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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

FINJAN LLC., a Delaware Limited Liability Corporation,

Plaintiff,

v.

CISCO SYSTEMS, INC., a California Corporation,

Defendant.

Case No.: 5:17-cv-00072-BLF-SVK

**CISCO SYSTEMS, INC.’S
ADMINISTRATIVE MOTION TO
CONTINUE THE OCTOBER 19, 2020
JURY TRIAL OR TO IMPLEMENT
PROCEDURES THAT ENSURE A
FAIR TRIAL**

1 Following the hearing held on September 17, 2020, Cisco reviewed and carefully considered
2 the Court's comments and more fully assessed the logistics and safety risks of a trial in San Jose
3 during the pandemic in which all participants (witnesses, counsel, jurors, and the Court) are wearing
4 masks. Cisco likewise investigated the willingness of its witnesses to travel from outside the country
5 or from other cities within the country to appear at trial under the current conditions. To perfect the
6 record, including and following up on Cisco's concerns articulated at the September 17 hearing,
7 Cisco formally requests a continuance to the Court's first available date in January 2021, during
8 which Cisco understands the Court's docket has availability.

9 If this case must press forward in the current environment, Cisco respectfully requests a
10 shorter continuance of the trial currently set for jury selection on October 16, 2020 to November 2,
11 2020 (or the Court's first available date thereafter) to enable Cisco's lead trial counsel to have a
12 procedure to address a medical condition that periodically impacts his ability to draw a full breath of
13 air, which is exacerbated when wearing a mask or talking while wearing a mask. A short
14 continuance will allow him to have a currently scheduled medical procedure that, if successful,
15 should ameliorate this condition and allow him to wear a mask in the courtroom throughout the trial
16 without any additional side effects. The basis for this request is described below and more fully
17 explained in the attached Declaration of L. Norwood Jameson (the "Jameson Declaration"), which is
18 being filed under seal to protect personal privacy.

19 In addition, if this trial is going forward under the current rules for conducting trials during
20 the pandemic, Cisco also requests that the Court issue an Order requiring all fact witnesses to testify
21 remotely and that neither party have a corporate representative at counsel table during trial. Such an
22 Order is necessary to level the playing field because many of Cisco's fact witnesses reside outside
23 this district, in other states and in other countries, and Cisco cannot reasonably compel them to travel
24 to California during the pandemic. Such an Order should extend to corporate representatives because
25 the logical Cisco corporate representatives for this trial are not willing to travel to California during
26 the foreseeable circumstances and expose themselves to the health risks associated with an extended
27 stay in California during the trial.

1 Per the Court's September 24, 2020 Order, Cisco recognizes that the Northern District of
2 California has determined that jury trials can resume, effective October 1, 2020. The Court
3 nonetheless has discretion to continue this trial. *See, e.g., United States v. Cea*, No. 2:19-cr-126-
4 MCE, Order at 3-4 (E.D. Cal. Mar. 25, 2020) (Ex. A). The Court should exercise that discretion here
5 based on the considerations of safety and fairness, as addressed in more detail below.

6 **I. Cisco's Reasons for the Requested Continuance**

7 Cisco concurs with the Court's assessment of the health risks posed by Covid-19, as
8 articulated at the September 17th hearing in this matter. *See* Ex. B at 41 ("I do think that the concern
9 over Covid is a valid reason for a continuance if you are making that argument."). Indeed, this case
10 is not between competitors where one party is at risk of suffering irreparable injury. Rather, it is
11 purely about money. And this does not justify proceeding with a jury trial during the pandemic that
12 risks the health of the jurors, the Court and the Court's staff, the witnesses, and the legal teams for
13 both parties. This civil case will have at least 8 jurors, plus the Court and members of the Court's
14 staff, plus client representatives, plus at least a half dozen (likely more) members of each legal team
15 (and IT support) present in the same courtroom for extended periods over the course of two weeks.
16 Further, these individuals will each be interacting with family and friends (for in-town participants)
17 and other members of the legal team and hotel staff (for out-of-town participants) when not in the
18 courtroom. Cisco notes the particular danger posed by trying complex civil cases, necessitating war
19 rooms staffed with many lawyers and assistants working long hours over those weeks. All of this
20 presents a heightened health risk for everyone involved and, as Cisco explained at the September
21 17th hearing, this alone is sufficient basis for this Court to exercise its discretion and continue the
22 trial date until January 2021.

