



will be more favorable, and not less favorable, in October. Having considered the Motion and the related briefing, and for the reasons set forth below, the Court is of the opinion that the Motion should be and hereby is **DENIED**.

In light of this conclusion, the Court's July 15, 2020 Order (Dkt. No. 342)<sup>1</sup> and the imminent pretrial conference on July 27, 2020, Apple's Unopposed Motion for Leave to File Reply in Support of Motion to Continue Trial (Dkt. No. 361) is **DENIED**, and, absent such leave, Apple's reply (Dkt. No. 362) is **ORDERED** removed from the record.

**I. The Risk of the COVID-19 Pandemic and the Public Health.**

The crux of Apple's argument is that proceeding with an August 3, 2020 jury trial would jeopardize the health and safety of all involved as well as the local community. (Dkt. No. 341 at 3.) Apple states that the number of COVID-19 cases is rising throughout the United States, and in Texas in particular. (*Id.*) Apple points to guidance from the Centers for Disease Control and Prevention ("CDC"), as well as Texas Governor Greg Abbott's Executive Orders regarding precautions that public spaces and members of the public must take in order to limit the spread of the disease. (*Id.* at 3–4, 8.) Apple further points to rising case numbers of the disease in Harrison County. (*Id.* at 5–7.) Apple attaches the declaration of Dr. Robert Haley, Professor of Internal Medicine at UT Southwestern Medical Center. (Dkt. No. 341-1.) Dr. Haley identifies generic challenges associated with conducting an in-person trial during the COVID-19 pandemic. (*Id.* at ¶¶ 20, 21.) His opinions are not so much tied to this location as they seem to convey that no in-person jury trial should be undertaken—anywhere. What Dr. Haley does not do is project when

---

<sup>1</sup> Apple's Motion was filed on July 14, 2020—one week ago. The next day the Court expedited a response from Optis and made it clear that neither a reply nor sur-reply should be filed without prior leave of the Court. This is usually understood by the parties to mean that the Court only wants a single response and not a litany of dueling briefs. By filing its Motion when it did, Apple put the Court on a very short timeline with the pretrial conference, jury selection, and trial on its doorstep.

in the future his ultimate conclusion might change. When Dr. Haley believes an in-person jury trial might be able to go forward is strikingly absent. The Court assumes he does not know and has no way to know.

Optis argues that the Court and the parties have proposed appropriate safety measures to address the dangers of COVID-19. (Dkt. No. 352 at 8–10 (laying out the precautions the Court has stated it is taking and will continue to take in order to ensure the safety and health of trial participants).) Optis views the Motion as a further attempt by Apple to “indefinitely delay this case,” despite having been aware of the challenges presented by COVID-19 for months, and having secured earlier relief in order to accommodate the challenges of the pandemic.<sup>2</sup> Optis points out that there is no evidence of impending public health improvement, and asserts that “Apple, by failing to provide crucial independent information regarding the projected course of the virus, is asking the Court to make decisions based upon incomplete and inaccurate information.” (*Id.* at 5.) Further, Optis points to various precautions it has taken in order to minimize the risk of COVID-19, including safety training regarding COVID-19 prevention; hiring an industrial hygienist to provide properly distanced work areas in Marshall and appropriate personal protective equipment; temperature monitoring; and daily health self-screenings. (*Id.* at 14; Dkt. No. 352-1 at ¶¶ 8–11.)

While the COVID-19 pandemic presents serious public health concerns, the Court has diligently undertaken to put in place reasonable precautions in order to facilitate a full and fair trial, while maintaining the health and safety of those involved. The Court abides by the recommendations of the CDC, both in spirit and in substance. In particular, the Court has

---

<sup>2</sup> The Parties have previously sought—and been granted—relief in accordance with the need to take precautions in light of COVID-19, including various scheduling extensions. (*See, e.g.*, Dkt. Nos. 158, 159.) Notably, Apple did not file this Motion until July 14, 2020—less than two weeks prior to the pretrial conference when a myriad of motions and disputes will be argued to the Court.

circulated instructions and appropriate reassurances to the venire panel by means of the attached letter which the Court caused to be served on each citizen summonsed for jury duty on August 3, 2020 by instructing the Clerk to attach an original version of such letter to every summons served in regard to this jury trial. (*See* Exhibit A.)

In addition, the Court has undertaken extensive measures to ensure a full and fair trial in which the litigants may preserve social distancing and minimize contact with tight spaces or common surfaces. The Court has heretofore e-mailed counsel for the parties precise instructions in advance of the pretrial hearing set for July 27, 2020, which is also attached, and precludes entrance to the Courthouse to those:

- Persons who have traveled to or from any of the following countries listed on the Centers for Disease Control and Prevention website [<https://www.cdc.gov/coronavirus/2019-ncov/travelers/from-other-countries.html>] as “Travelers Prohibited from Entry to the United States” within the preceding 14 days;
- Persons who have had close contact with someone who has traveled to or from one of the countries referenced above within the preceding 14 days;
- Persons who a medical doctor, doctor of osteopathy, hospital or public health agency has directed to self-quarantine, and such period of self-quarantining is ongoing;
- Persons who have been diagnosed with COVID-19 and who have not obtained express medical verification as now being non-communicative/non-contagious from a medical doctor, doctor of osteopathy, hospital or public health agency; and/or
- Persons who exhibit fever, cough or shortness of breath.

(*See* Exhibit B.) Further, the Court intends to provide additional guidance to counsel for the parties as part of the pretrial conference set for July 27, 2020 including limiting the number of persons seated at counsel tables to three persons per table during voir dire and during trial; directing trial counsel and the jury—once the trial begins—to wear face shields which will allow for a full view of the lawyers’ and jurors’ faces and expressions while providing substantial protection from

projection of breath droplets; and encouraging all participants to follow the CDC's community-mitigation guidelines.<sup>3</sup> The Court has arranged for daily sanitization of Courthouse facilities, including the Courtroom and all public bathrooms, as well as daily deep cleaning of the jury room, jury box, and juror restrooms.

These precautions will help assure that the trial can go forward to produce a just, speedy resolution to the parties' disputes while reasonably safeguarding the public health. This is especially challenging given the ever-changing state of the COVID-19 pandemic and the lack of any reliable assurances as to if and when the pandemic will subside. The unpredictability of the state of the pandemic in the future means that a continuance now will result in a delay of many months or even years. Nothing in Apple's request assures the Court of anything more than a lengthy, protracted delay, which will simply guarantee material prejudice to all parties.

The Court therefore finds that, on balance, in light of the precautions to be undertaken by the Court and the trial participants, the August 3, 2020 date for jury selection should be maintained.

## **II. Due Process Concerns Can be Alleviated by the Presentation of Live Video Testimony at Trial.**

Apple further raises concerns as to the parties' rights to due process related to three European witnesses who will be precluded from testifying in-person at trial due to international travel restrictions. (Dkt. No. 341 at 14–15; Dkt. No. 347 at 1–2.) In particular, Apple argues that three witnesses will be unable to testify in-person at trial:

- Mr. Rodermund, Apple's expert on standards organization rules and their applications to the patents in this case, who lives in Germany;
- Mr. Borghetti, Optis's expert on French law, who lives in France; and

---

<sup>3</sup> Such mitigation strategies include: washing hands often; avoiding close contact with people who are sick; practicing social distancing; covering mouth and nose with a cloth face cover when around others; covering coughs and sneezes; and cleaning and disinfecting frequently touched services daily.

# Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

## Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

## Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

## Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

## API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

## LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

## FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

## E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.