

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

MAXELL, LTD.,

Plaintiff

v.

APPLE INC.,

Defendant.

Civil Action NO. 5:19-cv-00036-RWS

JURY TRIAL DEMANDED



**APPLE INC.'S OPPOSED MOTION FOR LEAVE
TO EXTEND THE DEADLINE TO DEPOSE PATRICK MURPHY**

I. Introduction

Apple respectfully requests that the Court extend the August 15, 2020 deadline for Apple to depose Patrick Murphy to October 15, 2020. The Court set this deadline based in part on the expectation at the time that Japan would begin to relax applicable travel restrictions by the end of July. *See* D.I. 409 at 5. Unfortunately that has not happened—due to the continued impact of COVID-19, Japan has not lifted its travel restrictions, and Apple has, therefore, been unable to depose Mr. Murphy, who currently resides in Japan. Recent news reports indicate that Japan now expects to start permitting travel at least to nearby Singapore in September. If that happens, Apple believes it could make all the necessary arrangements to depose Mr. Murphy remotely from Singapore, or any other available, nearby venue, by October 15, 2020.

The Court also considered the impending October trial date in setting the August 15 deadline. *See* D.I. 409 at 5. But also due to the continued impact of COVID-19, that trial date has since been pushed to December 7, 2020, which, as the Court contemplated, provides sufficient time to extend pending deadlines. *See* D.I. 495 at 1 (requesting that the parties “move to amend other pending deadlines, if deemed necessary”). Apple’s request to extend the deadline for Mr. Murphy’s deposition to October 15 still leaves almost 2 months before the new trial date for this case.

Good cause exists to extend the deadline to depose Mr. Murphy. Apple has been unable to depose Mr. Murphy because of the continued COVID-19 travel restrictions. The Court has already found that Mr. Murphy’s testimony is likely important—he is one of two witnesses with knowledge of the June 2013 negotiations between Hitachi and Apple. D.I. 409 at 5. And with trial rescheduled for December, extending the deadline would not be prejudicial to Maxell.

II. Legal Standard

A schedule may be modified only for good cause and with the judge’s consent. D.I. 409

at 2. In determining whether good cause exists, the Fifth Circuit considers four factors: (1) the explanation for the failure to meet the deadline; (2) the importance of the discovery; (3) the potential prejudice; and (4) the availability of a continuance to cure such prejudice. *Id.* (citing *S&W Enters. v. SouthTrust Bank*, 315 F.3d 533, 536 (5th Cir. 2003).)

III. Argument

The Court previously found that “good causes exists for Apple to depose Mr. Murphy,” and that good cause still exists. D.I. 409 at 4. Good cause also exists for the Court to allow a modest extension of the deadline for Apple to depose Mr. Murphy—Japan has not yet lifted its applicable travel restrictions and the trial in this case has been rescheduled to December 7, 2020. Extending the deadline to depose Mr. Murphy will neither prejudice Maxell nor require a trial continuation.

The explanation for the failure to comply. When the Court granted Apple’s motion and set the August 15 deadline for Mr. Murphy’s deposition, multiple sources had reported that Japan was working to relax travel restrictions with nearby countries. Ex. 1, Japan to negotiate easing travel bans with China, S. Korea, Taiwan, Kyodo News, July 22, 2020, <https://english.kyodonews.net/news/2020/07/f7f95e23f783-japan-to-negotiate-easing-travel-bans-with-china-s-korea-taiwan.html> (last accessed August 14, 2020). And, as the Court noted, Apple was “prepared to go forward with a deposition shortly after applicable travel restrictions lift at the end of July.” D.I. 409 at 5. Unfortunately, Japan has not yet lifted the applicable travel restrictions or bar on remote depositions. Specifically, the U.S. embassy in Japan is still not permitting video depositions. Ex. 2, Depositions in Japan, U.S. Embassy and Consulates in Japan, <https://jp.usembassy.gov/u-s-citizen-services/attorneys/depositions-in-japan/> (last accessed August 14, 2020). And Japan is still denying entry to travelers from South Korea, Hong Kong, Taiwan, Singapore, and the U.S., among other countries. Ex. 3, Border

enforcement measures to prevent the spread of novel coronavirus (COVID-19), Ministry of Foreign Affairs of Japan, https://www.mofa.go.jp/ca/fna/page4e_001053.html (last accessed August 14, 2020). If Mr. Murphy left Japan now to be deposed remotely from a country that permits depositions for U.S. litigation, he would be stranded, with no way to return home to Japan.

