

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

OPTIS WIRELESS TECHNOLOGY, LLC,
OPTIS CELLULAR TECHNOLOGY, LLIC,
UNWIRED PLANET, LLC, UNWIRED
PLANET INTERNATIONAL LIMITED,
AND PANOPTIS PATENT
MANAGEMENT, LLC.,

Plaintiffs,

v.

APPLE INC.,

Defendant.

Case No. 2:19-CV-0066-JRG

Jury Trial Demanded

JOINT MOTION TO AMEND THE DOCKET CONTROL ORDER

Plaintiffs Optis Wireless Technology, LLC, Optis Cellular Technology, LLC, Unwired Planet, LLC, Unwired Planet International Limited, and PanOptis Patent Management, LLC and Defendant Apple Inc. (collectively, the Parties) file this Joint Motion to Amend the Docket Control Order to adjust the deadlines in the Second Amended Docket Control Order (Dkt. 106) due to COVID-19. A copy of Plaintiffs' proposed DCO is attached as Exhibit A.

I. Plaintiffs' Position and Proposal

Defendant Apple has requested a 60-day continuance of all deadlines, including trial, as a result of COVID-19. There has been no attempt to compromise on Apple's part. Plaintiffs do not believe it is necessary or appropriate to alter the trial date, but repeatedly offered to adjust interim dates to address Apple's stated concerns. Although Apple has had Plaintiffs' proposal set forth below for some time, it has not provided any meaningful feedback other than to so "no," to unilaterally cancel all depositions, and to state that it will only accept a 60-day continuance of all deadlines.

Trial is set in this matter for July 7, 2020 (nearly four months away) and the close of fact discovery is set for March 23, 2020. Dkt. No. 106. The substantial completion of document discovery has already occurred and eight depositions have already been completed. Plaintiffs believe that it is possible to craft viable solutions that allow the case to continue without any change in the trial date, while minimizing any potential health risks. In particular, there are technological innovations that the Parties can utilize that will allow the Parties to complete depositions and allow the case to proceed on a slightly modified schedule – all while keeping the July 7 trial date.

Deposition solutions proposed by Plaintiffs. In the past week, Plaintiffs repeatedly offered solutions to complete depositions. Plaintiffs proposed taking depositions by video and phone, while reserving only two witnesses for live deposition when the situation allows. (Declaration of Holly Engelmann (“Engelmann Decl.”) attached as Exhibit B, Ex. 1 at 1 (“we can explore videoconferencing”), Ex. 2 (identifying thirteen witnesses who could be deposed by video or telephonically), Ex. 3 at 3 (offering Brian Blasius, Plaintiffs’ 30(b)(6) witness, via video deposition after Apple stated video would be required rather than a telephonic deposition), Ex. 3 at 2 (identifying only Mewes and Whitt as depositions to be conducted live), Ex. 17 (offering to take a COVID-19 test before an in-person deposition)). Plaintiffs even offered to drive to Palo Alto, California from Los Angeles, California to depose Apple witnesses live so that any concern about exposure during air travel could be alleviated. (Engelmann Decl. Ex. 4). Additionally, both court reporting services used in this matter (TSG and Veritext) offer virtual deposition solutions that do not require special software, but simply the camera and microphone on a computer. (Engelmann Decl. Exs. 15-16).

Instead of accepting these offers and implementing these technological solutions going forward, immediately after Apple finished taking two depositions in London (which required a PanOptis lawyer to self-quarantine upon return) and two depositions in front of a videographer (which required one witness and a PanOptis lawyer to travel to Dallas), Apple informed Plaintiffs' counsel of its intent to unilaterally cancel all remaining scheduled depositions and requested that Plaintiffs agree to a sixty (60) day stay of all deadlines. (Engelmann Decl. ¶¶ 6-8, Ex. 5). As of the filing of this motion, Apple has yet to respond to Plaintiffs' proposal (closely mirroring the dates set forth herein) or to propose any compromise other than a sixty day stay of all deadlines. (Engelmann Decl. ¶ 8).

