

FILED UNDER SEAL PURSUANT TO PROTECTIVE ORDER

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

IMAGE PROCESSING TECHNOLOGIES,
LLC,

Plaintiff,

v.

SAMSUNG ELECTRONICS CO., LTD., ET
AL.,

Defendants.

Case No. 2:20-CV-00050-JRG

BEFORE: Hon. Rodney Gilstrap

PUBLIC VERSION

**JOINT DISPUTED MOTION FOR RELIEF RELATED
TO THE CORONAVIRUS (COVID-19) OUTBREAK**

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Defendants Samsung Electronics Co., Inc. (“SEC”) and Samsung Electronics America, Inc. (“SEA”) (collectively, “Samsung”) and Plaintiff Image Processing Technologies, LLC (“IPT”) hereby submit this Joint Motion pursuant to the Court’s Standing Order Regarding the Novel Coronavirus (COVID-19). Samsung provided the notice required by Section (1) of that Order on March 3, 2020. As required by Section (2), the parties met and conferred regarding this Motion on March 4, 2020. The parties were unable to reach agreement, and therefore submit their respective proposals herein.

I. SAMSUNG’S MOTION TO CONTINUE TRIAL

An outbreak of a deadly and highly contagious new disease, COVID-19, has exploded recently in South Korea and, after starting in China, has now expanded around the world, with 150 cases already reported in the U.S. Good cause exists to continue the trial until the outbreak abates. Key SEC employees are located in South Korea, including a technical witness that developed the accused algorithm, and a licensing witness who would respond to Plaintiff Image Processing Technologies, LLC’s (“IPT”) allegations of willfulness. And, all SEC management and legal personnel responsible for managing and assisting counsel to prepare this case also reside and work in South Korea. Requiring these individuals to travel to the United States in early April to prepare for and attend trial on April 13 creates an unnecessary risk of exposing them, the jury, and the United States public to a deadly new disease.

Continuing the trial for a reasonable period to allow global and Samsung internal measures already undertaken a chance to control this outbreak will cause IPT no prejudice, as its only business is seeking patent licensing fees. In contrast, it would be highly prejudicial to Samsung to deny a continuance because international travel risks exposing Samsung’s employees to the virus (not to mention the increased risk to the Court and the local population). Additionally, fear of the virus will likely cause the jury to become prejudiced against Samsung, a

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well-known South Korean conglomerate, and its South Korean employees. IPT's proposal that Samsung present key witnesses located in South Korea by live video at trial, and that SEC management and legal personnel responsible for managing and assisting in the presentation of these case do so by remote video feed, is equally prejudicial to Samsung and, as a practical matter, unworkable.

In view of the above, and for the reasons stated in more detail below, Samsung requests a continuance for 90 days, at which time the Court can reassess the status of the crisis and assess the potential need for other action.

A. SAMSUNG'S FACTUAL BACKGROUND

Approximately two months ago, a highly transmissible new coronavirus emerged called Severe Acute Respiratory Syndrome Coronavirus 2, or Sars-CoV-2, that causes a respiratory illness called COVID-19. Ex.¹ 4 at 2. In only two short months, over 95,000 cases have been identified with over 3,200 deaths. Ex. 7 at 1. In the last few weeks, the virus has rapidly spread in South Korea, expanding from only 104 cases on February 20, 2020, to over 3,000 cases eight days later, with approximately *800 new cases reported on February 29, 2020 alone*. Ex. 8 at 2; Ex. 6 at 3; Ex. 17 at 1. As of March 5, 2020, there are over 6,000 confirmed cases and more than 40 dead in South Korea.² The disease is airborne, spreads rapidly, and has an average mortality rate of 2.3%, rising rapidly for older individuals to 14.8% for individuals over 80 years of age. Ex. 14 at 1; Ex. 15 at 116; Ex. 9.

SEC is headquartered in South Korea, the country with the second highest number of COVID-19 infections in the world, and has more than 100,000 employees located in the country. Recognizing the extreme seriousness of the outbreak, SEC has proactively taken a number of

¹ Unless otherwise noted, exhibits cited in this motion are attached to the concurrently filed declaration of Marc J. Pensabene.

² <https://www.washingtonpost.com/world/2020/03/05/coronavirus-live-updates/>

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internal steps in an effort to minimize the spread of the virus, including:

- banning non-essential travel,
- requiring that all travel be approved by the head of the human resources department,
- cancelling non-essential business gatherings (including training, face-to-face meetings requiring Samsung employees to travel outside of their own work site, face-to-face meetings requiring visitors to come into Samsung premises, and business dinners), and
- requiring employees to wear masks during any gatherings that do occur, such as in necessary meetings.

