

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

SOLAS OLED LTD.

Plaintiff,

v.

SAMSUNG DISPLAY CO., LTD.,
SAMSUNG ELECTRONICS CO., LTD.,
AND SAMSUNG ELECTRONICS
AMERICA, INC.,

Defendants.

Civil Action No. 2:19-cv-00152-JRG

DEFENDANTS' OPPOSED MOTION TO CONTINUE TRIAL

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I. INTRODUCTION

In light of the significant worsening of the COVID-19 pandemic in the past two weeks, projections that conditions will further deteriorate in the coming weeks, and the announcement of clinical trial results suggesting that vaccines may begin to be available by the end of 2020, Defendants Samsung Electronics Co., Ltd., Samsung Electronics America, Inc., and Samsung Display Co., Ltd. (“Defendants”) respectfully move to continue trial by approximately 3 months from December 4, 2020 to March 2020.

Defendants had not intended to seek a change of the trial date, mindful that the case was continued from its originally scheduled October 1 trial and scheduled for a special trial setting on December 4. However, the recent worsening of the COVID-19 pandemic, particularly in Texas and in Harrison County, presents exceptional circumstances. Rates of infection in this District currently match or exceed those from the spring, when the Court temporarily suspended trials. The incidence of COVID-19 infecting thirteen people—jurors, counsel, and court staff—at a recent trial in Sherman, Texas underscores that even the best efforts and precautions cannot prevent trials from serving as spreader events. At the same time, there is now light at the end of the tunnel: new information has just become available concerning the promise and expected availability of at least two vaccines that will significantly reduce the safety risks associated with COVID-19. Defendants’ trial team includes persons at high risk for COVID-19, including Defendants’ lead trial counsel, and trial will require travel by numerous persons through areas that present significant risks of COVID-19 transmission. Under these circumstances, Defendants believe it necessary to make this request to the Court for a brief continuance of trial.

II. THE COVID-19 SITUATION IS WORSENING IN HARRISON COUNTY, TEXAS AND ACROSS THE COUNTRY

The number of cases of COVID-19 in Harrison County and in the entire country has recently and significantly increased to the point where conditions are now as bad as, or even worse than, in the spring when the Court continued all jury trials for over three months. Dr. Anthony Fauci, director of the National Institute of Allergy and Infectious Diseases and one of the nation's leading government experts in infectious diseases for the past four decades, recently stated that the United States needs to make an "abrupt change," warning that "[w]e're in for a whole lot of hurt. It's not a good situation."¹

Harrison County has now reported over 1,200 confirmed cases of COVID-19, with more than 120 of these cases coming in the last three weeks.² Harrison County Judge Chad Sims has estimated that, as of November 17, 2020, there were over 220 active cases in the county.³ This week, Marshall High School and Marshall Junior High temporarily transitioned from in-person classes to remote learning.⁴ And just last week, a Harrison County elementary school closed its

¹ Josh Dawsey, 'A whole lot of hurt': Fauci warns of covid-19 surge, offers blunt assessment of Trump's response, *The Washington Post* (Oct. 31, 2020), https://www.washingtonpost.com/politics/fauci-covid-winter-forecast/2020/10/31/e3970eb0-1b8b-11eb-bb35-2dcfdab0a345_story.html.

² See COVID-19 New Confirmed Cases by County (last visited Nov. 18, 2020), <https://dshs.texas.gov/coronavirus/TexasCOVID-19NewCasesOverTimebyCounty.xlsx> (available at Texas COVID19-Data, Texas Department of State Health Services, <https://dshs.texas.gov/coronavirus/AdditionalData.aspx>).

³ See Harrison County Judge, FACEBOOK (Nov. 17, 2020), <https://www.facebook.com/harrisoncountyjudge/posts/1664766543726276>.

