

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

GREE, INC.,

Plaintiff,

v.

SUPERCELL OY,

Defendant.

§ The Honorable Rodney Gilstrap

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**SUPERCELL OY'S UNOPPOSED RENEWED MOTION FOR
RELIEF IN VIEW OF HEALTH, SAFETY, AND DUE
PROCESS CONCERNS PRESENTED BY THE COVID-19 VIRUS**

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Defendant Supercell Oy acknowledges that the Court recently overruled its objection to Magistrate Judge Payne’s order denying Supercell’s motion for relief filed on April 23, 2020. Since the filing of that motion, however, the circumstances have drastically changed and additional information has been obtained. Supercell thus respectfully renews its request that the Court continue the August 3 trial to September or early October.¹ Because Supercell has agreed to several conditions (set forth below at 9-10) that minimizes the prejudice from this short trial delay, Plaintiff GREE, Inc. does not oppose Supercell’s request to the continue the trial date to September or early October.²

The COVID-19 Pandemic is accelerating in the United States, and particularly in California and Texas. Given the number of attendees from different locations, the scheduled trial presents the risk of becoming a super spreader event. Considering trial teams for both parties, approximately thirty people, presumably from different “social bubbles,” from thirteen different locations will travel to Marshall for trial—not even including witnesses, the Court, the Court’s staff, and jurors. *See* Declaration of Michael J. Sacksteder (“Sacksteder Decl.”), ¶ 2. Most of these attendees will travel to trial by air, putting them in enclosed quarters with at least 2,000 additional people, collectively, shortly before trial begins.³ Below are the current estimated active cases in areas from which attendees will travel from/through/to:

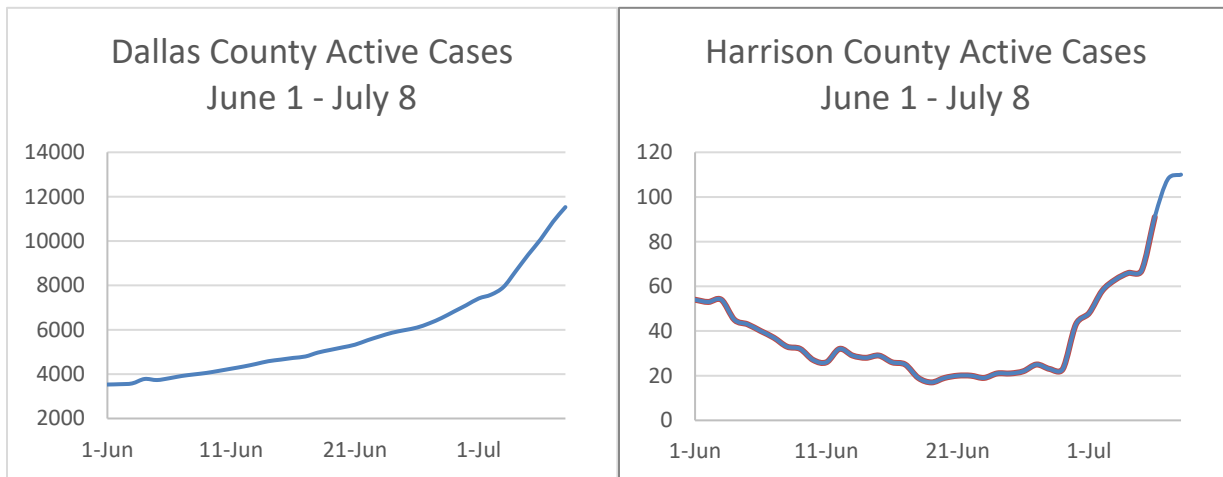
¹ Supercell acknowledges that continuing a trial creates a significant scheduling problem in a court with a docket as busy as this one. But Supercell respectfully submits that under the current circumstances, the alternative is potentially much worse, both legally and in terms of the public health.

² **GREE’s Statement:** GREE does not agree with all of the statements and arguments made by Supercell in this Motion. While GREE is ready to proceed with trial, in view of the agreed conditions made by Supercell herein, GREE does not oppose this motion.