Plaintiffs are sensitive to Defendant's concerns with respect to the impact created by COVID-19 and are sympathetic to all affected, but do not agree that a sixty day stay is necessary or appropriate. Moreover, Apple's main argument that several San Francisco-area counties have been ordered to shelter-in-place for three weeks until April 7 (Engelmann Decl. ¶ 8), is not a reason to grind this litigation to a complete halt for two months given Apple's many resources and Plaintiffs' willingness and ability to continue moving this case forward to a July 7 trial date.

Apple is more than sufficiently represented by attorneys not affected by the Bay Area shelter-in-place orders. While there are three Bay Area Wilmer Hale attorneys who have filed a notice of appearance in this matter (Joseph Haag, Kevin O'Brien, and Mark Selwyn), they are vastly outnumbered by at least twelve attorneys representing Apple in this matter, spread throughout the country and who are not under any government or public health agency restrictions that would prevent them from continuing the litigation in the manner proposed by Plaintiffs. Nor are these attorneys affected by any current official travel restrictions or advisories from government health agencies such as the Center for Disease Control and Prevention that

prevent these attorneys from continuing the litigation within the boundaries of this country. Some lawyers may have to work from home based on local government instructions (including PanOptis lawyers), but this does not detract from our duty to zealously represent our clients.

Just yesterday, Wilmer Hale filed notices of appearance for three Boston, Massachusetts attorneys. Dkt. Nos. 111-113. Daniel Wewers, Josephina Garcia, and Joseph Mueller join at least four other Wilmer Hale attorneys who filed notices of appearance or actively work on this matter and live outside of the Bay Area: Brittany Amadi in Washington DC (Dkt. No. 18), Mindy Sooter in Denver, Colorado (Dkt. No. 21), and Michaela Sewall and Timothy Syrett (Dkt. No. 20), both in Boston, Massachusetts. Apple is also represented by counsel in Los Angeles, California: Hannah Cannom (Dkt. No. 107) and Bethany Stevens (Dkt. No. 108) at Walker Stevens Cannom. Apple is additionally represented by local counsel Melissa Smith, Tom Gorham, and William “Bobby” Lamb.

Moreover, Wilmer Hale has six other United States offices outside of the Bay Area. (Engelmann Decl. Ex. 6.) According to Wilmer Hale’s website, it is a “1,000 lawyers strong” (*Id.*), with its Boston, Massachusetts office having “approximately 250 lawyers” (Engelmann Decl. Ex. 7), its Dayton, Ohio office “houses more than 250 employees” (Engelmann Decl. Ex. 8), and its New York office having “nearly 200 lawyers” (Engelmann Decl. Ex. 9). In addition, there are 336 lawyers and individuals associated with its Washington DC office (Engelmann Decl. Ex. 10), 29 lawyers associated with its Los Angeles, California office (Engelmann Decl. Ex. 11), and 27 lawyers listed as associated with its Denver, Colorado office (Engelmann Decl. Ex. 12). Moreover, there are 535 lawyers identified as “Litigation” attorneys (Engelmann Decl. Ex. 13) and 122 lawyers identified as specializing in “Intellectual Property Litigation”

(Engelmann Decl. Ex. 14) If necessary, Wilmer Hale can draw upon this deep bench of qualified individuals to assist in this matter.

Given Apple's wealth of representation across the country, Plaintiffs believe it is feasible to continue moving the case forward without altering the trial date. Accordingly, Plaintiffs propose the following relief by category:

1. **Third Party Discovery.** Plaintiffs propose moving the deadline to complete third party discovery only two days - from March 23, 2020 to March 25, 2020. This will allow the parties to conduct and complete the already confirmed depositions of third parties Les Ware (March 23), Richard Misiag (March 25), and Sophie Vrzic (March 25). Plaintiffs propose the parties conduct these depositions telephonically or via video if Apple's counsel can so attend.

2. **Party Depositions.** Plaintiffs propose conducting all of its noticed depositions telephonically or by video, with the exception of two witnesses – Heather Mewes and Jayna Whitt. The remaining witnesses are: Sanjeevi Balasubramanian, Kaushik Josiam, LingJia Liu, Dawei Zhang, Zhu Ji, Tony Blevins, Ray Warren, BJ Watrous, Jeff Risher, Ravi Thakkar, Jeff Williams, Apple's 30(b)(6) re Qualcomm products, and any additional Apple 30(b)(6) witnesses not yet identified.¹ One Apple witness (Christian Faber) lives in Germany, so this deposition would need to be postponed until appropriate arrangements can be made. Plaintiffs propose extending the deadline to complete party depositions from March 23, 2020 to May 18, 2020.