23 Separate and apart from these risks, as the Court noted at the September 17th hearing, the
24 State of California's safety requirements,¹ the Safety Protocols for the Northern District of
25 California Courthouses, and this Court's procedures for its courtroom, mandate that all trial

26 ¹ https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/Guidance-for-Face-Coverings_06-18-2020.pdf at Ex. C;
27 https://www.sccgov.org/sites/covid19/Pages/business-guidance.aspx#business_ops_requirements
28 at Ex. D.

1 participants – including counsel for the parties – wear face masks throughout trial, even throughout
2 the entirety of opening and closing arguments and during lengthy witness examinations. Ex. B at 42
3 (“I want to be clear that if we go further with trial, everyone in the Courtroom will be wearing a
4 mask all of the time. Your witnesses will testify with masks, they will be encased in plexiglass, you
5 will be – you will be asking questions and giving opening and closing arguments in a mask. And, I
6 don’t know how much experience you have wearing a mask, but I do my criminal pleas in the
7 Courtroom with a mask on, and I feel like I am going to suffocate after a half an hour.”) (Ex. B at
8 42). This legal requirement presents a particular challenge for Cisco’s lead trial counsel, Mr.
9 Jameson, who was not available for the September 17th hearing. While Mr. Jameson had informed
10 Mr. Gaudet as a friend and colleague of his medical issue and the need for a medical procedure, Mr.
11 Jameson had not authorized Mr. Gaudet to disclose the personal medical information filed herewith
12 and did not anticipate the possibility of a trial in which the wearing of a mask at all times would be
13 a requirement for lawyers in the courtroom. As explained in the attached Jameson Declaration, Mr.
14 Jameson was recently diagnosed with a condition that has a periodic side effect of temporary
15 shortness of breath. This side effect can be and has been exacerbated when wearing a mask, even
16 for short periods of time (much less for extended periods of time). Cisco requests a short
17 continuance – to at least November 2, 2020 – to allow Mr. Jameson to have a procedure, which if
18 successful, will address this issue and would then allow him to wear a mask for extended periods
19 without additional personal hardships.

20 **II. Cisco’s Reasons for Remote Trial Testimony**

21 While Cisco believes that the wearing of face masks as required by state law and court rules
22 are necessary to provide any degree of safety, having witnesses wear face masks obstructs the most
23 basic function of a jury: evaluating credibility. The role of the jury in assessing witness credibility
24 is a core instruction to any jury, and is at the heart of the jury system. *See* Stipulated Instruction
25 No. 11 (Dkt. 565-1). If the jurors cannot see anything but a witness’s eyes, the jurors will have
26 little ability to evaluate demeanor, and cannot rely on their life-long experience of “reading faces”
27 to determine who is telling the truth.

1 Cisco investigated how other Courts have handled the issue of masks for jury trials during
2 the pandemic. In those few venues where Courts have decided to proceed with jury trials, the
3 Courts appear to be addressing this fairness issue by having witnesses testify without a mask, and
4 also allowing the lawyers presenting in Court to not wear a mask, and some Courts have had jurors
5 wear plastic face shields instead of masks. *See Divisional Standing Order Regarding Trials in*
6 *Waco*, In Re: Waco Division Trials (W.D. Tex. Sept. 23, 2020) (Ex. E); *Optis Wireless Tech., LLC*
7 *et al v. Apple Inc.*, No. 2:19-cv-00066 (E.D. Tex.); *GREE, Inc. v. Supercell Oy*, No. 2:19-cv-00070
8 (E.D. Tex.)). None of this appears to be permitted under the current safety protocols in California.
9 Exs. C, D.