³ This estimate is conservative. The 2,000 figure amounts to less than 70 passengers per plane, assuming each attendee takes a direct flight to attend trial. Although some attendees will not fly to trial given their proximity to Marshall, others (and likely more) will need to take more than flight.

Location	Active Cases	Infected Persons Per 1,000
Dallas	11,529 ⁴	4.4
Harrison County	110	1.7
San Francisco Bay Area	24,259	3.1

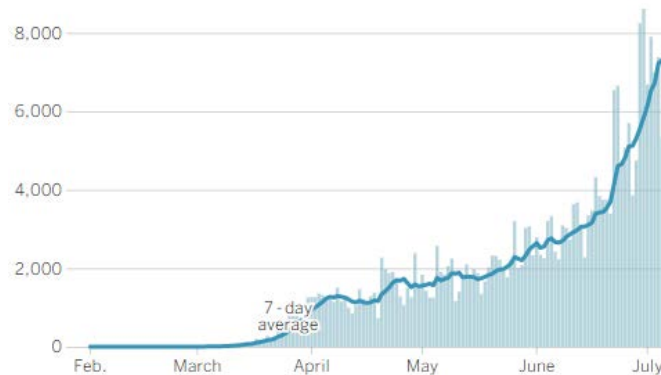
Experts generally agree that the actual number of active cases exceeds the reported active cases by 10 times.⁵ Based on these estimates, the attendees, collectively, will share enclosed quarters with between 34 and 88 persons with coronavirus traveling to and attending trial—this estimate does not include exposure for trips returning home following trial. Unfortunately, as shown below, the infection rates in these three areas are skyrocketing.



⁴ Data retrieved from <https://www.dshs.state.tx.us/coronavirus/TexasCOVID-19ActiveCaseDataByCounty.xlsx>. The active cases data was last reported on July 8.

⁵ <https://www.nytimes.com/2020/06/27/health/coronavirus-antibodies-asymptomatic.html>. Presumably persons with known active cases will not intentionally expose themselves to others by taking airlines, etc., but the number of unconfirmed active cases (i.e. people unknowingly carrying the virus) dwarfs the known cases.

Daily New Coronavirus Cases in California⁶



Given the current trends, the infection rate could be 4-10 times higher than it is today, meaning the attendees, collectively, could be exposed to 136-880 persons with coronavirus traveling to and attending trial. The dire situation caused by the coronavirus warrants a continuance for at least three reasons.

First, the risk to human health far exceeds the need to proceed with the current trial date. The COVID-19 pandemic is exploding right now in relevant geographic areas and will only get much worse before the curve flattens again. As shown above, the risk that trial attendees will be exposed to the coronavirus is significant. Importantly, one of Supercell's experts is immunocompromised and has been advised by his treating physicians to avoid travel during the pandemic, and in particular travel to Texas. The threat to this expert by attending trial cannot be overstated. In March, when the State of Texas was recording single digit numbers of new cases per day, this Court suspended jury trials "given the severity of the risk to the person by spread of COVID-19 in EDTX" and for "matters of public health." *See* Eastern District of Texas General Order 20-03, March 16, 2020. Now, daily new cases of COVID-19 in Texas are *one thousand*

⁶ <https://www.latimes.com/projects/california-coronavirus-cases-tracking-outbreak/>.

times higher.⁷ Forcing witnesses and legal staff—particularly those who may face severe or fatal complications from COVID-19—to travel from nearly a dozen major cities during the current outbreak and be confined indoors for extended periods creates an incredibly troubling and avoidable health hazard.

Second, proceeding with scheduled trial date will violate Supercell’s due process rights under the Fifth Amendment. Supercell’s witnesses residing in Finland—where Supercell is headquartered—are prohibited from entering the country and, even if permitted to enter, would be required to quarantine themselves upon returning home if they did. Supercell also maintains its position, as set forth in the briefing on its previous Motion for Relief (070 Case, Dkt. No. 152), regarding proceeding to trial without having the opportunity to take the depositions of certain GREE witnesses. Supercell submits that compelling Supercell to proceed to trial without the ability to call its own witnesses deprives Supercell of its due process rights.