3. **Document Discovery and Motions to Compel.** As there are still several outstanding discovery requests, Plaintiffs propose extending the deadline to complete document discovery and the deadline to file motions to compel two weeks from March 23, 2020 to April 6, 2020.

¹ Plaintiffs reserve the right to depose any of these unidentified witnesses live once the witnesses have been disclosed.

4. **Expert Discovery.** Plaintiffs propose extending the deadlines related to expert reports and expert discovery two weeks: initial expert reports from March 30, 2020 to April 13, 2020, rebuttal expert reports from April 20, 2020 to May 4, 2020, and completion of expert discovery from May 11, 2020 to May 25, 2020. Plaintiffs additionally propose that the parties be allowed to supplement their expert reports based solely on deposition testimony taken after service. Apple cannot be concerned that this supplementation will lead to changing theories, because the core theories of the parties are governed by infringement contentions, invalidity contentions, and discovery responses.

5. **Motions to Strike Expert Testimony.** With the proposed close of expert discovery on May 25, 2020, Plaintiffs propose extending the deadline to move to strike expert testimony from May 11, 2020 to May 29, 2020 and responses to motions to strike expert testimony from May 25, 2020 to June 10, 2020.

6. **Motions *in Limine*.** Because of the above proposed changes, Plaintiffs propose extending the deadline to file motions *in limine* from May 19, 2020 to June 2, 2020.

All other deadlines in the Court's Second Amended Docket Control Order would remain unchanged. Attached as Exhibit A is Plaintiffs' Proposed Third Amended Docket Control Order.

II. Apple's Position and Proposal

Apple Inc. ("Apple") respectfully requests a 60-day continuance of case deadlines due to the extraordinary and disruptive impact of the COVID-19 pandemic.

Six days ago, in its Order in *St. Lawrence Communications LLC v. Amazon.com, Inc.* (Civil Action No. 2:19-CV-00027-JRG), the Court observed "there are no current official travel restrictions or advisories from government health agencies such as the Center for Disease Control and Prevention." Demonstrating the speed at which the public health situation has

deteriorated, federal, state, and local authorities across the country have now issued multiple such restrictions and advisories across the country. Ten counties in California—including those in which Apple is headquartered, WilmerHale has offices, and in which many of the Apple witnesses and its in-house counsel live—are now subject to “Shelter-in-Place” orders for at least three weeks,² Massachusetts, Colorado, and New York (where the majority of the remaining WilmerHale lawyers are based) and multiple other states have declared states of emergency,³ and the U.S. Surgeon General has warned that “there’s every chance that we could be Italy” unless we make drastic adjustments to slow the spread of the virus.⁴

Fact discovery is set to close in five calendar days, yet more than fifteen fact depositions of parties and non-parties remain to be taken. The parties have both proposed extensions of the discovery deadlines but have different views on how long of an extension is warranted. Even with resort to non-traditional means to accomplish depositions and other discovery tasks, it is not possible to complete discovery on the current schedule or the schedule proposed by Plaintiffs

² See, e.g., City and County of San Francisco, Order of the Health Officer No. C19-07 (Mar. 16, 2020), <https://www.sfdph.org/dph/alerts/files/HealthOrderC19-07-%20Shelter-in-Place.pdf>; County of Santa Clara, Order of the Health Officer (Mar. 16, 2020), <https://www.sccgov.org/sites/phd/DiseaseInformation/novel-coronavirus/Documents/03-16-20-Health-Officer-Order-to-Shelter-in-Place.pdf>.

