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13 UNITED STATES DISTRICT COURT
14 CENTRAL DISTRICT OF CALIFORNIA

15 Epistar Corporation,
16 Plaintiff,

17 v.

18
19 Lowe's Home Centers, LLC
20 Defendant.

Case No.: 2-17-cv-03219 JAK
(KSx)

**MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF MOTION FOR
CONTINUANCE OF TRIAL**

Date: July 12, 2021
Time: 8:30a.m.
Dept: 10B
Before: Hon. John A. Kronstadt

1 Pursuant to Federal Rule of Civil Procedure 16(b)(4), Local Rule 40-1, and the
2 Court’s Initial Case Standing Order Paragraph 4, Plaintiff Epistar Corporation
3 (“Epistar”) hereby respectfully requests a continuance of the trial date from July 13,
4 2021 to November 2021.

5 **I. INTRODUCTION**

6 Plaintiff Epistar Corporation (“Epistar”) is a Taiwanese corporation based in
7 Hsinchu, Taiwan. Although the United States has begun to bring the Covid-19
8 pandemic under control, that is not the reality in other parts of the world. In Taiwan,
9 Covid-19 is currently closing down the economy, overwhelming hospitals, and making
10 travel impractical. Because Epistar’s witnesses, client representatives, and Legal
11 Director cannot be vaccinated or travel to the United States, it would be severely
12 prejudicial for trial to proceed in a month. *First*, the possibility of vaccinations in
13 Taiwan for the relevant individuals is remote at this time. *Second*, Taiwan is 15 hours
14 ahead of California, and this time difference renders video testimony and witness
15 preparation infeasible (as it would be the middle of the night for Epistar’s witnesses).
16 *Third*, Epistar’s Legal Director (herself a key witness in this case) cannot reasonably
17 monitor, supervise, or consult with outside counsel about the progress of trial in real
18 time from across the world.

19 To ensure that Epistar can participate in the trial effectively, Epistar respectfully
20 requests that the Court reschedule the trial for November 2021.

21 **II. BACKGROUND**

22 **A. Procedural Background**

23 Epistar filed its Complaint on April 28, 2017. On March 19, 2020, the Court
24 scheduled trial for August 15, 2020. Dkt. No. 264. Because of disruptions caused by
25 the Covid-19 pandemic, on June 15, 2020, the Court entered an amended schedule with
26 an open trial date. Dkt. No. 271. On July 17, 2020, the trial was moved to November
27 10, 2020. Dkt. No. 275. On October 20, 2020, the trial was once again continued, this
28

1 time to March 2, 2021. Dkt. No. 304. Finally, on February 5, 2021, the trial was moved
2 to its current date of July 13, 2021. Dkt. No. 315.

3 **B. Factual Background**

4 **1. The Dire Covid-19 Situation in Taiwan**

5 Epistar has been working diligently towards trial and had been prepared to
6 proceed in July 2021. However, despite its early success in containing the Covid-19
7 pandemic, Taiwan is suffering severe outbreaks. During the course of intense trial
8 preparations over the last month, Epistar has witnessed the continuing deterioration of
9 the Covid-19 crisis in Taiwan. Since May 2021, cases there have surged. This outbreak
10 coincides with a severe vaccine shortage.

- 11 • <https://www.bbc.com/news/world-asia-57246914> (Declaration of James C. Yoon
12 (“Yoon Decl.”), Ex. A)
 - 13 ○ “[F]ew people in Taiwan are protected against the virus. Up until this
14 week, Taiwan had received around only 700,000 vaccine doses. Just 1% of
15 the population of 23 million had received a jab.”
- 16 • [https://www.reuters.com/world/china/taiwan-extend-covid-19-curbs-schools-stay-
17 shut-2021-06-07/](https://www.reuters.com/world/china/taiwan-extend-covid-19-curbs-schools-stay-shut-2021-06-07/) (*Id.*, Ex. B)
 - 18 ○ “After months of relative safety, Taiwan has been dealing with a spike in
19 domestic infections and is at its second-highest alert level, with gatherings
20 restricted, entertainment venues shut and students shifted to on-line
21 learning.”
- 22 • [https://www.theguardian.com/world/2021/may/16/lockdowns-and-panic-buying-
23 in-taiwan-as-covid-cases-rise](https://www.theguardian.com/world/2021/may/16/lockdowns-and-panic-buying-in-taiwan-as-covid-cases-rise) (*Id.*, Ex. C)
 - 24 ○ “The sudden rise in cases in an island state widely considered to have had
25 one of the world’s leading pandemic responses prompted partial lockdown
26 measures in two cities including the capital, Taipei, and sent worried
27 residents indoors, clearing usually busy shopping districts and temples.”