⁴ See Bert Ortigo, *Marshall High, junior high campuses switch to virtual learning only Thursday, Friday*, *The Marshall News Messenger* (Nov. 17, 2020), https://www.marshallnewsmessenger.com/covid-19/marshall-high-junior-high-campuses-switch-to-virtual-learning-only-thursday-friday/article_c797cec4-28ed-11eb-bc60-7b54af55d44b.html.

campus and switched to virtual classes due to positive cases among its staff.⁵ Further, two school districts in nearby Upshur County have also temporarily closed schools due to the increase in COVID-19 cases.^{6 7}

Cases across the country are similarly on the rise. The United States is currently averaging over 150,000 new cases per day, nearly quadruple the levels seen at the end of September.⁸ Texas appears to be undergoing a second wave on par with or worse than its first wave, recently surpassing one million cumulative cases and passing California for the most overall cases of any state.⁹ Over 100,000 of Texas's cases were reported in the last two weeks.¹⁰ California, where lead counsel from both sides reside, has seen its seven day rolling average nearly double in the past two weeks,¹¹ leading California's governor to issue a travel advisory urging against non-essential out-of-state travel and recommending 14-day quarantines for anyone returning to the state

⁵ See Bert Ortigo, *Elysian Fields campus to remain virtual only after staff COVID-19 cases*, The Marshall News Messenger (Nov. 10, 2020), https://www.marshallnewsmessenger.com/covid-19/elysian-fields-campus-to-remain-virtual-only-after-staff-covid-19-cases/article_d8495472-22e9-11eb-872b-837faa2c2483.html/.

⁶ See Giselle Chavez, *Gilmer ISD to start Thanksgiving break early due to COVID-19*, CBS 19 (Nov. 16, 2020), <https://www.cbs19.tv/article/news/local/gilmer-isd-to-start-thanksgiving-break-early-due-to-covid-19/501-fa895f15-3b5f-49e4-8d50-4fb085179bcf>.

⁷ See Longview News General, *New Diana ISD closes middle, high schools until Nov. 30*, CBS 19 (Nov. 17, 2002), <https://www.cbs19.tv/article/news/local/new-diana-isd-closes-middle-high-schools-until-nov-30/501-e0a458a8-5d78-499e-a32a-d93985dad843>.

⁸ See CDC COVID Data Tracker, Center for Disease Control and Prevention (last visited Nov. 18, 2020), https://covid.cdc.gov/covid-data-tracker/#trends_dailytrendscases.

⁹ See Joe Carroll, *Texas Covid-19 Cases Top 1 Million in Worsening Second Wave*, Bloomberg (Nov. 11, 2020), <https://www.bloomberg.com/news/articles/2020-11-11/texas-covid-19-cases-exceed-one-million-in-worsening-second-wave>.

¹⁰ See COVID-19 New Confirmed Cases by County (last visited Nov. 18, 2020), <https://dshs.texas.gov/coronavirus/TexasCOVID-19NewCasesOverTimebyCounty.xlsx> (available at Texas COVID19-Data, Texas Department of State Health Services, <https://dshs.texas.gov/coronavirus/AdditionalData.aspx>).

¹¹ See CDC COVID Data Tracker, Center for Disease Control and Prevention (last visited Nov. 18, 2020), https://covid.cdc.gov/covid-data-tracker/#trends_dailytrendscases.

from any other state.¹² Cases are rising as well in South Korea, from where Defendants' witnesses will travel for trial, to the point where the country increased restrictions just yesterday.¹³

With the holidays approaching, it is expected that the trend of increasing cases across the country will only accelerate. Those involved in trial will also be traveling to Marshall during the busiest travel time of the year, and will face an increased risk of virus exposure on their way to and from trial.

III. EVEN WITH THE COURT'S BEST EFFORTS AND PRECAUTIONS, TRIAL PARTICIPANTS WILL FACE A HIGH RISK OF INFECTION WHILE IN MARSHALL

The Court has issued a number of precautions to be followed during trial. However, these will likely not be enough to mitigate against the risk of spread of infection.^{14 15}

Recent events in the Eastern District of Texas have shown that, despite logical precautions and best efforts, there may be people at trial who are infected with COVID-19, and due to the contagiousness of this virus one infected person puts everyone at risk. As the Court is aware, last

¹² See Press Release, Office of Governor Gavin Newsom, California, Oregon & Washington Issue Travel Advisories (Nov. 13, 2020), <https://www.gov.ca.gov/2020/11/13/california-oregon-washington-issue-travel-advisories/>.

