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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

17 EPISTAR CORPORATION,

18 Plaintiff,

19 vs.

20 LOWE'S HOME CENTERS, LLC,

21 Defendant.

Case 2:17-cv-03219-JAK-KS

Judge: Hon. John A. Kronstadt
Magistrate: Hon. Karen L. Stevenson

Final Pretrial Conference:
June 28, 2021 at 1:30 p.m.

Motion Hearing Date:
July 12, 2021 at 8:30 a.m.

Trial Date:
July 13, 2021 at 9 a.m.

**DEFENDANT LOWE'S HOME
CENTERS LLC'S MEMORANDUM
IN OPPOSITION TO EPISTAR'S
MOTION FOR CONTINUANCE OF
TRIAL**

1 On June 9, 2021, less than a month prior to the scheduled start of trial, Plaintiff
2 Epistar Corporation (“Epistar”) requested a trial continuance to November 2021. The
3 history between the parties and their communications with the Court show that Epistar’s
4 request lacks good cause.

5 **I. INTRODUCTION AND BACKGROUND**

6 On April 28, 2021, fifty-two business days (76 calendar days) before the scheduled
7 start of trial, Courtroom Deputy Clerk Joseph Remigio contacted the parties via email to
8 “confirm your intent to go forward with the Jury Trial set for 7/13/21 (FPTC 6/28/21).”
9 (Eisenberg Decl.¹ Ex. 1.) The next day counsel for Epistar responded confirming its
10 intent “to go forward with the July 13, 2021 jury trial.” (*Id.*) Counsel further explained
11 “[a]t the Final Pretrial Conference, we may discuss with the Court the potential need for
12 certain Epistar witnesses from Taiwan to testify via video.” (*Id.* (emphasis added).) The
13 undersigned counsel then responded on behalf of Defendant Lowe’s Home Centers LLC
14 (“Lowe’s”) stating “[w]hile circumstances are obviously not ideal, we will be prepared
15 for trial to the extent that the Court is able to proceed on that schedule.” (*Id.*)

16 On June 9, 2021, just twenty-three business days (34 calendar days) before the
17 scheduled trial, after much of the ramp-up, preparations, and logistics have been made,
18 Epistar submitted its motion claiming:

19 *First*, the possibility of vaccinations in Taiwan for the relevant individuals is
20 remote at this time. *Second*, Taiwan is 15 hours ahead of California, and this
21 time difference renders video testimony and witness preparation infeasible (as
22 it would be the middle of the night for Epistar’s witnesses). *Third*, Epistar’s
23 Legal Director (herself a key witness in this case) cannot reasonably monitor,
supervise, or consult with outside counsel about the progress of trial in real
time from across the world.

24 (Dkt. 335-1 at 1.) Absent from Epistar’s motion is an explanation for what changed
25 between April 28, 2021 (when it indicated that trial could proceed with testimony via
26 video) and June 9, 2021 (when that predicted and predictable eventuality became

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28 ¹ “Eisenberg Decl.” refers to the June 14, 2021 Declaration of Michael B. Eisenberg
in support of Lowe’s Opposition filed concurrently herewith.

1 “severely prejudicial” to Epistar). Difficult schedules, appearances by video, and
2 logistical hassles are not “good cause,” but instead are simply the realities of litigation in
3 the Covid era. Moreover, if Epistar had indicated its willingness to proceed with trial if
4 and only if its Taiwan-based witnesses could attend in person, counsel for Lowe’s would
5 not have agreed that such a contingent plan to prepare for trial was reasonable or feasible.

6 **II. APPLICABLE STANDARD**

7 There are two relevant standards for determining whether to modify a schedule
8 under Federal Rule of Civil Procedure 16. First, the Ninth Circuit has provided a four-
9 factor standard:

10 First, we consider the extent of appellant’s diligence in his [or her] efforts to
11 ready his [or her] defense prior to the date set for hearing. Second, we consider
12 how likely it is that the need for a continuance could have been met if the
13 continuance had been granted. Third, we consider the extent to which granting
14 the continuance would have inconvenienced the court and the opposing party,
including its witnesses. Finally, we consider the extent to which the appellant
might have suffered harm as a result of the district court's denial.