Based on current news reports, Apple has reason to believe that it could depose Mr. Murphy by October 15. Japan and Singapore, for example, have mutually agreed to permit travel in September. Ex. 4, Japan, Singapore to ease COVID-19 travel restrictions from Sept., Kyodo News, August 13, 2020, <https://english.kyodonews.net/news/2020/08/edd923e8f26e-breaking-news-japan-singapore-to-ease-border-restrictions-from-sept-japan.html> (last accessed August 14, 2020). While rules concerning travel continue to evolve with the pandemic, Apple is prepared to go forward with a remote deposition in Singapore (or another nearby venue) once travel is permitted.

The importance of the discovery. The Court found that Mr. Murphy likely has important information to this case. D.I. 409 at 5. That Apple was unable to “secure documentary evidence or depose the only other alleged witness with personal knowledge [of the June 2003 negotiations between Apple and Hitachi] underscores the importance of Mr. Murphy’s deposition testimony.” *Id.*

Potential Prejudice. Extending the deadline will not cause Maxell any undue prejudice. First, as the Court explained in its Order, any prejudice resulting from a late deposition “is heightened the closer the matter gets to trial.” D.I. 409 at 5. Even if Maxell would suffer any prejudice based on the timing of Mr. Murphy’s deposition—Apple maintains that the facts do not support that it would—the new December 7 trial date provides sufficient time for Apple to

depose Mr. Murphy without prejudicing Maxell. And as noted above, current news reports suggest that Apple will be able to depose Mr. Murphy within the requested 2-month extension from a nearby venue, such as Singapore.¹

Second, Mr. Murphy's testimony will not necessitate or justify either party supplementing expert reports or dispositive motions. Mr. Murphy will testify about his personal knowledge of the pre-suit communications between Apple and Hitachi on which Maxell bases its willfulness claims and its claims for pre-suit damages. *See* D.I. 409 at 3-5. Apple proffers that Mr. Murphy's testimony will be entirely consistent with the detailed description of those pre-suit communications that Apple already provided to Maxell in Apple's interrogatory responses, and the documents cited therein. *See, e.g.,* Ex. 5, Apple's Response to Interrogatory No. 5 at 68, 73. The parties have completed expert discovery and fully briefed dispositive motions. D.I. 409 at 5. Mr. Murphy will not provide any new or different material facts that would warrant supplementation.

Moreover, although Maxell bears the burden of proving that it is entitled to enhanced or pre-suit damages (*see* D.I. 368 at 5-6) and has known since the beginning of this case that Mr. Murphy has personal knowledge of the parties' pre-suit communications (*see* D.I. 307 at 2, 6), Maxell made no effort to depose Mr. Murphy. Having not sought his deposition, Maxell cannot now claim that Mr. Murphy's testimony was needed for its expert reports or any motions.

Indeed, while extending the deadline for Apple to depose Mr. Murphy will not prejudice Maxell, not doing so could impose significant prejudice on Apple. As explained in Apple's

¹ Apple is also exploring whether, subject to this Court's permission, Mr. Murphy could testify remotely at trial by live videoconference from a nearby venue, such as was permitted under Judge Gilstrap's recent order in a recent trial. *See Optis Wireless Tech, LLC v. Apple*, No. 2:19-CV-00066-JRG, Dkt. 387 at *6 (E.D. Tex. July 21, 2020) (ordering a German witness to testify by "[r]eal time live video testimony" at trial).

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