Third, given that GREE does not oppose this Motion, continuing the August trial to September or early October will not prejudice any party. GREE’s argument that it would be prejudiced by a trial continuance has been mooted following the PTAB’s decision not to institute IPR trials in response Supercell’s *inter partes* review petitions for the patents at issue in these proceedings and Supercell’s agreement, as stated below, not to seek rehearing of the PTAB’s institution decisions at all.

In sum, moving forward with an August trial needlessly places the health and welfare of trial participants at risk when no party would suffer prejudice from a continuance to September or October.

⁷ Compare March 17, 2020 (7 new cases) with July 9, 2020 (9,782 new cases). See <https://tabexternal.dshs.texas.gov/t/THD/views/COVIDExternalQC/COVIDTrends?%3AisGuestRedirectFromVizportal=y&%3Aembed=y> (the “DSHS Dashboard”).

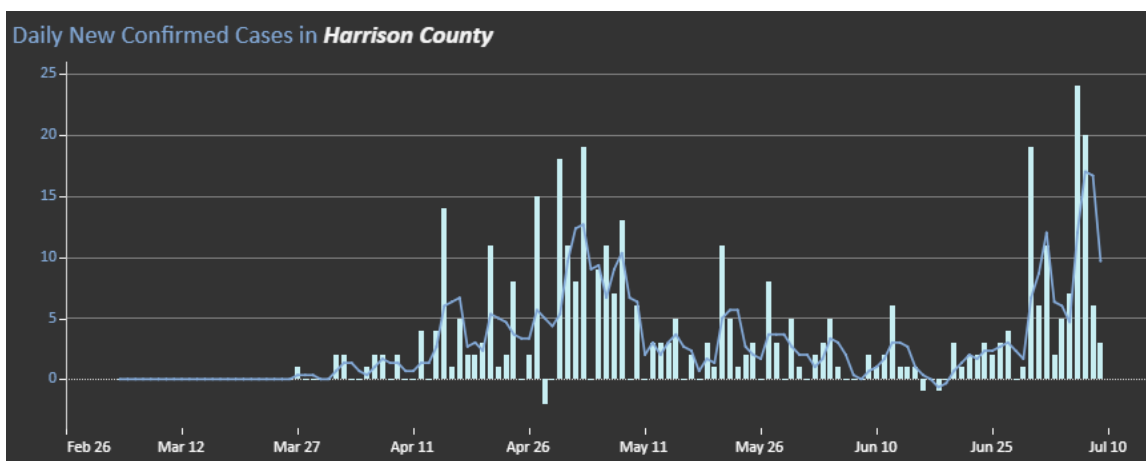
I. THE AUGUST TRIAL JEOPARDIZES THE HEALTH AND SAFETY OF COUNTLESS INDIVIDUALS

Setting aside the inability for Supercell's trial witnesses to enter the country, the August trial will potentially require dozens of *other* individuals traveling to or through Texas from the following cities: San Francisco and Menlo Park, CA; New York, NY; Seattle, WA; Raleigh and Durham, NC; Boston, MA; Salt Lake City, UT; Lake Oswego, OR; Tyler, Denton, Austin, and Houston, TX; and Tokyo, Japan. Many of these individuals will then confine themselves inside the Marshall courthouse with court staff and jurors for up to eight hours a day. Doing so after extensive air and land travel from cities all over the globe—and then having these individuals return home—creates an extreme risk of spread of COVID-19. *See* Sacksteder Decl., Exs. A, B. Additionally, existing safeguards employed to identify individuals at risk of spreading COVID-19, such as temperature checks, cannot account for infected yet asymptomatic individuals who can still spread COVID-19. *See* Sacksteder Decl., Ex. C.

