

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

MAXELL, LTD.,

Plaintiff,

v.

APPLE INC.,

Defendant.

Case No. 5:19-cv-0036-RWS

JURY TRIAL DEMANDED

**EMERGENCY JOINT MOTION TO PARTIALLY AMEND
DOCKET CONTROL ORDER**

Plaintiff Maxell, Ltd. and Defendant Apple Inc. hereby jointly move to amend the current Docket Control Order (Dkt. No. 46) as to the above-captioned matter with respect to the timing of fact depositions, expert reports and discovery, and dispositive motion briefing. The proposed amendments do not impact the dates for trial or the pretrial conference.

Emergency treatment of this Motion is justified in view of the impact that the Motion has on travel currently scheduled to occur beginning the morning of March 17, 2020. Throughout just this week, Mayer Brown (counsel for Maxell) has at least three attorneys scheduled to travel to New York City and the San Francisco/Palo Alto area of California to take depositions, and O'Melveny & Myers (counsel for Apple) has at least three attorneys scheduled to travel to the San Francisco/Palo Alto area of California to defend these depositions. The Parties' Motion seeks to extend the deadline for such depositions so that attorneys, deponents, court reporters, and videographers can postpone travel to and appearances in locations that are significantly impacted by the COVID-19 pandemic until there is more certainty regarding the safety of these activities.

I. The Requested Amendments Are Necessary in View of COVID-19

On March 13, 2020, President Trump declared a national emergency due to the COVID-

19 pandemic. The White House has identified Santa Clara County—where Apple is headquartered and over a dozen remaining fact depositions are scheduled to take place—as one of two regions in the United States having “widespread transmission of coronavirus disease 2019 (COVID-19).”¹ Apple has closed all of its retail stores in the U.S. until March 27 and has allowed all employees to work remotely if their job allows.² Although restrictions have not been officially placed on travel within the United States, the CDC has acknowledged that crowded travel settings like airports increase risk of exposure to COVID-19 and countless businesses (including the law firms representing both parties) have banned all non-essential travel in order to decrease the rate of spread of the disease. The situation is rapidly changing—there are multiple reports of new infections on a daily basis, and regular changes to travel restrictions.³

The other locations implicated are (1) the Washington, DC metropolitan area, where most of Maxell’s counsel participating in the depositions work and reside; (2) the Greater Los Angeles area in Southern California, where several of Apple’s counsel participating in the depositions work and reside; and, (3) New York, where another deposition is set to take place this week. All three localities have taken significant measures in response to the spread of the novel coronavirus. Public schools in and around Washington, D.C. and Los Angeles have closed until at least the end of March, and some until mid-April.⁴ Even the Pentagon is stopping domestic travel as of March

¹ <http://whitehouse.gov/briefings-statements/white-house-coronavirus-task-force-announces-community-mitigation-strategies-seattle-santa-clara/>

² <https://www.apple.com/newsroom/2020/03/apples-covid-19-response/>

³ <https://www.usatoday.com/story/travel/airline-news/2020/03/14/coronavirus-travel-president-trump-adds-united-kingdom-ireland-flight-restrictions/5050097002/>

⁴ https://www.cnn.com/world/live-news/coronavirus-outbreak-03-14-20-intl-hnk/h_09c381eb236b1c1478ae35c1e703e346; <https://www.latimes.com/california/story/2020-03-13/los-angeles-schools-closure-possible-cornavirus>

16.⁵

COVID-19 has already had a significant impact on this case. COVID-19 concerns have resulted in the postponement of the depositions of an Apple engineer and a third-party fact witness. One of Maxell's experts has placed himself in self-quarantine in California, and another of Maxell's expert is unable to travel due to school closures. Several other of Maxell's experts are over the age of 60 and thus fall within the subgroup of older adults who at a higher risk for severe illness from COVID-19.⁶ These experts are unable to travel to review Apple's source code, conduct testing of the accused devices, and/or meet with counsel for preparation of the depositions and their expert reports.

The impacts of the travel required for the depositions, and especially those in Northern California and New York, would be felt by the families of counsel as well.⁷ Having traveled to higher-risk areas such as these, the travelers (particularly the parties' counsel traveling from Washington, DC or Southern California to the Northern California area) would either have to be quarantined apart from their families for two weeks upon returning, or have their spouses, children, and other family members be quarantined as well. This could further impact their respective communities, all of which makes clear why officials have recommended against travel at this time.