Of note, SEC started putting these measures in place prior to the Court's February 24th order lifting the stay in this case. At this stage, SEC employees in South Korea are encouraged to seek medical attention and self-quarantine if the employee has, or is suspected of having, a fever, cough or respiratory symptoms. And employees based in or near company premises where confirmed corona patients have visited, or have been in contact with a potentially infected employee who exhibits coronavirus symptoms, are required to seek medical attention and self-quarantine until medically cleared. And SEC has established a coronavirus task-force to assist employees in following these safety precautions. SEC's wholly owned U.S. subsidiary, Samsung Electronics America, Inc. ("SEA"), has taken certain similar steps. *See, e.g.*, Ex. 20; Ex. 21; Ex. 22.

Turning to the specifics of this case, SEC has key management, legal, and technical personnel involved in this litigation that are all located in South Korea. Samsung's trial witness list includes South Korea residents Taewha Hong, Daejin Jeon, Dongyeob Shin, Seungjin Hyun

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and Ikseon Kang. Ex. 16 at 2. [REDACTED]

B. SAMSUNG’S ARGUMENT

1. Legal Standard

Courts have broad discretion to control their own docket, *Clinton v. Jones*, 520 U.S. 681, 706 (1997), and a court may extend the deadlines set forth in its Docket Control Order for good cause. Fed. R. Civ. P. 6(b). The grant of a continuance where the risk of spreading infectious disease can be avoided by delaying a trial is not at all uncommon and certainly constitutes good cause for doing so. *See, e.g., United States v. Allen*, 2012 U.S. Dist. LEXIS 123487, at *15–*16 (D.V.I. Aug. 30, 2012) (continuing trial during chickenpox outbreak where travel could cause infectious public spread); *People v. Tucker*, 196 Cal. App. 4th 1313 (continuing trial where defendant was at risk of contracting “infectious disease” and a trial could expose “trial court personnel, jurors, and witnesses” to H1N1, a “debilitating and perhaps life-threatening illness”); *State v. Drewry*, 946 A.2d 981, 987 (Me. 2008) (continuing case where defendant under infectious disease quarantine); *People v. Goode*, 628 N.Y.S.2d 727, 728 (N.Y. App. 1995) (similar); *State v. Ibarra*, Case No. 54736, 1988 Ohio App. LEXIS 5256, at *2 (Ohio App. 1988) (similar); *Capers v. U.S.*, 403 A.2d 1155, 1156 (D.C. App. 1979) (similar).

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2. Good Cause Exists to Continue the Trial

Requiring Samsung employees, such as Taewha Hong, Daejin Jeon, and its management personnel to engage in international travel from South Korea will put them, the jury, and the United States public at risk. In the last two months, over 95,000 cases have been identified with over 3,200 deaths. Ex. 7 at 1. The Centers for Disease Control and Prevention (CDC) confirm that COVID-19 “has caused severe disease and death” and emphasize “older adults . . . may be at higher risk for severe illness.” Ex. 1 at 1. Coronavirus spreads rapidly “[t]hrough respiratory droplets produced when an infected person coughs or sneezes” and from “contact with infected surfaces or objects.” Ex. 14 at 1; Ex. 9. “The virus that causes COVID-19 seems to be spreading easily and sustainably in the community . . .” *Id.* The Chinese CDC calculates that COVID-19 has an overall mortality rate of 2.3%, which rises to 14.8% for individuals over 80 years of age. Ex. 15 at 116.

The CDC recommends avoiding travel to the two countries most impacted by the coronavirus, China and South Korea. Ex. 2 at 1. The CDC classified South Korea at the highest possible danger level—Level 3—which indicates travel should be avoided as there is “widespread community transmission” (*id.*) and “no precautions are available to protect against the identified increased risk” (Ex. 3 at 4).

Types of Notices**Warning Level 3**

Warning Level 3 (Red): Avoid all non-essential travel to this destination. The outbreak is of high risk to travelers and no precautions are available to protect against the identified increased risk.

Alert Level 2

Alert Level 2 (Yellow): Practice enhanced precautions for this destination. The Travel Health Notice describes additional precautions added, or defines a specific at-risk population.

Watch Level 1

Watch Level 1 (Green): Practice usual precautions for this destination, as described in the Travel Health Notice and/or on the [destination page](#). This includes being up-to-date on all recommended vaccines and practicing appropriate mosquito avoidance.

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Id. Similarly, the U.S. Department of State has classified part of South Korea at a travel advisory Level 4 (“Do Not Travel”), the highest possible travel advisory, and the remainder of South Korea at Level 3 (“Reconsider Travel”). Ex. 5 at 1; Ex. 13 at 2. The State Department explains that the “World Health Organization determined the COVID-19 outbreak constitutes a Public Health Emergency of International Concern (PHEIC). The South Korean government has . . . upgraded its response level to ‘grave’, its highest response level.” *Id.* “The coronavirus outbreak in South Korea is now spreading faster than the epidemic in China, where the virus first emerged” Ex. 6 at 1. South Korea has begun asking citizens to stay indoors as now is a “‘critical moment’ in its battle on the coronavirus after recording the biggest daily jump in infections, as 813 new cases took the tally to 3,150” on February 28, 2020. Exhibit 8 at 2. The disease is spreading rapidly in South Korea—eight days earlier, on February 20, 2020, South Korea had only 104 cases of coronavirus. Ex. 6 at 3.