³ Press Release, Office of Governor Newsom, Governor Newsome Declares State of Emergency to Help State Prepare for Broader Spread of COVID-19 (Mar. 4, 2020), <https://www.gov.ca.gov/2020/03/04/governor-newsom-declares-state-of-emergency-to-help-state-prepare-for-broader-spread-of-covid-19/>; Jess McKinley & Edgar Sandoval, *Coronavirus in N.Y.: Cuomo Declares State of Emergency*, N.Y. Times (updated Mar. 10, 2020), <https://www.nytimes.com/2020/03/07/nyregion/coronavirus-new-york-queens.html>; Marc Fortier, *Gov. Baker Declares State of Emergency as Mass. Coronavirus Cases Rise to 92*, NBC Boston (updated Mar. 10, 2020, 11:24 PM), <https://www.nbcboston.com/news/local/gov-baker-to-speak-on-states-coronavirus-preparedness/2088681>; Jessica Seaman, *State of Emergency in Colorado as Coronavirus Cases Rise to 17*, Denver Post (updated Mar. 10, 2020, 8:25 PM), <https://www.denverpost.com/2020/03/10/coronavirus-colorado-state-of-emergency/>; Melissa Alonso, *At Least 8 U.S. States have Declared a State of Emergency*, CNN (Mar. 8, 2020, 4:02 PM), https://www.cnn.com/asia/live-news/coronavirus-outbreak-03-08-20-intl-hnk/h_1b09bcd8c4b247c893d65b7118353923.

⁴ See, e.g., Tamar Lapin, *Surgeon General on Coronavirus: U. S. Could Become as Bad as Italy*, N.Y. Post (Mar. 16, 2020, 3:52PM), <https://nypost.com/2020/03/16/surgeon-general-on-coronavirus-us-could-become-as-bad-as-italy/>; Chas Danner, *CDC’s Worst-Case Coronavirus Model: 214 Million Infected, 1.7 Million Dead*, N.Y. Mag. (updated Mar. 13, 2020), <https://nymag.com/intelligencer/2020/03/cdcs-worst-case-coronavirus-model-210m-infected-1-7m-dead.html> (CDC warning of drastic consequences); Noah Higgins-Dunn & William Feuer, *New Yorkers Should Be Prepared for a ‘Shelter-in-Place,’ Mayor Bill de Blasio Says*, N.Y. Times (Mar. 17, 2020 2:36 PM), <https://www.cnn.com/2020/03/17/new-yorkers-should-be-prepared-for-a-shelter-in-place-order-mayor-bill-de-blasio-says.html>.

because, among multiple other disruptions, the Shelter-in-Place orders now in effect directly impact Apple, its witnesses, and its counsel who are under government order to confine themselves to their homes except for essential activities.

In light of the unprecedented situation the nation, generally, and Northern California, in particular, are facing—and the cascading restrictions and other emerging impacts of coronavirus—Apple respectfully submits the 60-day continuance is necessary for three reasons:

- ***first***, to give the parties time to complete fact and expert discovery—including the large number of remaining fact depositions of parties and non-parties—in a fair and orderly fashion under the now dramatically different circumstances while taking all necessary precautions to help ensure the safety of all those involved (e.g., witnesses, lawyers, law firm staff, court reporters);
- ***second***, to give Apple a full and fair chance at preparing for trial under the now dramatically different circumstances where the majority of its witnesses and counsel are now confined to their homes and no longer have complete access to their offices and all the resources to which they would normally have access; and
- ***third***, to give the individuals involved in this litigation—particularly those subject to the Shelter-in-Place orders—time to address the significant disruptions in their lives.

Apple does not make this request lightly, and recognizes that it would require the July 7 trial date to be rescheduled, but believes this extension is necessary given the severe restrictions required by the Shelter-in-Place orders and public health advisories.⁵

⁵ The Court recently rescheduled the trial date from August 17, 2020 to July 7, 2020. ECF No. 106.

A. A 60-Day Continuance Is Necessary To Complete Discovery In Light Of The Extraordinary Circumstances Caused By The Ongoing COVID-19 Pandemic And Recent Shelter In Place Orders

The traditional approach to certain fact discovery activities—notably, depositions—is not feasible under the current circumstances. COVID-19 is a global health emergency,⁶ Texas has declared a “State of Disaster,”⁷ President Trump issued guidelines telling citizens to follow the directives of state and local authorities to work or engage in schooling from home whenever possible,⁸ and local authorities have canceled schools and issued lock down orders for counties especially impacted by the virus.⁹ As a result of the pandemic, the parties have already postponed multiple fact depositions (including several due to illness of lawyers or their family members), leaving more than fifteen party and non-party depositions remaining.