Texas is now an epicenter in the United States for COVID-19. *See* Sacksteder Decl., Ex. D (noting Texas hit a record high of over 8,000 new COVID-19 cases on July 1, 2020 and has a record number of COVID-19 related hospitalizations). Cases are rising so rapidly that Texas Governor Greg Abbott has rolled back reopening Texas and, as of July 2, has suspended elective surgeries in eight Texas counties to provide additional hospital capacity to treat COVID-19 patients. *See* Sacksteder Decl., Ex. E. On July 9, Texas recorded 9,782 new COVID-19 cases. *See* DSHS Dashboard. As previously noted, when this Court initially suspended jury trials on March 16, 2020, daily new confirmed cases in Texas were in the single digits. *See id.*; Eastern District of Texas General Order 20-03, March 16, 2020. When this Court extended the March 16 General Order on April 22, further suspending jury trials through the end of May, COVID-19

daily new cases in Texas were less than one thousand per day. *See* DSHS Dashboard; Eastern District of Texas General Order 20-09, April 22, 2020.

And unfortunately, Harrison County suffers from the same dangerous trend. In just the last 10 days, Harrison County has seen “significant community spread” and reported at least 75 new confirmed cases of COVID-19, up from its average in mid-June of less than one new case per day.⁸ The number of new confirmed cases, which reached its lowest point on June 18, 2020, now exceeds the highest levels that were previously reported in April and May:⁹



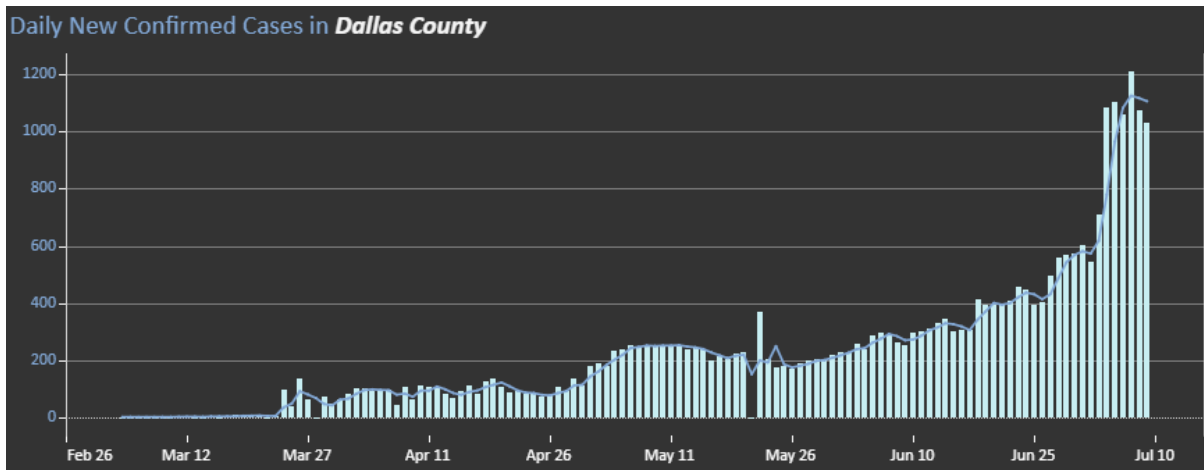
Indeed, Harrison County has seen its active cases quadruple in the last ten days,¹⁰ and available data indicates that Harrison County’s positive test rate for COVID-19 may be as high 26% since

⁸ <https://www.cbs19.tv/article/news/harrison-county-reports-20-new-cases-of-covid-19/501-5840e404-15c4-4b03-9ce7-585bffd14ca6>; <https://dshs.texas.gov/coronavirus/additionaldata.aspx> (retrieved July 7, 2020).

⁹ <https://dshs.texas.gov/coronavirus/additionaldata.aspx> (retrieved July 7, 2020).

¹⁰ On June 29, Harrison County had an estimated 23 active COVID-19 cases. By July 9 that number jumped to 110. *See* <https://www.dshs.state.tx.us/coronavirus/TexasCOVID-19ActiveCaseDatabyCounty.xlsx>.