1 **2. Epistar’s Witnesses, Client Representatives, and Legal Director**
2 **Cannot Travel**

3 Due to the outbreak in Taiwan, several of Epistar’s witnesses and representatives
4 are unable to attend the currently scheduled trial without the highest personal sacrifice,
5 including risking their health on a long-haul flight (to the extent they could even secure
6 Covid-19 tests to board a flight). These potential witnesses include (1) Meng-chun Kuo,
7 Director of Epistar’s Intellectual Property Office (“Legal Director”), who is also a Rule
8 30(b)(6) witness on Epistar’s licensing program, patent enforcement, and intellectual
9 property programs; (2) Luke Lu, a witness testifying about Epistar’s business; and (3)
10 Dr. Ou, the inventor of the ’780 patent. None of these individuals has been vaccinated.
11 Declaration of Meng-chun Kuo (“Kuo Decl.”) ¶ 6. Given the vaccine shortage, they
12 may have to wait several months to secure vaccines. *Id.*

13 **III. ARGUMENT**

14 **A. Legal Standard**

15 Federal Rule of Civil Procedure 16(b)(4) provides that a case’s schedule may be
16 modified “for good cause and with the judge’s consent.” Fed. R. Civ. P. 16(b)(4). The
17 Ninth Circuit has developed a four-factor test to determine whether good cause exists to
18 continue trial: “(1) the movant’s diligence in preparing the case for trial, (2) the need for
19 a continuance, (3) whether the grant of a continuance will inconvenience the court and
20 the opposing party (including witnesses), and (4) whether the movant will suffer harm
21 as a result of denial.” *Singh v. Truong*, No. ED CV 16-2393-DMG (SPx), 2017 U.S.
22 Dist. LEXIS 225768, at *4-5 (C.D. Cal. June 15, 2017) (citing *United States v. Acres of*
23 *Land*, 791 F.2d 666, 671 (9th Cir. 1985)); *see also United States v. Flynt*, 756 F.2d
24 1352, 1358-59 (9th Cir. 1985). Of these factors, the fourth (potential prejudice to
25 movant) is the most critical. *United States v. Wiggins*, No. 1:19-po-00092-SAB, 2020
26 U.S. Dist. LEXIS 33833, at *3 (E.D. Cal. Feb. 27, 2020).

27 “Good cause may be found where the moving party shows . . . it is unable to
28 comply with the scheduling order’s deadlines due to matters not reasonably foreseeable
at the time the scheduling order issued, and that it was diligent in seeking a modification

1 once it became apparent it could not comply with the scheduling order.” *Sagikor Life*
2 *Ins. Co. v. Jang*, No. EDCV 19-2028 JGB (KKx), 2020 U.S. Dist. LEXIS 247328, at
3 *5-6 (C.D. Cal. Nov. 24, 2020); *see also Allen v. Holland Am. Line N.V.*, No. C20-
4 0352JLR, 2021 U.S. Dist. LEXIS 73986, at *2-3 (W.D. Wash. Apr. 16, 2021) (“good
5 cause” standard based on “development of matters which could not have been
6 reasonably foreseen or anticipated at the time of the Rule 16 scheduling conference”).

7 This Court, as well as others across the country, have recognized that case
8 management difficulties caused by Covid-19 are precisely the types of unforeseeable
9 events that justify continuing a trial. *See, e.g., Sagikor*, 2020 U.S. Dist. LEXIS 247328,
10 at *6 (In finding that “Defendants have shown good cause for a modest modification of
11 the trial date . . . the Court consider[ed] the impact of the pandemic in [the] litigation”);
12 *Novoa v. GEO Grp., Inc.*, No. EDCV 17-2514 JGB (SHKx), 2020 U.S. Dist. LEXIS
13 215159, at *6-8 (C.D. Cal. Oct. 15, 2020) (continuing trial because, *inter alia*, “Covid-
14 19 has had a continuing impact on [defendant’s] ability to gather information”); *Allen*,
15 2021 LEXIS at *2-3 (finding the parties have established good cause to continue the
16 trial due to the impact of the COVID-19 pandemic, including because witnesses who
17 reside outside of the United States had returned to their home countries).

18 **B. A Continuance of the Trial Date Is Necessary and Appropriate**

19 As demonstrated below, each of the four relevant factors weighs in favor of a
20 continuance.

21 *Diligence.* Epistar has been diligent in following the schedules set in this case.
22 But for the unexpected turn of events in Taiwan these past few weeks, it was ready and
23 prepared to proceed with trial in July. *See Yoon Decl., Ex. D* (email to Courtroom
24 Deputy Clerk regarding readiness for trial). Likewise, Epistar diligently sought a
25 modification of the trial date once it became apparent that travel to the trial would be
26 difficult.