As explained above, Samsung is actively taking drastic actions to prevent the spread of coronavirus, and requiring travel in this case would undermine those efforts. Prior to this Court lifting the stay, Samsung implemented controls to prevent the spread of coronavirus to its employees, South Korea, and the United States. In South Korea, SEC has banned non-essential travel, cancelled non-essential business gatherings (including training, face-to-face meetings requiring Samsung employees to travel outside of their own work site, face-to-face meetings requiring visitors to come into Samsung premises and business dinners), and required employees to wear masks during any necessary gatherings. Requiring South Korean individuals to travel to the United States at this time exposes them, the jury, and the United States public to risk of

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illness and death.³ Thus, the trial should be continued.

IPT argues that the above listed South Korea witnesses were listed as “may call” on Samsung’s original trial exhibit list, suggesting that Samsung did not intend to call any fact witnesses. This is far from the case. At the time the stay was granted, the potential scope of the case was far broader, with two other asserted patents, additional asserted claims and, by IPT’s own expert’s account, *eleven* accused algorithms (*i.e.*, the software alleged to infringe). Further, each accused product includes multiple of the eleven accused algorithms. Thus, IPT did not have to present testimony at trial as to all eleven algorithms in order to capture all of the accused products; they could select two or three and still capture the vast majority. And because Samsung had different engineer witnesses responsible for the various algorithms, Samsung had no way to know which of these witnesses would be required to respond; the witnesses were, therefore, listed as “may call.” Now that the scope of the case has been limited and just two algorithms developed by Samsung remain in the case, Samsung has elevated the two engineers with knowledge relevant of those accused algorithms to the status of “will call.” And, although Daejin Jeon remains a “may call,” his testimony will be critically important, depending on the willfulness allegations IPT chooses to present at trial.

3. Continuing the trial will not unduly prejudice IPT, but denying a continuance would unduly prejudice Samsung

IPT suffers no prejudice from delay caused by a continuance because it is a licensing entity that has never designed, manufactured, or sold any products. *See* Dkt. No. 159, Ex. A. IPT does not compete in the marketplace, was unable to identify any facts supporting its request

³ In fact, one of Samsung’s outside counsel on this case recently traveled to South Korea for a meeting and he is now experiencing coronavirus-like symptoms. He is attempting to gain access to a test kit, but they are not publicly available. Los Angeles, where this attorney is based, has declared a state of emergency, and the public health department in Los Angeles is restricting access to the test kits to hospitalized patients.

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for an injunction in response to Samsung's discovery requests (*see* Dkt. No. 159, Ex. D at 16), and has not sought a preliminary injunction, all of which confirms delay causes no undue prejudice. *See VirtualAgility Inc. v. Salesforce.com*, 759 F.3d 1307, 1319 (Fed. Cir. 2014).

Thus, monetary relief will be sufficient to compensate IPT. *See NFC Techs. LLC v. HTC Am., Inc.*, No. 13-1058, 2015 WL 1069111, at *2 (E.D. Tex. Mar. 11, 2015); *Intellectual Ventures II LLC v. BITCO Gen. Ins. Corp.*, No. 15-00059, 2016 U.S. Dist. LEXIS 79778, at *7-*8 (E.D. Tex. May 12, 2016) (Gilstrap, J.). And, as another court in this district has previously determined, a delay of the vindication of patent rights alone is not sufficient reason to deny a request for a delay. *See, e.g., NFC Tech.*, 2015 WL 1069111 at *2.

A lack of undue prejudice or tactical disadvantage is also apparent from IPT's conduct. The '293 Patent issued in 2005. Dkt. No. 69-3 ('293 Patent). The earliest accused products were first sold in the 2008 time period. Dkt. No. 159-1, ¶ 8. Yet, rather than promptly seek to resolve this dispute, IPT waited approximately five years after Samsung's alleged infringement began before even contacting Samsung in 2013. *See* Dkt. No. 69 at ¶ 18 (Amended Complaint alleging notice in 2013). It then waited an additional three years before filing suit in 2016. *See* Dkt. No. 1. And after this case was stayed pending resolution of the IPRs, IPT sought repeated delays of those IPR proceedings, further underscoring a lack of urgency. Dkt. No. 345 at 3. Because IPT is in no hurry to pursue its claims, it cannot credibly argue that it requires a swift resolution of this case, filed approximately *eight years* after the alleged infringement began.

