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-00036-RWS **JURY TRIAL DEMANDED**

MAXELL, LTD.'S OPPOSITION TO
APPLE INC.'S OPPOSED MOTION FOR LEAVE TO EXTEND THE DEADLINE TO DEPOSE PATRICK MURPHY

Apple asks the Court to ignore the case schedule, Apple's failure to act in a diligent manner during discovery, and the resultant prejudice to Maxell, all for the deposition of a person whose testimony Apple now says provides nothing new to the case. When Apple first sought leave to depose Mr. Murphy, it was based on the assertion that Apple needed critical information regarding the June 2013 negotiations between Apple and Hitachi from someone who was there. *See, e.g.*, D.I. 307 at 6-7; D.I. 409 at 3-5. Now, Apple admits it never needed the testimony at all because it will, in Apple's own words, be "entirely consistent with the detailed description of those pre-suit communications that Apple already provided" and "will not provide any new or different material facts." Mot. at 4. Apple's confidence in what Mr. Murphy's testimony will show belies Apple's earlier story that Mr. Murphy's untimely deposition was necessary only because Apple had originally planned to obtain information about the negotiations through a third-party Hitachi employee, Mr. Matsuo, rather than the friendly, former employee of Apple, Mr. Murphy. This completely undermines the basis on which Apple initially moved for Mr. Murphy's deposition and for which the Court granted Apple's request.

Based on Apple's new position that Mr. Murphy has no new details to offer, Apple asserts that supplementation of expert reports or dispositive motions will not be warranted. Mot. at 4. If that is the case, Apple's demand for more time to take the deposition should be denied as nothing more than a nuisance on Maxell and the Court. Given how hard Apple is pressing for the deposition, however, it is likely not the case. As Maxell previously noted, Apple's belated attempt to depose Mr. Murphy is but an attempt to counter the discovery previously taken in the case which is adverse to Apple. Apple does not like the current set of facts and is relying on Mr. Murphy to hopefully change them. As such, Apple's about face on the nature of the facts with respect to which Mr. Murphy will testify is misleading at best. Further, Mr. Murphy's testimony at this late date

will unquestionably prejudice Maxell, as noted in Maxell's opposition to Apple's initial motion. Had Apple timely and diligently sought Mr. Murphy's deposition, Maxell could have sought the deposition of other attendees of the early meetings between Hitachi and Apple.

Furthermore, Apple's requested extension of the deadline to depose Mr. Murphy is not "modest." The Court's Order permitting Mr. Murphy's deposition gave Apple one month to do so. D.I. 409. Apple now requests two full additional months to complete the deposition and does not stop there. Apple explicitly notes in its motion that, if it cannot complete the deposition by October 15, it may request additional time. Mot. at 5. In granting Apple leave to depose Mr. Murphy, the Court held that "the prejudice of allowing a late deposition here cannot be discounted." D.I. 409 at 4. Although Apple asserts its proposed extension still leaves almost 2 months before the new trial date, Apple ignores the potential impact that Mr. Murphy's testimony has on other pending deadlines and trial preparation. The Court set a deadline for Mr. Murphy's deposition in order to strike a balance between Apple's alleged "need" for the testimony and the prejudice that would be inflicted on Maxell from its proceeding after the close of discovery. Although Apple asserts that such balance can be maintained with its proposed new deadline, the facts as presented by Apple, and the remaining schedule for this case, show otherwise. Apple's requested extension should be denied based on the "new" basis which underlies its request and the serious prejudice to Maxell.

I. LEGAL STANDARDS

The parties do not dispute the legal standard set forth in Apple's Motion. Mot. at 1-2.

II. ARGUMENT

No good cause exists to extend the time for Mr. Murphy's deposition. Apple failed to act in a diligent manner during discovery and now provides no compelling justification for another opportunity to make up for that failure. The inconsistencies in Apple's initial motion and its

extension request should give the Court pause in granting Apple's request. In short, the Court should deny Apple's repeated efforts to take a deposition that Apple now admits it does not need.

A. That COVID-19 Could Prevent Mr. Murphy's Deposition Was A Known Factor

When Apple originally sought leave to take Mr. Murphy's deposition, Maxell raised the concern that, given the status of the pandemic, it was unclear when travel restrictions would be removed and Apple's motion thus amounted to a request to keep fact discovery open indefinitely. *See, e.g.*, D.I. 332 at 7. In arguing against this concern, Apple oversold the state of affairs in Japan with respect to its relaxation of travel restrictions. Specifically, during the hearing, Apple presented various avenues to conduct the deposition outside of Japan and gave the appearance that the deposition would be able to occur "shortly after applicable travel restrictions lift at the end of July." *See* D.I. 409 at 5. The Order setting the deadline of August 15 suggests the Court anticipated the deposition could be completed by then based, at least in part, on Apple's representations.

What has come to pass is not surprising. Apple had no true basis on which to represent to the Court that it could complete the deposition shortly after the end of July. Its representations were based on hopes, not facts. Indeed, the article Apple cites in its current motion was published a week after Apple made such arguments to the Court and it states that "Japan **will commence negotiations** to resume business travel with some 10 countries and regions including China, South Korea and Taiwan…." Ex. 1 (emphasis added). It was always possible, if not likely, that the travel restrictions would remain in place, as Maxell cautioned. Moreover, Japan's restrictions apply differently to foreign nationals and nationals. Only the former are denied permission to enter Japan. Mot. at Ex. 3. Though Apple asserts Mr. Murphy would be stranded were he to leave the country for deposition, Apple does not actually provide any details regarding Mr. Murphy's nationality.

Having obtained leave to depose Mr. Murphy by representing it could quickly complete the deposition (based on nothing more than Apple's hopes), Apple should not be permitted again

to assert that limited additional time will enable the deposition to take place—again on nothing more than Apple's hope that this may be the case. This chain of events was completely foreseeable and not a sufficient basis on which to draw out fact discovery even further. If Apple would have reasonably acted and timely sought Mr. Murphy's deposition in the year plus time period it had to undertake such deposition (like Maxell arranged for the depositions of the inventors located in Japan), Apple would not now be in this situation.

B. Apple Itself Admits the Discovery Is Not Important

In first seeking to obtain leave to take Mr. Murphy's deposition, Apple espoused the importance of obtaining discovery from someone with personal knowledge of the June 2013 meeting between Apple and Hitachi on which Maxell bases its claim to past damages. D.I. 307 at 7. Apple stated: "Mr. Murphy, therefore, is the only witness who can shed light on the highly-disputed pre-suit communications between Apple and Hitachi. Mr. Murphy's testimony is therefore irrefutably important to this case." *Id.* at 6-7 (internal citations omitted). This was the core basis for the Court granting Apple's initial request. In its current motion, Apple abandons this position. Apple cites to the Court's prior order regarding importance of the discovery, but does not itself re-assert such importance. No longer claiming that Mr. Murphy is needed to "shed light" on the prior negotiations, Apple now "proffers that Mr. Murphy's testimony will be entirely consistent with the detailed description of [the pre-suit communications between Apple and Hitachi] that Apple already provided to Maxell in Apple's interrogatory responses, and the documents cited therein" and concedes that "Mr. Murphy will not provide any new or different material facts…." Mot. at 4. Apple cannot have it both ways. It cannot argue the testimony is important to satisfy this factor and then turn around and state that it will introduce nothing new in order to satisfy another.

Given Apple's knowledge of Mr. Murphy's involvement in the June 2013 negotiations and its clearly close contact with Mr. Murphy, if Apple genuinely believed that Mr. Murphy's

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