15 *United States v. 2.61 Acres of Land, More or Less, Situated in Mariposa Cty., State of*
16 *Cal.*, 791 F.2d 666, 671 (9th Cir. 1985). Epistar asserts that the potential prejudice to the
17 movant is the most “critical.” Dkt. 335-1 at 3 (citing *United States v. Wiggins*, No. 1:19-
18 po-00092-SAB, 2020 U.S. Dist. LEXIS 33833, at *3 (E.D. Cal. Feb. 27, 2020)). Epistar’s
19 characterization of the relevant standard is at best incomplete. The cited portion of
20 *Wiggins* relies on *United States v. Zamora-Hernandez*, 222 F.3d 1046 (9th Cir. 2000),
21 which in turn explains that “to prevail [an appellant] must still demonstrate ‘at a
22 minimum that he has suffered prejudice as a result of the denial of his request.’” *Id.* at
23 1049. In other words, the fourth factor is not the most important in the final analysis, but
24 instead is a threshold issue. *Id.* Stated differently, a district court need not perform a
25 discretionary analysis unless the moving party establishes potential harm. Indeed,
26 *Wiggins* itself confirms that the fourth factor is critical because it is “mandatory.” 2020
27 U.S. Dist. LEXIS 33833, at *3 (quoting *Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 961
28 (9th Cir. 2001)). Nothing in *Wiggins* suggests that harm to the moving party is

1 predominant within the discretionary analysis. The Court should factor Epistar’s
2 questionable legal analysis when applying its discretion.

3 Although harm to the moving party is necessary, once that threshold is met, courts
4 in the Ninth Circuit generally focus on the diligence of the moving party. *See Johnson v.*
5 *Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992). A leading case discussing
6 the diligence standard is *Jackson v. Laureate, Inc.*, 186 F.R.D. 605 (E.D. Cal. 1999),
7 which explains:

8 [T]o demonstrate diligence under Rule 16’s “good cause” standard, the
9 movant may be required to show the following: (1) that she was diligent in
10 assisting the Court in creating a workable Rule 16 order . . .; (2) that her
11 noncompliance with a Rule 16 deadline occurred or will occur,
12 notwithstanding her diligent efforts to comply, because of the development of
13 matters which could not have been reasonably foreseen or anticipated at the
14 time of the Rule 16 scheduling conference . . .; and (3) that she was diligent
in seeking amendment of the Rule 16 order, once it became apparent that she
could not comply with the order

15 *Id.* at 608 (emphasis added, internal citations omitted); *accord Del Rio v. Virgin Am., Inc.*,
16 No. CV 18-1063, 2019 WL 210957, at *2 (C.D. Cal. Jan. 3, 2019) (finding lack of
17 diligence under *Jackson*, 186 F.R.D. at 608).

18 **III. ARGUMENT**

19 Simply put, “good cause” does not exist here because the issues raised by Epistar
20 were not merely reasonably foreseeable at the time it agreed to proceed with trial, but
21 instead were expressly acknowledged. Epistar and its counsel were aware that the Covid-
22 19 pandemic was affecting both Taiwan and the United States. Epistar and its counsel
23 were also undeniably aware of “the potential need for certain Epistar witnesses from
24 Taiwan to testify via video.” (Eisenberg Decl. Ex. 1.) Rather than an unexpected
25 circumstance that only later became apparent, Epistar agreed to the trial date with
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1 knowledge of and despite the very harms it now cites.²

2 Moreover, had Epistar honestly stated that it would proceed with the trial if and
3 only if its witnesses could appear in person, it is unlikely that Lowe’s (or perhaps even
4 the Court) would have agreed to move forward based on that contingent and
5 uncontrollable circumstance. Instead, Epistar blithely consented in the apparent hope that
6 the world and the pandemic would comply with its hopes. The alleged harms that Epistar
7 will suffer, therefore, are solely of Epistar’s own making.