In sharp contrast to the lack of prejudice to IPT from a continuance, proceeding with trial in April will cause considerable prejudice to Samsung for at least three reasons. **First**, Samsung's employees will be exposed to a greatly increased risk of contracting coronavirus while traveling for this case. **Second**, due to fear of contracting the coronavirus and the stigma

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attached to those who are from high risk countries, the jury may become prejudiced against South Korean individuals, including Samsung witnesses, in-house legal counsel and corporate representatives, all of whom would be attending trial, particularly while the outbreak is rapidly expanding. Ex. 19 (CDC publication explaining “Fear and anxiety can lead to social stigma Stigma and discrimination can occur when people associate an infections disease, such as COVID-19, with a population or nationality”); Ex. 18 (report of Corona beer sales dropping 40% in US due to consumer fear of coronavirus). *Third*, if Samsung employees are involved in any spread of coronavirus, Samsung may suffer reputational harm causing reduced sales of its consumer products, including smartphones, tablets, wearables, laptops, and televisions. This prejudice is particularly acute in the present case given the extraordinary (and unreasonable) size of IPT’s claim for damages, well in excess of [REDACTED].

4. IPT’s Proposed Remedial Actions Are Unworkable and Do Not Alleviate the Prejudice To Samsung

IPT has proposed a number of measures as an alternative to a continuance that are unworkable and would not alleviate the prejudice to Samsung.

First, IPT proposes that Samsung show the deposition testimony of its witnesses in place of their live testimony. But the witnesses were deposed by IPT’s attorneys and were not subject to direct examination by Samsung’s lawyers, let alone a full and complete trial direct that could be used in place of live testimony. While this may be acceptable (and even preferable) to IPT, it is far from acceptable to Samsung. To the contrary, it is highly prejudicial.

Second, IPT proposed that Samsung present witnesses by live video. But the *fifteen hour* time difference between South Korea and Texas means witnesses in South Korea would be testifying in the middle of the night. IPT acknowledges this by suggesting, as one alternative, that testimony start at 11pm in South Korea. Assuming arrangements could be made for such

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middle of the night videoconferencing, the witnesses would be tired and forced to interact with unfamiliar videoconference personnel and others, any of whom could be carriers of a deadly virus. And there is a significantly increased risk the witnesses would appear less than truthful to the jury due to weariness and discomfort with the increased health risk. IPT's alternate proposal to start at 7am in South Korea, would correspond to the evening in Texas and require jurors to attend court past the end of usual business hours. This means they would be subject to complex and important (at least to Samsung), technical testimony, at a time when they are the least alert. While this may be acceptable to IPT, it is seriously prejudicial to Samsung.

Additionally, the time difference would mean preparing the witnesses for the trial would be close to impossible. Either the witness or Samsung's U.S. litigation counsel would have to be awake in the middle of the night to work together to prepare the witness's testimony. This is unworkable because Samsung's witnesses and attorneys need sleep in order to prepare for and perform in this trial. Complicating the issue, testimony of native Korean speakers will need to be translated. If the remote video communication between attorneys, translators, and the witness is anything less than perfect, then questions, answers, and translations will have to be repeated, impeding the already difficult task of understanding complex technical testimony. And the use of exhibits and demonstratives will similarly be seriously impaired since the witnesses will be, literally, on the other side of the planet.

The technological hurdles are also significant and unpredictable. Transferring high quality video and audio between countries thousands of miles apart requires a high bit rate and modern processing hardware. There is no guarantee that the Court's infrastructure or any private party solution could present live video that would not be choppy, disjointed, involve a long delay between questions and answers, or have poor sound quality. And there is no guarantee that,

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when it comes down to the specific moment the witness must to testify, a last minute technical glitch would not prevent the video feed from working entirely. Even if the video does work, credibility is critical in jury trials. The jury will likely be far less engaged and interested in a non-live witness, meaning they may simply ignore the testimony or find it not credible, heavily prejudicing Samsung's case.

Third, IPT proposed that instead of SEC's corporate representatives attending the trial live, they could review daily transcripts from South Korea. Putting aside the risk of inadvertent disclosure of non-Samsung confidential information, this alternative is unworkable. The SEC corporate representatives, obviously, would not be at the trial and, thus, unable to advise Samsung's counsel on the spot as witnesses are testifying. They will not be able to get a sense of the court, counsel, or the witnesses, which are all critical inputs into the decision making process. In addition, once receiving the transcripts, they would need to read them closely to understand them, which would then result in a several hour delay from when the transcripts were provided before SEC's representatives could provide any (and likely tardy) input. This would almost certainly be the middle of the night when Samsung's counsel would be in the final moments of preparing for trial or sleeping to rest for trial the next day. This alternative is clearly unworkable and very prejudicial.