In an effort to keep discovery moving, Apple offered a compromise that was fair to both sides. Under Apple’s proposal, *both* parties would participate remotely in depositions: the depositions would be both taken and defended by *video*. The deponent could be in a location near the witness’s home or work, and a local court reporter and videographer could be present. Plaintiffs refused to agree to Apple’s proposal. Apple also made clear it was open to conducting at least some depositions entirely by telephone, where all participants—including the court reporter—would be separated from each other. In response, Plaintiffs insisted on taking at least some depositions *in person*—a choice that is not possible under the current circumstances.

Recent events have only underscored that depositions cannot proceed in person, as Plaintiffs demand. On March 16 and 17, ten counties in Northern California issued “Shelter in Place” orders directing that, with limited exceptions, residents must stay inside their homes and

⁶ See General Order 20-03 (E.D. Tex. Mar. 16, 2020)

⁷ Proclamation, Governor Abbott Declares State of Disaster in Texas Due to COVID-19 (Mar. 13, 2020), <https://gov.texas.gov/news/post/governor-abbott-declares-state-of-disaster-in-texas-due-to-covid-19>.

⁸ The President’s Coronavirus Guidelines for America, 15 Days to Slow the Spread, https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20_coronavirus-guidance_8.5x11_315PM.pdf.

⁹ *Supra* n.2.

businesses must cease operations.¹⁰ This Order directly impacts Apple's witnesses and their counsel who live and/or work in the impacted areas and have been instructed to stay home. In-person depositions are simply not going to be possible in the immediate future.

Proceeding with remotely conducted depositions will be possible—but it will take some time to plan the logistics for doing so, given that these types of depositions have always been conducted in-person in the past. Approximately eight Apple witnesses—including six 30(b)(6) witnesses—remain to be deposed. Of those witnesses, many are subject to the Shelter in Place orders. This means that any deposition of them will involve the witness (and the attorneys and court reporters) participating from home, with the related distractions, including homebound family members. In normal times, courts have recognized that telephonic or even video depositions may be insufficient. *See, e.g., Music Grp. Macao Commercial Offshore Ltd. v. Foote*, 14-CV-3078-JSC, 2015 WL 13423886, at *3 (N.D. Cal. Aug. 11, 2015) (declining to allow deposition via videoconference as impractical based on the inability to test credibility and copious amount of deposition document); *United States v. One Gulfstream G-V Jet Aircraft Displaying Tail Number VPCE5*, 304 F.R.D. 10, 17 n.4 (D.D.C. 2014) (noting that “telephonic depositions are disfavored because it is impossible to see the witness's demeanor, watch what documents the witness is reviewing, or monitor who else the witness is talking with”). Apple shares these concerns but also recognizes these are not normal times. At a minimum, some additional time is required for the parties to explore logistics for overcoming these challenges, e.g., taking fully remote depositions where all involved are in separate locations.

Given the voluminous record and wide-ranging topics on which Plaintiffs seek corporate testimony, preparing each of the designated witnesses to testify will require review of a significant volume of documents, which will take longer when done remotely. Moreover, the

¹⁰ *Supra* n.1.

circumstances have made it difficult for counsel and experts to review source code, which, given its commercial sensitivity, may only be inspected in the first instance and printed at a limited number of authorized locations and then may only be reviewed and stored at the offices of Apple's outside counsel. ECF No. 57, ¶ 10; ECF No. 59, ¶ 32(a); ECF No. 62, ¶ 11.

Also importantly, one Apple witness resides in Germany where depositions can only be conducted at the U.S. Consulate, which requires significant advance notice; he also cannot be deposed in a different country in the foreseeable future given the current travel restrictions in place in both the United States and abroad.¹¹

A continuance would give the parties time to address these challenges, and to work collaboratively to find a path forward in the litigation. Apple believes the parties could find ways to maintain an orderly progression in the case, completing fact discovery and then completing expert discovery. Additionally, Apple proposes filing a status report in 21 days to advise the Court on how the parties will go forward with depositions other discovery in light of these extraordinary circumstances.

