counties/>. Additional information and statistics regarding the current state and spread of the COVID-19 pandemic are amply set forth in motions to continue filed in other co-pending cases, incorporated here for reference and brevity. See, e.g., *Solas OLED Ltd. v. Samsung Display Co., Ltd. et al.*, No. 2:19-cv-00152-JRG, Dkt. 297 (Defendants’ Opposed Motion to Continue Trial filed November 18, 2020) (“Samsung Motion to Continue”).

² See, e.g., Exhibit B, Texas Department of State Health Services Nov. 18, 2020 News Release, “DSHS Shares Advice for a Safe, Healthy Thanksgiving,” <https://www.dshs.texas.gov/news/releases/2020/20201118.aspx> (“With Thanksgiving right around the corner, Texas enters the holiday season at a time when COVID-19 is spreading rapidly and hospitalizations continue to rise throughout the state,” “One of the safest ways to celebrate is with a virtual Thanksgiving dinner.”).

parties' damages experts are in Dallas. Plaintiffs' lead trial counsel has had recent international travel to Brazil this week and certain individuals on the Plaintiffs' trial team have had or will have exposure to that lead counsel just before and during trial. *See* Dkt. 255. An attorney on Plaintiffs' trial team tested positive last Friday for COVID-19 and certain individuals on Plaintiffs' trial team have already been exposed to that known positive COVID-19 carrier (Dkt. 255). All of these individuals will spend substantial time indoors together throughout the trial both in the courtroom and at preparation sites before and during trial. Upon the conclusion of the trial on or about December 11, 2020, each of these individuals will return home to their own communities. Even assuming that no actual spread of COVID-19 occurs during the trial (which is not a reliable assumption, as discussed below), Defendant's California witnesses and representatives will be subject to a 14-day quarantine which would envelop the Christmas holiday – i.e., up to and including December 25, 2020, Christmas Day.³

There have been periods of time when the community spread of COVID-19 has not been as significant, the risks were lower, and the Court has successfully conducted a number of jury trials without any known transmission of COVID-19. But given the increased community spread of COVID-19 throughout the potential juror pool as well as throughout the parts of the country from which other trial participants will arrive, the probability of having just one person infected with COVID-19 within close contact of other individuals involved in the anticipated trial has significantly increased. According to some estimates, that risk is now about a 1-in-3 chance.⁴ It only takes one positive case for a jury trial to become a super-spreader event that impacts not only Marshall and its surrounding communities but numerous other communities to which

³ Exhibit C, California Travel Advisory dated November 13, 2020, <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Travel-Advisory.aspx>.

⁴ *See* Samsung Motion to Continue at p. 6, n23.

unknowingly positive carriers may return following trial.

Defendant appreciates that the Court undertakes great effort to provide a clean and safe environment for trial. Nonetheless, if even one positive COVID-19 carrier ends up in the courtroom for any meaningful period undertaking normal courtroom interactions, it is hard if not impossible to stop the viral spread. Despite highly similar safety precautions being applied in this District’s Sherman courthouse, a recent trial resulted in a mistrial after at least 15 participants in the trial – including two jurors, three members of the defense team, a “handful of folks” on the plaintiff’s team, and five or six court staffers – contracted COVID-19.⁵ Trials during COVID are safe until they quickly pivot to very dangerous, and that pivot point is invisible and impossible to detect until it is too late. Today it was announced that the Sherman courthouse will be closed to the public for two weeks “[a]s a precautionary measure out of concern for the health and safety of court employees, parties having business with the court, and the public”⁶ Defendant respectfully submits that the same concern for health and safety should be proactively addressed by this Court, and for all of the reasons discussed herein, justifies a continuance of the trial in this matter.

Dated: November 19, 2020

Respectfully submitted,
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⁵ Exhibit D, “COVID-19 Outbreak Leads To Mistrial In EDTX”, November 17, 2020, https://www.law360.com/ip/articles/1329617/covid-19-outbreak-leads-to-mistrial-in-edtx?nl_pk=9475e0fa-dadf-4317-94eb-96291cbfb2af&utm_source=newsletter&utm_medium=email&utm_campaign=ip

⁶ Exhibit E, “Closing of Paul Brown United States Courthouse,” November 19, 2020.

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*Counsel for Defendant Sony Interactive
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CERTIFICATE OF CONFERENCE

I hereby certify that counsel for Defendant conferred with counsel for Plaintiffs regarding the foregoing Motion to Continue Trial on November 19, 2020. Plaintiffs' counsel stated that it is opposed to the relief requested in this motion.

/s/ Eric A. Buresh

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served on all counsel who have consented to electronic service, Local Rule CV-5(a)(3), on November 19, 2020.

/s/ Eric A. Buresh