8 In addition, Epistar’s assertion that “[a] continuance should not cause much
9 inconvenience to Lowe’s (or its witnesses)” is not well taken. The parties have proceeded
10 under a series of trial dates, with Lowe’s’ preparations progressing through fits and starts.
11 That circumstance, though suffered by many litigants during the Covid-19 era, is far
12 more than a mere inconvenience. Each time the potential ramp up to trial begins, witness
13 and attorney schedules are set, vacations and alternative plans are cancelled, and travel
14 arrangements are made. Preparations with the individual witnesses then begin, with the
15 time spent preparing occurring again for each newly set schedule. Time is expended in
16 both its chronological and corresponding financial sense for each and every false start.
17 As the plaintiff, Epistar might care little about the additional effort imposed upon an
18 already expensive litigation process, but that nonchalance is far from universal.

19 Epistar’s failure to even acknowledge the Court and its schedule is also striking.
20 Rather than a remote or theoretical concept, the *2.61 Acres of Land* decision cited by
21 Epistar expressly mentions the potential inconvenience to the Court as an important
22 factor. 791 F.2d 666, 671 (9th Cir. 1985). While Lowe’s does not claim to speak on the
23 Court’s behalf, courts nationwide have confirmed that dockets and schedules are less
24 than healthy as the country reopens. A schedule opening that is sufficient for a week-
25 plus trial is not to be taken for granted. Epistar’s insistence that its own difficulties and
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27 ² Epistar’s reference to the 15-hour time difference is particularly galling, as the
28 distance between Taiwan and Los Angeles has not changed since April.

1 convenience must dominate the analysis is both unrealistic and frustrating.

2 In addition, the undersigned counsel understands that Epistar’s counsel in this case
3 also represents the plaintiff in *Cyntec Co., Ltd. v. Chilisin Electronics Corp.*, No. 4:18-
4 cv-00939-PJH (N.D. Cal. filed Feb. 14, 2018). A joint case management statement in
5 *Cyntec* (Eisenberg Decl. Ex. 2) dated May 13, 2021, indicates that a trial is scheduled for
6 August 23, 2021 and that the plaintiff (represented by Epistar’s counsel) similarly
7 requested the right to have certain Taiwanese witnesses testify remotely “because of the
8 current COVID-19 situation in Taiwan.” *Id.* Epistar and its counsel fail to explain why
9 they waited weeks after acknowledging the situation in Taiwan to inform the Court or its
10 opponent of the alleged “inconvenience.”

11 Lowe’s further notes that “inconvenience” to the party seeking continuance is not
12 necessarily coextensive with the types of “harm” encompassed by fourth *2.61 Acres of*
13 *Land* factor. Trial, by its very nature, is not particularly convenient. In fact, the harm
14 identified in *2.61 Acres of Land* was a complete bar to the corporate defendant presenting
15 a defense. 791 F.2d at 671 (finding an abuse of discretion for failure to grant a short
16 continuance to permit the corporate defendant to be reinstated). Epistar identifies no legal
17 support for the argument that testifying via video (as previously agreed to by the party
18 seeking continuance) is a sufficient harm to merit continuance.

19 Finally, should the Court apply its discretion to continue the trial, the Court need
20 not accede to its assumption that a slot will necessarily be available in November.
21 Instead, the Court should consider all avenues to ameliorate the harm already suffered
22 by Lowe’s and minimize additional harm as the case again shambles toward trial.

23 **IV. CONCLUSION**

24 For the foregoing reasons, Lowe’s requests that Epistar’s request for continuance
25 be denied.

1 DATED: June 14, 2021

Respectfully submitted,

2
3 /s/ Michael B. Eisenberg

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document has been served on June 14, 2021 via electronic mail on all counsel of record.

/s/Anna M. Targowska
Anna M. Targowska

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