July 1. *See* Sacksteder Decl., ¶ 3. Dallas County reports a similar (if more pronounced) trajectory:¹¹



Given that Texas-wide COVID-19 cases are *a thousand times higher* than in March, and ten times higher than they were in April, it is unsurprising that the State of Texas, as well as the Western, Southern, and Northern Districts of Texas either have suspended or expect to suspend jury trials and indicated those suspensions are likely to be extended past the August 3 trial date. *See* Sacksteder Decl., Ex. F (noting that the Supreme Court of Texas has suspended state court jury trials through September 1, the Southern District courthouses are closed, Chief Judge Garcia has continued all jury trials in the Western District of Texas through August 31, and Chief Judge Lynn of the Northern District indicated the prohibition on jury trials will likely be extended past the current July 17 date). Further, Governor Abbott’s July 2, 2020 Executive Order GA-29 mandates face coverings for individuals in public buildings in any Texas county with over 20 active COVID-19 cases—which includes Harrison County.¹² Sacksteder Decl., Ex. G. As cases

¹¹ *Id.*

¹² Mandatory face coverings for lawyers and witnesses, per Governor Abbott’s order, would preclude the jury from being able to evaluate critical body language and the totality of the lawyer’s or witness’s communication. Sacksteder Decl., Ex. H. The face covering requirement therefore further merits a continuance of the August trial.

are also surging in Harrison County, an August jury trial in this case simply presents too large of a health risk to justify.

Such risks are particularly acute for certain individuals at high risk of complications from COVID-19, including an expert witness for Supercell. As detailed in the accompanying sealed declaration, this witness has been advised by medical professionals not to travel to Texas at this time given their heightened risk of contracting COVID-19, their risk of facing severe complications if they contract COVID-19, and the serious risk of complications or death of family members if they were to spread the virus upon returning home. *See* Sealed Declaration. Moreover, these concerns are not limited to Supercell. GREE has also previously expressed “concerns about employees traveling to the United States due to the high number of coronavirus cases and the 14-day quarantine period upon return.” 070 Case, Dkt No. 160-37 at ¶ 13 [Declaration of Tomoki Umeya, GREE’s Vice President, General Counsel, Legal & General Affairs Unit Dated April 29, 2020].

II. SUPERCCELL’S INABILITY TO CALL ITS WITNESSES LIVE AT TRIAL VIOLATES ITS DUE PROCESS RIGHTS

Supercell’s witnesses residing in Finland, where Supercell is headquartered, remain unable to enter the United States to testify at trial. *See* <https://www.cdc.gov/coronavirus/2019-ncov/travelers/from-other-countries.html>. Additionally, due to the increasing COVID-19 cases in the United States, even if Supercell’s witnesses were allowed into the United States for the August trial, under current European Union rules they would be required to self-quarantine for 14 days upon returning home. *See* <https://valtioneuvosto.fi/en/information-on-coronavirus/current-restrictions>. On the other hand, GREE, headquartered in Japan, does not face the same limitations on presenting its Japanese resident witnesses at trial. *See* <https://www.cdc.gov/coronavirus/2019-ncov/travelers/from-other-countries.html>. GREE’s

ability to present its witnesses live is a decided procedural advantage,¹³ and Supercell's inability to do the same, in a case brought by GREE, violates Supercell's due process rights. *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) ("Due process is flexible and calls for such procedural protections as the particular situation demands.").

III. A SEPTEMBER OR OCTOBER TRIAL WILL PREJUDICE NEITHER PARTY

Subject to the conditions below, GREE does not oppose moving the August trial to September or early October. Moreover, the prejudice previously asserted by GREE relating to certain PTAB proceedings has been mooted in light of the PTAB's decisions denying institution of Supercell's petitions regarding the '873 and '655 patents and Supercell's representation here that it will not seek rehearing of the Board's decisions not to institute an *inter partes* review.¹⁴ Supercell further agrees that it will not rely on GREE's agreement not to oppose this motion or any change in the August 3 trial date in any other PTAB proceeding between the parties.

In addition, Supercell and GREE agree not to seek leave to serve any additional discovery requests or notices in the cases scheduled for trial on August 3. This agreement, however, does not apply to:

- Supercell requesting the Court's permission to use a certification from YouTube regarding the Sniper vs Sniper video as soon as that certification becomes available, provided that GREE shall have the right to argue against Supercell's

¹³ Indeed, the Court has acknowledged the importance of nonverbal communication from live witnesses during a jury trial. Sacksteder Decl., Ex. I.