27 *Necessity.* Covid-19 has inhibited Epistar’s ability to prepare for trial, meet with
28 its trial attorneys, and even be present for live testimony. Like the crew members in

1 *Allen*, Epistar’s witnesses and representatives are overseas and 15 hours ahead of
2 Epistar’s California attorneys. *See Allen*, 2021 LEXIS at *2-3. Setting aside the health
3 risks of a long-haul flight while unvaccinated, Epistar’s representatives may not even be
4 able to secure Covid-19 tests to board flights, (to the extent flights to the United States
5 were available for booking). Kuo Decl. ¶ 7.

6 Remote testimony would also be infeasible given the time difference between
7 Taiwan and California. For example, it may require a witness to stay alert and be
8 available to testify on Zoom between the hours of midnight to 8:00 a.m. (Taiwan time).
9 For the same reason, Ms. Kuo could not practically or regularly monitor, supervise, or
10 consult with her outside counsel during the progression of the trial.

11 In the next several months, and with the proliferation and importation of vaccines,
12 Epistar is hopeful that its witnesses and representatives can be vaccinated in Fall 2021
13 and travel to the United States for a trial in November 2021. *Id.* ¶ 9.

14 *Inconvenience.* A continuance should not cause much inconvenience to Lowe’s
15 (or its witnesses). Its witnesses are in the United States and can appear in Los Angeles
16 with more flexibility. During meet and confers, Lowe’s only stated objection to the
17 continuance was timing, closeness to trial, and Lowe’s advanced trial preparation. *See*
18 Yoon Decl. ¶ 8. However, as explained, the recent outbreak in Taiwan was
19 unanticipated, especially given the government’s much lauded handling of the pandemic
20 last year.

21 *Prejudice to Epistar.* Epistar will be greatly prejudiced if a continuance were not
22 granted. This is an important case to Epistar and its research and development efforts.
23 Epistar believes it is critical that its key personnel such as its Legal Director attend the
24 trial. Courts in this Circuit have long recognized that a party will suffer substantial
25 harm if its witnesses are unable to testify at trial. *See, e.g., Dancy v. Scribner*, No. 1:07-
26 cv-00716 JLT (PC), 2012 U.S. Dist. LEXIS 77213, at *2-3 (E.D. Cal. June 4, 2012)
27 (“Given the unavailability of Defendants and Defendants’ counsel from June 26, 2012
28 through July, Defendants have demonstrated good cause to continue the trial.”);

1 *Wiggins*, 2020 U.S. Dist. LEXIS 33833, at *3 (“Given that if the trial is not continued,
2 and chief witnesses will be unavailable to testify in this matter, the Government has
3 demonstrated that it will suffer substantial harm and prejudice from such denial.”);
4 *Cohen v. Hansen*, No. 2:12-CV-1401 JCM (PAL), 2015 U.S. Dist. LEXIS 171819, at
5 *4-5 (D. Nev. Dec. 24, 2015) (granting trial continuance because key witness will be
6 unavailable due to recent surgery).

7 While it is technically possible for some of the witnesses to appear remotely, the
8 15-hour time difference with Taiwan and the reality of trial make the ability to present
9 and defend these witnesses logistically challenging. For example, normal trial hours of
10 9 a.m. to 4 p.m. would translate to midnight to 7 a.m. in Taiwan. It would be difficult to
11 ensure a witness is “on call” during such hours, and virtually impossible to provide any
12 technical assistance.

13 Taken together, Epistar’s ability to present its case will be severely hampered if
14 this continuance were not granted.

15 **IV. CONCLUSION**

16 Like Lowe’s, Epistar is eager to proceed with trial, especially because it seeks to
17 recover for infringement of its patents. However, given recent developments, Epistar
18 has no choice but to seek a modest continuance of the trial date. Epistar regrets any
19 inconvenience to the Court or Lowe’s, but believes that Epistar has clearly exceeded the
20 good cause standard necessary to merit a continuance.

21 For all the reasons stated above, Epistar respectfully requests that the Court
22 continue the trial date to November 2021.

1 Dated: June 9, 2021

2 WILSON SONSINI GOODRICH & ROSATI
3 Professional Corporation

4 /s/ James C. Yoon

James C. Yoon

5 *Attorneys for Plaintiff*
6 *Epistar Corporation*

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