Fourth, IPT proposed SEC's in-house legal team and corporate management personnel be replaced with personnel from a subsidiary located in the US—SEA—that primarily focuses on commercialization, distribution, marketing, sales, service, and repair. This proposal is also unworkable and extremely prejudicial. [REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

It would be highly prejudicial to expect U.S. attorneys who are not responsible for managing the entirety of the case to make critical trial management decisions that depend on facts with which they are not familiar.

Fifth, IPT proposed SEC's attorneys and corporate management personnel oversee the trial by video. But again, the fifteen hour time difference and technological limitations make that proposal unworkable, and IPT's suggestion that certain witnesses be time shifted (even if reasonable) does nothing to address the problem for the rest of the trial. SEC employees cannot be expected to make critical strategic decisions in the middle of the night while surrounded by quarantines and a deadly virus. And preparing for trial will be unworkable as either the SEC attorneys or the U.S. trial team would have to be awake to work together in the middle of the night. Finally, there is no guarantee that it will be possible to set up an adequate video and audio feed that will capture the trial clearly, showing the judge, witnesses, counsel, and the jury, and allow SEC to gauge the progress of the trial and make critical strategic decisions.

This case is not a minor dispute—IPT demands over [REDACTED]. And, while Samsung vehemently disagrees with IPT's assessment as to the potential damages in this case, Samsung should not be forced to gamble on a technical solution that would put key SEC witnesses at less than their best, that may work poorly or fail entirely, that may heavily impact Samsung's trial time, or that the jury may not find compelling. [REDACTED]

[REDACTED] with SEA employees who have more limited knowledge and are not responsible for managing the entirety

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of the case, or require them to attempt to decipher the trial over a video feed and make critical decisions in the middle of the night. Thus, all of IPT's alternatives to a continuance are highly prejudicial.

5. CONCLUSION

For the foregoing reasons, Samsung respectfully requests the Court continue the trial for 90 days, at which time the Court can reassess the status of the crisis and assess the potential need for other action.

II. IMAGE PROCESSING'S RESPONSE TO SAMSUNG'S MOTION TO CONTINUE TRIAL

Plaintiff appreciates the gravity and potential impact of the Novel Coronavirus (COVID-19) that led to the Court's issuance of its March 3, 2020 Standing Order and agrees that adequate precautions must be taken. At the same time, as the Court acknowledged in its recent order lifting the stay in this case after a two and half year delay, "Lifting the stay will allow IPT to timely enforce its valid patent rights and such outweighs any prejudice to Samsung." (Dkt. No. 1 at 7.)

Samsung requests an indefinite postponement of the trial of this case based on its claim that two witnesses and in-house legal staff would need to travel from Korea, which is subject to a Level 3 Travel Advisory. But Samsung had not previously identified a single witness from Korea as a will-call witness. Indeed, when the case was originally set for trial Samsung's only will-call witnesses were its experts. Even now, Samsung has identified only one will-call and one may-call witness from Korea. If they testify, their testimony will be only a small part of the trial, as all of the other witnesses, including the experts, are not subject to any travel advisory. Plaintiff proposes that the most reasonable manner to take their testimony in view of the potential COVID-19 risks is via alternative means permitted under the Federal Rules of Civil

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Procedure. There also exist alternative means to keep Samsung in-house legal staff abreast of the case. Finally, there is no indication the delay as sought by Samsung would alleviate the relevant concern.

A. Samsung Has Continually Sought to Delay Trial.

Samsung has requested that this Court delay this trial multiple times, and ultimately was successful in obtaining a two-and-a-half-year stay. Even after the stay was entered, when it appeared Samsung would lose the IPR on the '293 patent, it filed an *ex parte* reexamination request regarding claim 1 of the '293 patent in order to prolong the stay and take yet another shot at the patent. Samsung cited that pending reexamination request in opposing Plaintiff's motion to lift the stay filed on November 1, 2018. Then, when Samsung ultimately lost the reexamination on September 7, 2019, following an appeal to the PTAB, Samsung yet again opposed lifting the stay. (Case No. 2:16-cv-00505-JRG, Dkt. Nos. 345, 349.)

When the Court issued its order lifting the stay and directing the parties to prepare a docket control order setting the case for trial on April 13, 2020 (Case No. 2:16-cv-00505-JRG, Dkt. No. 357), Samsung immediately asked Image Processing jointly to move the Court to postpone the trial date by one or more months, citing as a reason a desire to have more time to prepare for trial or possibly to mediate the case. Image Processing declined to join such a motion, though expressed willingness to mediate prior to the April 13, 2020, trial date.⁴ (Declaration of Michael Zachary, ¶ 2.)

Now that the Court has entered a Docket Control Order setting the case for trial, Samsung is once again, in effect, asking the Court to stay the case indefinitely. Samsung asks the Court to take the trial date off calendar, and then reevaluate in three months when or whether the case

⁴ The parties are currently working with Judge Folsom to schedule a mediation date within the next two weeks.