¹³ See James McCurry, *South Korea facing 'crisis', says PM, as Covid measures tightened*, The Guardian (Nov. 16, 2020), <https://www.theguardian.com/world/2020/nov/17/south-korea-facing-crisis-says-pm-as-covid-measures-tightened>.

¹⁴ The court's precautionary measures include temperature checks for individuals entering the courthouse on trial days. A recent study published in the New England Journal of Medicine has found that temperature checks are inadequate for spotting coronavirus infections and preventing outbreaks. One study leader stated that "[a] lot of the infection that occurs, we don't even realize it is occurring" Marilyn Marchione, *Fever, symptom screening misses many coronavirus cases*, Associated Press (Nov. 11, 2020), <https://apnews.com/article/fever-symptom-screening-misses-virus-c31802fea6720906a9b9c2f913f9acb7>.

¹⁵ With regard to face shields, the CDC has advised that it "does not recommend using face shields . . . as a substitute for masks . . . Face shields have large gaps below and alongside the face, where your respiratory droplets may escape and reach others around you." *Considerations for Wearing Masks*, Center for Disease Control and Prevention (last visited Nov. 18, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover-guidance.html>.

week during trial in *ResMan LLC v. Karya Property Management LLC*, Judge Mazzant suspended trial after a juror who had been excused tested positive for the virus.¹⁶ Following the suspension of the trial, another juror, multiple attorneys, and a court staff member also tested positive for COVID-19.¹⁷

As of November 17, a total of 13 participants in the trial—jurors, counsel, and court staff—have tested positive for COVID-19 and a mistrial has been declared.¹⁸ Judge Mazzant has announced that he will be continuing all trials scheduled for 2020 to next year.¹⁹ Judge Mazzant observed during his November 13 teleconference that the outbreak at trial “*happened despite the court taking all the protocols the court has taken.*”²⁰

While each of the positive cases from the Sherman trial has thankfully been reported to be mild so far, the outbreak shows that proceeding with trial on December 4th would carry significant risks.²¹ Lead trial counsel for Defendants is in a high-risk category for the virus, and it is likely that several members of the jury panel will be as well.²²

¹⁶ See Ryan Davis, *EDTX Trial Suspended After Juror, Attorney Get COVID-19*, Law360 (Nov. 12, 2020), <https://www.law360.com/trials/articles/1328361/edtx-trial-suspended-after-juror-attorney-get-covid-19>.

¹⁷ See Madison Alder, *More Positive Tests as Covid Disrupts Federal Trial in Texas*, Bloomberg Law (Nov. 13, 2020), <https://news.bloomberglaw.com/us-law-week/more-positive-tests-as-covid-disrupts-federal-trial-in-texas>.

¹⁸ See Katie Buehler, *COVID-19 Outbreak Leads to Mistrial in EDTX*, Law360 (Nov. 17, 2020), <https://www.law360.com/legalindustry/articles/1329617/covid-19-outbreak-leads-to-mistrial-in-edtx>.

¹⁹ See *id.*

²⁰ Katie Buehler, *More EDTX Trial Participants Test Positive for Virus*, Law360 (Nov. 13, 2020), <https://www.law360.com/articles/1328721/more-edtx-trial-participants-test-positive-for-virus>.

²¹ One attorney in that case who tested positive for COVID-19 was also diagnosed with pneumonia. See *id.*

²² Defendants are further concerned about the health of key employees who will be attending trial.

Under the current conditions, the Georgia Tech COVID-19 Event Risk Assessment Planning Tool estimates that in Harrison County, an event with 100 participants will have approximately a one-in-three chance of including at least one COVID-19-positive attendee.²³ This does not take into account that many of the attendees at trial will have come from places where they are more likely to be infected than Harrison County and will have faced increased chance of exposure due to travel. Nor does it take into account that many jurors and other attendees will have gathered with families for Thanksgiving shortly before trial. Given these additional factors, it is statistically likely that at least one person attending trial will be infected with COVID-19.