B. A Continuance Is Necessary To Enable Trial Preparations Under The Changed Circumstances

The public health imperative to maintain “social distancing” is likely to remain for months, and this will impact not only depositions, but also trial preparations. Attorney preparations that would otherwise have occurred in offices with other attorneys—and with ready access to physical exhibits and other resources needed for trial preparation—will likely need to occur in attorneys' respective homes.

The parties will find ways to overcome these hurdles and to prepare to make effective trial presentations, but it will take some time. Shifting longstanding trial preparation practices

¹¹ See U.S. Consulate General in Germany, Depositions, https://de.usembassy.gov/wp-content/uploads/sites/21/Deposition-Instructions_022719.pdf.

will require developing creative ways to utilize technologies. And, with in-person contact limited, activities like witness preparation will take longer than it would in person. A continuance would allow the parties, witnesses, and others impacted (e.g., vendors of trial services) the requisite time to deal with the practical constraints of the public health emergency.

Plaintiffs would suffer no prejudice from a modest extension of the trial date. Plaintiffs are asserting patents that issued between 2011 and 2015 against products sold by Apple as early as 2012 (which is to say, Plaintiffs or their predecessors-in-interest waited at least seven years to assert their rights). Any injury they prove at trial is fully compensable with money damages. The trial was originally scheduled for August 17, 2020, and Apple's proposed continuance would still allow the case to be tried in September or October. *See Stragent LLC v. BMW of N.A., LLC*, No. 6:16-CV-446, 2017 WL 3709083, at *2 (E.D. Tex. July 11, 2017) (“[A] delay is not inherently prejudicial when a party, as here, seeks only money damages and no injunctive relief.”). In contrast, Apple would be prejudiced by inadequate time to adjust to the new reality of the public health emergency and its implications for trial preparations.

C. A Continuance Is Necessary To Allow The Parties And The Law Firms Time To Attend To Pressing Family Obligations.

Finally, a continuance is necessary to give the Apple and WilmerHale employees—particularly those subject to the Shelter-in-Place orders—time to address the significant disruptions in their lives. As the CDC predicted, the virus is causing “severe” disruptions in Americans’ lives.¹² Among many other issues, elderly parents are at extreme risk with predicted mortality rates exceeding 10% for those over 80 years old. The witnesses and lawyers involved in this case need time to ensure the safety of elderly parents living alone, children who are now

¹² Julian Borger, *Coronavirus Could Cause ‘Severe Disruption’ in America, CDC Says*, Guardian (Feb. 25, 2020, 2:42 PM), <https://www.theguardian.com/world/2020/feb/25/coronavirus-outbreak-severe-disruption-america-cdc-united-states>.

out of school, and college age children returning from school. A continuance will ensure that they have the time to address these personal circumstances while also proceeding with this litigation.

D. Plaintiffs' Proposal Would Be Unworkable

Plaintiffs' proposed solution to maintain the current trial date would make the progress of discovery even more onerous and disorderly. Plaintiffs propose that opening and rebuttal expert reports would be due before the completion of all fact discovery depositions. Plaintiffs apparently envision "supplemental" expert reports will be filed after fact discovery depositions are complete. The Court's Docket Control Order does not provide for supplemental expert reports, and there is no reason to force the parties to spend additional time and resources submitting these reports and then inevitably fighting over whether one side or the other is improperly trying to advance new claims or theories in those "supplemental" reports. In addition, Plaintiffs propose three different deadlines for different pieces of fact discovery, which not only is inconsistent with the Court's Docket Control Order but would lead to greater complexity of the discovery process. The coronavirus has also already slowed the ability of third parties to provide discovery. The deadline for fact discovery as a whole should be continued, and not chopped up with different deadlines as plaintiffs propose.

There is no reason to complicate the case schedule and waste party and court resources in this manner. The better approach is to maintain the case schedule but simply shift all case deadlines to account for the current crisis.

E. CONCLUSION

Accordingly, under the extraordinary and unfortunate circumstances specific to the facts set forth above, Apple respectfully requests that the Court grant a 60-day continuance of the schedule in this case.

Dated: March 18, 2020

Respectfully submitted,

/s/ Samuel F. Baxter

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Dated: March 18, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document has been served on all counsel of record via the Court's ECF system on March 18, 2020.

/s/ Sam Baxter
Sam Baxter