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should be set for trial. Samsung bases this request on its assertion that Samsung personnel in Korea may not be able to attend the trial in light of concerns about the COVID-19 virus which has affected some parts of Korea.

B. Samsung's Need to Bring Witnesses From Korea Is New.

Samsung's stated need to bring people from Korea for trial is new. In its witness list submitted in October 2017 (Case No. 2:16-cv-00505-JRG, Dkt. No. 263-2), when the case was originally set for trial, Samsung did not identify a single witness from Korea as a "will call" witness. In fact, it only identified its two expert witnesses as "will call" witnesses. Every single Samsung witness from Korea was identified as "may call by deposition," and in some cases additionally as "may call." Plaintiff identified a Samsung witness as a "will call" witness, but during pretrial discussions Samsung refused to commit to bring that witness to trial. (Zachary Decl. ¶ 3.)

Now that COVID-19 is an issue that the Court must address, Samsung newly asserts that two Samsung witnesses are "will call" witnesses, and that a third witness is "potentially" a "will call" witness. [REDACTED]

[REDACTED] which is not a country affected by any COVID-19 U.S. State Department travel advisory. [REDACTED]

[REDACTED]

The third "potential" "will call" witness, which really means he is a "may call" witness, is the same person that Samsung refused to commit to bringing to trial when Plaintiff so

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requested in October 2017. The witness, [REDACTED], was involved in Samsung's licensing activities. He also was deposed in the case, and his deposition is available for use at trial.

Finally, Samsung does not claim that its "corporate representative" at trial will be someone from Korea. Indeed, since Samsung's U.S. subsidiary is also a defendant, presumably one of Samsung America's employees can or will act as corporate representative.

Even crediting Samsung's assertions at face value, Samsung still only has one "will call" witness and one "potentially" "will call" witness from Korea. As discussed below, in the unlikely event testimony is needed from either witness, there are alternative ways for that testimony to be presented.

C. Alternative Means Exist for Presenting Testimony from Any Witnesses from Korea.

At least two alternative means exist for presenting the testimony of the witnesses from Korea that Samsung has identified, if in fact Samsung decides to do so. First, as noted above, their deposition testimony may be shown and/or read to the jury. All of the depositions of Samsung's witnesses were videotaped.

Second, Fed. R. Civ. P. 43(a) expressly authorizes live testimony by remote transmission. The rule states: "For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location."

The requirements of Rule 43(a) are satisfied here. No one would reasonably dispute that good cause exists for the two witnesses from Korea that Samsung identifies either as a "will call" or a potential "will call." If the witnesses are unavailable to attend trial in person, but their testimony is important or essential, that would be the hallmark of "good cause." *See* Advisory Committee Notes to Fed. R. Civ. P. 43(a) ("The most persuasive showings of good cause and

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compelling circumstances are likely to arise when a witness is unable to attend trial for unexpected reasons, such as accident or illness, but remains able to testify from a different place. Contemporaneous transmission may be better than an attempt to reschedule the trial[.]”)

Indeed, courts have often allowed testimony from overseas or U.S.-based witnesses who were ill or were otherwise unavailable to come to the U.S. for trial. *See, e.g., Haimdas v. Haimdas*, 720 F. Supp. 2d 183 (E.D.N.Y. 2010) (party that could not obtain a visa testified via a live video link from London); *Meeks v. Parsons*, No. 1:03-CV-06700-LJO-GSA-PC, 2010 WL 11671811 (E.D. Calif. Feb. 8, 2010), and *Meeks v. Parsons*, No. 1:03-CV-06700-LJO-GSA-PC, Dkt. No. 231 (February 18, 2010) (cancer patient’s caregiver spouse could testify by live video link) (jury trial); *Sawant v. Ramsey*, No. 3:07-CV-980 VLB, 2012 WL 1605450 at *3 (D. Conn. May 8, 2012) (“Serious health conditions inhibiting a witness's ability to travel constitute good cause and compelling circumstance to permit live testimony in open court via video conference.”) (jury trial).

As the Standing Order notes, an important consideration in addressing COVID-19 is “the Court’s duty to ensure the ‘just, speedy, and inexpensive determination of every action and proceeding.’” Particularly given the length of the stay, the age of the case, and the other considerations noted in Plaintiff’s Renewed Motion to Lift Stay (Case No. 2:16-cv-00505-JRG, Dkt. No. 342, p. 9) and the Court’s order granting the same (Case No. 2:16-cv-00505-JRG, Dkt. No. 356), this policy embedded in Fed. R. Civ. P. 1 favors strong consideration of employing alternative measures when a witness cannot testify in person. *See In re Actos (Pioglitazone) Prod. Liab. Litig.*, 2014 WL 107153 at *10 (W.D. La. Jan. 8, 2014) (granting motion to present live video testimony of several witnesses in an MDL products liability case based in part on the

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federal policy to secure “the just, speedy and less expensive determination” of every action) (jury trial).