Finally, even if trial is accomplished without any participants contracting the virus, the burdens imposed by the recent increased restrictions across the country will be substantial. Trial is currently scheduled to begin on December 4 and end on December 11. Under the new guidelines from California, Defendants' lead counsel from California, and the majority of Plaintiff's counsel would need to spend Christmas day in self-quarantine if trial goes forward as scheduled.

IV. COVID-19 VACCINES ARE ON THE HORIZON, AND A BRIEF CONTINUANCE WILL ALLOW THE PARTIES TO TRY THE CASE UNDER SAFER CONDITIONS.

Defendants seek only a brief continuance until March 2021 to allow the "second wave" of COVID-19 to pass and to allow for vaccines to become available to as many trial attendees as possible, particularly those who are in the high-risk categories.

Just today, Pfizer announced that its proposed vaccine has "met all of the [clinical] study's primary efficacy endpoints," that the studies show 95% effectiveness, and it "plan[s] to submit *within days* to the FDA for [Emergency Use Authorization]" based on the totality of safety and

²³ See Professors Joshua Weitz & Clio Andris, *COVID-19 Event Risk Assessment Planning Tool*, Georgia Institute of Technology (last accessed Nov. 18, 2020), <https://covid19risk.biosci.gatech.edu/>.

efficacy data collected to date.”²⁴ As reported in the media, there are now two vaccine candidates—one from Pfizer and the other from Moderna—that have reported efficacy rates of 90% or greater from Phase III clinical trials, and other drug companies are expected to follow suit.

Dr. Fauci recently stated that “[health officials] likely will be able to start dispensing vaccines in December”²⁵ and that the “administration has both purchased and funded development of [vaccine] doses from Pfizer and other drugmakers with a goal of making enough supplies for most Americans by year-end.”²⁶ Texas, in fact, has been chosen by Pfizer as one of four states to participate in Pfizer’s “COVID-19 Immunization Pilot Program” whereby Pfizer will “work[] with U.S. officials in Operation Warp Speed (OWS) and the U.S. Centers for Disease Control and Prevention (CDC) to help ensure that after potential authorization or approval, the Pfizer-BioNTech COVID-19 vaccine can reach those in most need as quickly and equitably as possible.”²⁷

V. A BRIEF CONTINUANCE WILL NOT PREJUDICE THE PARTIES.

A three-month continuance will not prejudice Solas, who will still be afforded a trial less than two years after filing its Complaint in May 2019, which is faster than the average time-to-

²⁴ Press Release, Pfizer, Pfizer and Biontech Conclude Phase 3 Study of COVID-19 Vaccine Candidate, Meeting All Primary Efficacy Endpoints (Nov. 18, 2020), <https://www.pfizer.com/news/press-release/press-release-detail/pfizer-and-biontech-conclude-phase-3-study-covid-19-vaccine>.

²⁵ Quentin Fottrell, *‘Help is coming — and it’s coming soon’: Dr. Fauci outlines when COVID-19 vaccine will be available to all Americans*, MarketWatch (Nov. 16, 2020), <https://www.marketwatch.com/story/help-is-coming-and-its-coming-soon-dr-fauci-outlines-when-covid-19-vaccination-will-be-available-to-all-americans-2020-11-12>

²⁶ Jason Gale, *Fauci Says Pfizer Vaccine’s Trial Success May Boost Acceptance*, Bloomberg News (Nov. 14, 2020), <https://www.bloomberg.com/news/articles/2020-11-15/fauci-says-pfizer-vaccine-s-trial-success-may-boost-acceptance>.

²⁷ Press Release, Pfizer, Pfizer Update On Our U.S. COVID-19 Vaccine Candidate Distribution Preparedness (Nov. 16, 2020), <https://www.pfizer.com/news/press-release/press-release-detail/pfizer-update-our-us-covid-19-vaccine-candidate>.

trial of 25.6 months in this Court.²⁸ Such a continuance would also be in line with other districts in the country that are currently not holding in-person jury trials currently,²⁹ including the district closest to Marshall, the Western District of Louisiana.³⁰ In this District, Judge Mazzant has determined not to proceed with additional jury trials until January 2021 in view of the recent COVID-19 incident.³¹ In light of the recent worsening of conditions, a number of courts that had reopened have recently announced a temporary further suspension of trials.³² Moreover, Solas is seeking only monetary damages for alleged patent infringement, and would not be unduly prejudiced by a continuance to March 2020.