In view of the COVID-19 pandemic and under the guidance issued by Chief Judge Gilstrap, the parties conferred to discuss "viable solutions that allows the case to continue while minimizing the potential health risks." *Saint Lawrence Comm'n LLC v. Amazon.com Inc.*, No. 2:19-CV-

⁵ <https://www.nbcnews.com/news/us-news/pentagon-halts-all-domestic-travel-amid-coronavirus-pandemic-n1158781>

⁶ <https://www.cdc.gov/coronavirus/2019-ncov/high-risk/high-risk-complications.html>

⁷ As of the time of this filing, at least fifteen depositions are scheduled to take place between March 18th to March 31st requiring at least seven Mayer Brown attorneys to travel from the Washington, D.C. area to San Francisco/Palo Alto and New York.

00027-JRG, D.I. 79 at *2 (E.D. Tex. Mar. 12, 2020). Consistent with Judge Gilstrap's guidance, Apple proposes to conduct the remaining depositions remotely using video-conference technology, which Apple believes would allow the parties to complete fact discovery without exposing witnesses, counsel, court reporters, and other personnel to unnecessary health risks. Apple is also willing to work with Maxell to address technological challenges relating to the use of documents and source code during remote depositions. Apple believes that the impact of COVID-19 will likely extend beyond March and that the use of remote deposition technology will likely be unavoidable without other scheduling modifications.

Maxell contends this is not a workable solution here. First, remote depositions are already difficult and inefficient, but in cases such as this one that are document and source code intensive, they are prohibitively complicated.⁸ Indeed, under the Protective Order, counsel for Maxell is not permitted to bring copies of the source code to the deposition. It must be identified in advance and brought to the deposition by the producing party. D.I. 45 at ¶ 11(c)(xi). This could make a video deposition covering source code all but impossible given the constraints of the Protective Order, in some cases limiting Maxell's counsel's ability to have the source code available for both counsel (located in a video-conference room as opposed to a secure, locked facility) and the witness (located presumably in a video-conference facility in California). Further, as noted above, Maxell's experts cannot travel to Northern California to inspect Apple's source code as a result of the COVID-19 situation. Apple produced 15 additional source code folders at the end of last week and still has further source code to produce that Maxell has been and will be unable to review in the coming weeks as a result of the COVID-19 situation. Moreover, Mayer Brown has instituted a

⁸ To date, the parties have used just over 100 exhibits, with several multiples of that number expected to be used in the next 15 depositions.

mandatory work from home policy on alternate days next week causing some of the fifteen depositions to fall on the days attorneys on this team are mandated to work from home. With school closures in effect, it will be quite challenging to take such video depositions from home with children in the house and the lack of availability of childcare. While video depositions solution might be appropriate if it were (1) workable with loosened protective order restrictions and (2) the only alternative available, that is not the case here. As explained above, the current case schedule has sufficient time built-in to enable the taking of in-person depositions after the current fact discovery cut-off without impacting other major deadlines.

II. Maxell Contends That Amendment is Further Justified in View of Magistrate Judge Craven’s March 13, 2020 Order Cancelling Hearing

In addition to the impact on public health and welfare, and accommodating those individuals who have already self-quarantined, Maxell contends that the requested extensions to the expert report and dispositive/*Daubert* motion briefing deadlines are further justified by Magistrate Judge Craven’s Order cancelling the hearing set for March 17, 2020 on Maxell’s pending Motion to Compel and Motion for Sanctions.⁹ D.I. 230. The Order resets the briefing schedule on Maxell’s Motion for Sanctions, which will now be completed March 31, 2020, and states that orders on Maxell’s pending motions are intended to issue the week of April 6, 2020 (if neither party requests hearing). The Order further stated that, “[t]o the extent either party believes an extension of any scheduling order deadlines (other than the pretrial and trial deadlines) is warranted in light of this order, the Court advises the parties to raise the issue with District Judge Schroeder.” D.I. 230 at fn. 1. Maxell contends that the timing of Judge Craven’s proposed ruling relative to the current expert deadlines (opening reports due April 7) further warrants the extensions proposed herein. Likewise, the impacted fact depositions will affect the ability of

⁹ Apple does not join in this section.

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