In addition, appropriate safeguards exist regarding the testimony of any Samsung witnesses testifying remotely. In determining whether such safeguards exist, “the courts focus on whether the testimony was made in open court, under oath, and whether the opportunity for cross examination was available.” *F.T.C. v. Swedish Match North America, Inc.*, 197 F.R.D. 1, 2 (D.D.C. 2000) (resident of Oklahoma permitted to appear by live video testimony in Washington, D.C. owing to witness inconvenience). Here, like witnesses who are physically present, Samsung’s witnesses will testify in open court, under oath, and will be subject to cross-examination.

Samsung states that it will be “prejudiced” if one or two of its witnesses need to appear by video. However, it has not identified any specific way in which it will be prejudiced. The jury can be instructed and will surely understand the circumstances leading to such witnesses appearing by video; indeed, they will likely appreciate Samsung for the steps taken to allay any concerns about COVID-19 that they may have. Further, there is no prejudice arising from live video transmission. As one court put it: “While the defendants argue that the court’s ability to assess the demeanor and credibility of Mr. Cross will be jeopardized by allowing Cross to testify by live video transmission, I can say that there is no practical difference between live testimony and contemporaneous video transmission[.]” *Id. See also In re Vioxx Prod. Liab. Litig.*, 439 F. Supp. 2d 640, 644 (E.D. La. 2006) (“By allowing for contemporaneous transmission, the Court allows the jury to see the live witness along with ‘his hesitation, his doubts, his variations of language, his confidence or precipitancy, his calmness or consideration,’ [citation omitted], and, thus, satisfies the goals of live, in-person testimony and avoids the short-comings of deposition

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testimony.”) (permitting video testimony); *Lopez v. NTI, LLC*, 748 F. Supp. 2d 471, 480 (D. Md. 2010) (finding no prejudice; Honduran witnesses permitted to testify via video link).

Accordingly, when circumstances arise such as illness, courts find good cause to allow testimony by live video.

D. Delay Would Not Alleviate the Concern, and Would Prejudice Plaintiff.

Samsung’s proposal for delay would unfortunately not alleviate the concern regarding COVID-19. There is nothing to suggest that in three months from now the situation will be any different.

Samsung’s proposal, with no trial date in sight, would prejudice Plaintiff’s interest in vindicating its rights, not only as against Samsung, but also as against other parties that Plaintiff believes are infringing and who have declined to negotiate with Plaintiff pending the outcome of this case.⁵ Moreover, owing to the trial schedule of Plaintiff’s counsel, who have another trial scheduled in June 2020 (*Lambeth Magnetic Structures, LLC v. Seagate Technology (US) Holdings, Inc., et al.*, 2:16-cv-00538-CB (W.D. Pa., Trial Date: June 1, 2020)) and an additional trial later in the year (*Ramot at Tel Aviv University Ltd. v. Cisco Systems, Inc.*, 2:19-cv-00225-JRG (E.D. Tex., Trial Date: December 9, 2020)), Samsung’s proposal is not feasible.

E. Samsung’s In-House Personnel Can Participate by Alternative Means.

The Standing Order focuses on alternative measures with respect to “witnesses and corporate representatives,” both of which are addressed above.

⁵ Above, Samsung recycles some previously-rejected and incorrect arguments that Plaintiff has not actively enforced its patents, and therefore would not be prejudiced by a further (indefinite) delay. Prior to Samsung, Plaintiff filed suit against Canon and achieved a substantial settlement. It also achieved licenses with four other well-known camera technology companies. It also notified Samsung promptly of its infringement immediately after the suit against Canon was resolved, and sued Samsung only after Samsung repeatedly delayed meaningful license discussions. (Case No. 2:16-cv-00505-JRG, Dkt 347 at 4-5.) As the Court is aware, Plaintiff has also opposed every effort by Samsung to stay this case or continue the stay of this case.

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Samsung contends that Samsung in-house legal staff who manage this case also would preferably like to attend trial. While the Federal Rules and Standing Order do not address attendance by in-house staff, presumably because such staff are not as critical to the trial as witnesses and corporate representatives, nonetheless here again alternative measures are feasible.

First, Samsung has at least 40 legal counsel employed in the United States. Two of its U.S. counsel attended depositions of Samsung witnesses taken in the U.S. (Zachary Decl., ¶¶ 5-6.) One of those counsel is based in Dallas, Texas, has some familiarity with the litigation, and could attend trial in person.

