

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION**

FINTIV, INC.,
Plaintiff

-vs-

APPLE INC.,
Defendant

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6:21-CV-00926-ADA

ORDER

A week after this Court re-transferred this case from the Austin Division back to the Waco Division (Dkt. 386), Defendant Apple petitioned the Federal Circuit for a writ of mandamus to vacate this Court’s re-transfer order and moved this Court to continue the trial for four months or stay it pending resolution of its mandamus petition. Dkt. 394.

Apple requests this Court to continue or stay the current jury trial setting on two bases: (1) two of its witnesses, Mohammad Khan and Henry Dreifus, are not available to testify at trial, which is currently set for October 4, 2021; and (2) the current surge of COVID cases. Dkt. 394. Apple states that Mr. Khan “agreed to attend trial in Austin if it were held in February or March 2022” but “he does not want to travel to Waco.” *Id.* at 1-2. First, the unavailability of one of Apple’s witnesses does not justify the continuance or stay of the trial, which could potentially disrupt the availabilities of all other witnesses on both sides to testify at trial. Second, even if the trial is continued pending the Federal Circuit’s resolution of Apple’s mandamus petition, that does not make Mr. Khan available to testify at trial at that point — according to the current statistics, Apple’s mandamus petition will be resolved long before Mr. Khan’s alleged availability time frame of February or March 2022. Finally, Apple does not explain why Mr. Khan cannot testify

remotely. The Waco courtroom is equipped with modern technologies that allow a witness to testify remotely in an effective manner. In fact, in the past patent jury trials before this Court during the COVID pandemic, a number of witnesses testified remotely at trial and their remote testimonies were equally, if not more, effective as in person testimonies. Although this Court recognizes the value of live trial testimonies in certain circumstances, Apple's does not explain why it is crucial to have Mr. Khan, a prior art fact witness, testify live at trial. *See* Dkt. 394 at 3.

As for Mr. Dreifus, Apple states that he is not available to testify in this trial starting on October 4, 2021 because he is scheduled to testify in another trial starting on the same day before Judge Gilstrap in the Eastern District of Texas. As Apple admitted, the current trial date for this case was set at least six months ago and the trial before Judge Gilstrap was set almost a year ago. Dkt. 394 at 1. Apple could have informed either this Court or Judge Gilstrap long ago to avoid such a conflict, instead of waiting until now — just over two weeks before trial. Thus, the alleged unavailability of Mr. Dreifus is largely Apple's own making.

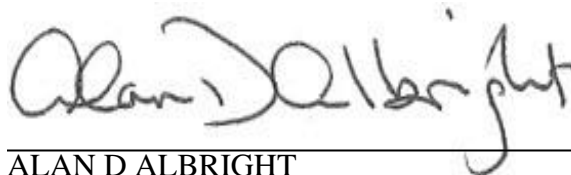
Finally, Apple contends that a continuance or stay is necessary in view of the current surge of COVID cases and cites to the Court's statements back in March 2020 and Standing Order dated on April 9, 2020. *Id.* at 2. Apple's argument based on outdated facts is unavailing. In March 2020, the COVID pandemic just began, and the world still did not have a good understanding of the impact of COVID. Therefore, the Court acted cautiously at that time for the benefit of public health. However, now that we have a much better understanding of COVID, this Court has safely conducted six patent jury trials and several other non-patent civil trials and criminal trials during the COVID pandemic between October 2020 and June 2021, with no reported COVID exposure of those involved in any of the trials. Indeed, it is even safer to conduct jury trials now compared to early 2021 given that COVID vaccines, which have been proved to be highly effective, are

readily available in the United States. As Apple noted in its motion, the Eastern District of Texas is, and has been, conducting jury trials during the COVID pandemic in a safe manner. Lastly, even if the trial is continued to February or March 2022, there is no guarantee that COVID pandemic will subside by then. Therefore, the alleged surge of COVID cases does not justify a continuance or stay either.

For the above reasons, the Court is not persuaded that either of Apple's bases justify a continuance or stay of the trial in this case. Nevertheless, to afford the Federal Circuit more time to resolve Apple's mandamus petition, the Court will continue this trial for one week, with a new trial date of October 12, 2021. Further, re-setting this trial to October 12, 2021 allows Mr. Dreifus to testify in this case after he testifies in the Eastern District case.

Accordingly, it is **ORDERED** that jury selection and trial for this case is reset to start on October 12, 2021 at 9:00AM in the Waco courthouse.

SIGNED this 16th day of September, 2021.



ALAN D ALBRIGHT