10 In addition, consistent with the safety concerns expressed by the Court (and as required by
11 local regulations in jurisdictions such as Santa Clara County, where Cisco's U.S. headquarters is
12 located), Cisco's U.S. offices remain in a mandatory work-from-home phase; business travel of any
13 sort in the U.S. is permitted in limited circumstances and *only if* the employee is "willing and
14 comfortable with traveling." Cisco has now confirmed that because of the health concerns caused by
15 Covid-19 only one of its out-of-town witnesses (who are located across the United States, e.g.,
16 Texas, Maryland, Vermont, and in Canada, England, Israel, and India) is willing to travel and attend
17 trial in-person, and only one in-town witness is willing to attend in-person. Unlike Finjan (which is
18 now owned by Fortress, a \$40+ billion-dollar investment entity), Cisco's witnesses include several
19 engineers who are focused on product research, development, maintenance, and/or updates. Finjan's
20 suggestion at the September 17th hearing that Cisco find any in-town employee willing to attend the
21 trial in person is unreasonable and prejudicial; Cisco's selected corporate representative, who is
22 located in Calgary, Canada, is an inventor of the key accused product and is intricately connected to
23 Cisco's presentation of its case.

24 There is no way to account for the jury's reaction to the decision of Cisco's witnesses not to
25 attend in person for safety reasons when the jurors must be there in-person, nor to compensate for
26 the difference in impact between in-person testimony (and the natural process of relationship
27 forming) versus remote testimony. This concern is heightened by Finjan's insistence on calling its

1 lead fact witness (Mr. Hartstein) in-person and having him sit in the courtroom throughout the trial.
2 The jury's reactions to the reasonable decision of Cisco witnesses, who are not being paid, not to
3 attend in-person are further exacerbated by the fact that the jury will see all of the paid experts
4 testify in-person in trial, despite having to travel to do so. In other words, the jury will see that
5 counsel and experts – who are paid to be there – were willing to attend, the jury will know that they
6 were themselves required to attend, the jury will see Mr. Hartstein in attendance the whole time, but
7 the jury will know that Cisco's fact witnesses opted to stay home. Cisco is concerned there is no
8 way it can overcome the natural resentment that this imbalance likely would engender in the jury –
9 especially when the jurors may feel forced to put their own health at risk. Accordingly, if this case
10 is going forward in the current environment, Cisco requests that the Court order that all fact
11 witnesses appear remotely and that neither party have a corporate witness at trial. This would at
12 least level the playing field if Finjan believes this case is so urgent it should not be continued.

13 Conclusion

14 There appears to be complete agreement between the parties and the Court about the danger
15 of holding a jury trial during the pandemic. Cisco thus requests that this trial be continued at least
16 until January. If the Court is not amenable to such a continuance, then Cisco requests a shorter
17 continuance for the reasons explained in the attached Jameson Declaration.

18 Additionally, Cisco requests that if this jury trial is conducted during the pandemic, then all
19 fact witnesses be required to testify remotely and not appear in the courtroom.

20
21 Dated: September 29, 2020

Respectfully submitted,

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23 /s/ Matthew C. Gaudet

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing document has been served on September 29, 2020 to all counsel of record who are deemed to have consented to electronic service via the Court’s CM/ECF system.

/s/ Matthew C. Gaudet
Matthew C. Gaudet

CERTIFICATE OF CONFERENCE

Counsel for the parties met and conferred on September 24, 2020, and September 28, 2020, regarding both bases for Cisco’s motion for continuance—the safety and fairness issues arising from Covid-19 and Mr. Jameson’s health condition. Plaintiff has indicated that it opposes this motion, and thus a stipulation pursuant to Civil L.R. 7-12 could not be obtained.

/s/ Matthew C. Gaudet
Matthew C. Gaudet