Second, there are other options besides in-person attendance for in-house Samsung legal staff to keep abreast of the trial. They could receive daily transcripts of the proceedings. Very likely, real-time transcriptions could be made available to them. *See* Dkt. No. 3 at p. 3 (parties to advise the Court by March 13, 2020, whether they wish to obtain daily transcripts and/or real-time transcriptions). Further, Samsung's outside counsel and local attendees can be in communication with in-house staff in Korea regarding the progress and strategy for the case and seek their input. Finally, if these measures were not sufficient, Plaintiff has no objection to live video transmission of the proceedings to Samsung's in-house staff in Korea, subject to any protocols the Court may require.

F. Reply to Samsung's Response to Plaintiff's Arguments Regarding Live Transmission

Samsung's explanation as to what has changed between October 2017 and now that requires the presence in the United States of its witnesses from Korea at trial overlooks some important facts. Samsung mentions that the case is now more focused, but claim 1 of the '293 patent was going to be tried at the time Samsung submitted its witness list in 2017 that fails to identify any will call Korean witnesses, and the same face detection algorithms at issue now

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were critically at issue then to almost all key products and claims. Samsung also provides no meaningful explanation regarding its refusal to bring [REDACTED], when Plaintiff wanted to call [REDACTED] as a witness in 2017, whereas now Samsung indicates he is a critical witness (albeit still a “may call”).

As to the logistics, Plaintiff does not seek to prejudice Samsung but attempts to propose compromise solutions that can balance everyone’s interests to the greatest extent possible under these challenging circumstances. Instead of proposing solutions, however, Samsung conjectures about potential prejudice, how the time differences make trial impossible, and how the technology might break down (even though Samsung is one of the premier technology companies in the world). Plaintiff commits to work cooperatively to resolve any technology issues, and to mitigate any prejudice and ensure a smooth process.

As to the time differences, courts and parties have found solutions to these issues. One solution for witnesses in Asia is to schedule such witnesses for testimony in the early morning or late afternoon Texas time. For example, 4 p.m. in Texas would be 7 a.m. in Korea, or 8 a.m. in Texas would be 11 p.m. in Korea, which times should be feasible. *See also Junjiang Ji v. Jling Inc.*, No. 15-CV-4194 (SIL), 2017 WL 6501865, at *3 (E.D.N.Y. Dec. 19, 2017) (New York court allowed video conferencing for live testimony from China) (citing numerous other cases); *Virtual Architecture, Ltd. v. Rick*, 08 Civ. 5866, 2012 WL 388507, at *2 (S.D.N.Y. Feb. 7, 2012) (permitting witness to testify to jury remotely from the Seychelles) (detailing procedures employed to ensure effective video transmission); *Optional Capital, Inc. v. Kyung Joon Kim*, No. CV043866ABCPLAX, 2007 WL 9653243, at *5-6 (C.D. Cal. Dec. 18, 2007) (live video conference testimony from South Korea for jury trial in California); *Dagen v. CFC Group Holdings Ltd., ET.*, No. 00-Civ. 5682, 2003 WL 22533425 at *1 (S.D.N.Y. Nov. 7, 2003)

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(allowing telephonic testimony of five employee witnesses from Hong Kong because of cost, international travel issues and business concerns, stating “The jury has never had any difficulty in evaluating such testimony”).

Samsung also raises objections because video testimony might be slowed down by the need for translations. That would be no different than for live testimony. In addition, many courts have approved requests for video transmission that involved witnesses who needed interpreters. *See, e.g., El-Hadad v. United Arab Emirates*, 496 F.3d 658 (D.C. Cir 2007) (interpreter used for witness testifying by video from Egypt); *Sawant v. Ramsey*, No. 3:07-CV-980 VLB, 2012 WL 160545088 (D. Conn. May 8, 2012) (ordering interpreter to be arranged for remote testimony under Fed. R. Civ. P. 43(a)).

In the end, Samsung offers no reasons why the solutions found by other courts in the cases noted above to be acceptable could not be equally employed by this Court. Samsung surely has the ability to cooperate to accommodate the objectives of the Court both to limit travel and exposure to COVID-19, while carrying out its duty to move forward with cases consistently with Fed. R. Civ. P. 1. But it offers no solutions, only objections.

G. IPT’s Conclusion

For the reasons stated above, Plaintiff requests that the Court maintain the dates for jury selection and trial, currently set for April 13, 2020, and that it grant the parties permission to proceed at trial with testimony from witnesses in Korea by contemporaneous transmission as authorized by Fed. R. Civ. P. 43(a).

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Dated: March 6, 2020

Respectfully submitted,
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via email on March 6, 2020.

/s/ Marc J. Pensabene
Marc J. Pensabene
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CERTIFICATE OF AUTHORIZATION TO FILE UNDER SEAL

This undersigned hereby certifies that Samsung is authorized to file this motion under seal because it contains material covered by the Protective Order approved and entered in this case on October 3, 2016 (ECF No. 38).

/s/ Marc J. Pensabene
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