²⁸ See DocketNavigator Time-To-Milestone Report for Jury Trials in EDTX before Judge Gilstrap (last accessed November 18, 2020).

²⁹ See Madison Alder, Jasmine Ye Han, Porter Wells, *Federal Courts Respond to Covid-19: Live Map*, Bloomberg Law (Nov. 16, 2020), <https://news.bloomberglaw.com/us-law-week/arguments-axed-access-limited-courts-respond-to-covid-19-map>.

³⁰ See Ninth Supplemental Order Regarding Court Operations Under the Exigent Circumstances Created by the COVID-19 Pandemic (W.D. La. Aug. 5, 2020), https://www.lawd.uscourts.gov/sites/lawd/files/UPLOADS/COVID-19_Ninth_Supp_Order_8-5-20.pdf.

³¹ Katie Buehler, *COVID19 Outbreak Leads to Mistrial in EDTX*, Law360 (Nov. 18, 2020), <https://www.law360.com/legalindustry/articles/1329617/covid-19-outbreak-leads-to-mistrial-in-edtx>.

³² See, e.g., Administrative Order 8, In re: Court Operations During COVID-19 Pandemic (E.D. Ark. Nov. 6, 2020), <https://www.are.uscourts.gov/sites/are/files/AdminOrderEight%20110620.pdf>; General Order, In The Matter of: Continued Court Operations Under the Exigent Circumstances Created by COVID-19 and Related Coronavirus (S.D. Ind. Nov. 13, 2020), <https://www.insd.uscourts.gov/sites/insd/files/2020.11.12%20General%20Order%20Suspending%20Jury%20Trials.pdf>; Coronavirus (COVID-19) Guidance (E.D. Va.) <https://www.vaed.uscourts.gov/covid-19>; General Order 20-39, In the matter of: Continuing Court Operations in the District of Arizona Under the Exigent Circumstances Created by the Coronavirus Disease (COVID-19) (D. Ariz. Nov. 5, 2020), <https://www.azd.uscourts.gov/sites/default/files/general-orders/20-39.pdf>; Eighth Amended General Order 20-0012, In re: Coronavirus COVID-19 Public Emergency, (N.D. Ill. Nov. 13, 2020), https://www.ilnd.uscourts.gov/_assets/_documents/Eighth%20Amended%20General%20Order%2020-0012_FINAL.pdf.

In discussions of scheduling, Solas referenced co-pending IPR proceedings. Final written decisions in these proceedings are not due until April 1, 2020 (for the '311 patent), May 10, 2020 (for the '450 patent), and June 1, 2020 (for the '338 patent). Even with the requested three-month continuance, trial would take place in advance of any of these decisions. Defendants will also stipulate that they will not file any renewed motions to stay pending the IPR proceedings based on the trial's continuance.

Trial in this case is still more than two weeks away. The parties have sufficient time to adjust plans should a continuance be granted. Defendants note that their witnesses and client personnel from Korea would depart Korea for Marshall on November 25 (the evening of November 24 in the United States) to the extent necessary.

VI. CONCLUSION

For the reasons stated above, Defendants respectfully request the Court continue the December 4, 2020 trial until March 2020.

Dated: November 18, 2020

Respectfully submitted,

/s/ Daniel W. Cho

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**COUNSEL FOR DEFENDANTS SAMSUNG
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that all counsel of record who are deemed to have consented to electronic service are being served with a copy of the foregoing document via the Court's CM/ECF system per Local Rule CV-5(a)(3) this November 18, 2020.

/s/ Melissa Smith
Melissa Smith

CERTIFICATE OF CONFERENCE

I hereby certify that counsel for Defendants and counsel for Solas met and conferred concerning the substance of this motion and the relief requested on November 16, 2020. Following discussions, Solas remains opposed to this motion and the relief requested. Discussions conclusively ended in an impasse, leaving open the instant issues for the Court to resolve.

/s/ Melissa Smith
Melissa Smith