¹⁴ The proceedings for which Supercell will not request reconsideration of the Board's decision not to institute are: IPR2020-00513 (related to the '655 Patent) and IPR2020-00215 (related to the '873 Patent). GREE has agreed not to raise this representation by Supercell, or the decision that underlies it, in any other action between the parties before the PTAB.

requests for any reason, and provided that Supercell shall not argue any extension of the trial date in favor of any such requests;

- Supercell's previously noticed discovery to Zynga related to Farmville¹⁵; and
- To the extent possible under Japanese law, Supercell conducting the previously noticed depositions of GREE witnesses.¹⁶

Supercell also agrees not to seek leave to amend its invalidity contentions in the cases set for trial on August 3 (2:19-cv-0070 and -0071) for references that were not identified and charted in Supercell's invalidity contentions in those cases, except any amendment made necessary by additional discovery from Supercell's subpoena to Zynga relating to Farmville.¹⁷ Supercell further agrees that it will not base any objection to or request for reconsideration of the Court's Memorandum Order re [142] Opposed Motion for Leave to File Amended Invalidity Contentions under P.R. 3-6 filed by Supercell [Dkt. 288] on any change in the timing of the trial.

IV. REQUESTED RELIEF

Supercell therefore respectfully requests that the trial scheduled for August 3 be continued until the Court's September or October jury selection dates.

¹⁵ GREE reserves all rights to object to the discovery or any corresponding amendment on any basis, including because the production, discovery, or amendment occurs too close to trial.

¹⁶ GREE reserves all rights to object to the discovery or any corresponding amendment on any basis, including because the production, discovery, or amendment occurs too close to trial.

¹⁷ GREE reserves all rights to oppose leave to amend or otherwise to object to any amendment to Supercell's contentions, expert reports or defenses based on this discovery, including because they occur too close to trial.

Dated: July 10, 2020

FENWICK & WEST LLP

By: /s/ Michael J. Sacksteder

Michael J. Sacksteder (Admitted E.D. Texas)

Bryan A. Kohm (Admitted E.D. Texas)

Christopher L. Larson (Admitted E.D. Texas)

Shannon E. Turner (Admitted E.D. Texas)

FENWICK & WEST LLP

555 California Street, 12th Floor

San Francisco, California 94104

Telephone: 415.875.2300

Facsimile: 415.281.1350

Email: msacksteder@fenwick.com

bkohm@fenwick.com

clarson@fenwick.com

sturner@fenwick.com

Geoffrey R. Miller

(Texas State Bar No. 24094847)

FENWICK & WEST LLP

902 Broadway, Suite 14

New York, NY 10010

Telephone: 212.430.2600

Email: gmiller@fenwick.com

Jessica M. Kaempf (Admitted E.D. Texas)

Jeffrey A. Ware (Admitted E.D. Texas)

FENWICK & WEST LLP

1191 Second Ave., 10th Floor

Seattle, Washington 98101

Telephone: 206.389.4510

Facsimile: 206.389.4511

Email: jkaempf@fenwick.com

jware@fenwick.com

Deron R. Dacus

State Bar No. 00790553

THE DACUS FIRM, P.C.

821 ESE Loop 323, Suite 430

Tyler, TX 75701

Telephone: (903) 705-1117

Facsimile: (903) 581-2543

ddacus@dacusfirm.com

Attorneys for Defendant Supercell Oy

CERTIFICATE OF CONFERENCE

The undersigned certifies that counsel for Supercell has complied with the meet and confer requirement in Local Rule CV-7(h). The personal conference required by Local Rule CV-7(h) was conducted on July 9, 2020 by counsel for Supercell and Plaintiff.

As noted in the statement of GREE's position in Footnote 2 above, GREE does not agree with all of the statements and arguments made by Supercell in this Motion and does not join this motion. While GREE is ready to proceed with trial, in view of the agreed conditions made by Supercell herein, GREE does not oppose this motion.

/s/ Michael J. Sacksteder

Michael J. Sacksteder

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a). All other counsel of record not deemed to have consented to electronic service were served with a true and correct copy of the foregoing by first class mail.

/s/ Michael J. Sacksteder

Michael J. Sacksteder