FILED UNDER SEAL PURSUANT TO PROTECTIVE ORDER

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

PERSONALIZED MEDIA COMMUNICATIONS, LLC Plaintiff, v.	
GOOGLE LLC Defendant.	Case No.: 2:19-cv-90-JRG

PLAINTIFF PERSONALIZED MEDIA COMMUNICATIONS, LLC'S
OPPOSITION TO DEFENDANT GOOGLE LLC'S MOTION TO CONTINUE TRIAL

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Google's motion for a continuance makes a remarkable omission. Not once does Google mention what is driving its position on bringing its witnesses to trial: its corporate work-from-home policy, which allows all employees to stay home and has been extended until July 2021. Ex. 1 to Declaration of Geng Chen ("Chen Decl."), at 1. When Google first met and conferred on this motion—more than a month ago—Google explained it could not bring its witnesses in person because of this policy. Declaration of Joseph S. Grinstein ("Grinstein Decl."), at ¶¶ 1-2. That is why Google's witness list indicates that "at least some of [its] percipient witnesses"—*i.e.*, Google employees—"will likely not be able to appear in person." Dkt. 365 at 3. When PMC referenced this policy in its *limine* oppositions, Dkt. 352 at 1, and the pretrial order, Dkt. 354 at 12, PMC was not generating the issue from thin air; it was responding to what Google had told it.

But Google is savvy enough to know it cannot credibly argue to this Court that it can excuse itself from the judicial process by corporate fiat. So its motion to continue trial generates a host of other arguments and excuses in an effort to find cover for its unmentioned corporate directive. All of this hand-waiving falls flat, however, considering that this Court just conducted a safe trial involving Google's California neighbor, Apple. Apple had to bring its witnesses and lawyers from California. Apple had to confront the same COVID-19 situation as Google in Marshall. And, to the best of counsel's knowledge, the Apple trial was conducted safely and successfully.

Google's request is not really a request for a 90-day continuance. Indeed, PMC already agreed to one continuance (for a month) to account for Google's COVID-19 concerns. Here, when 90 days comes and goes, Google is going to ask for another continuance, and will keep doing so again and again until its corporate work-from-home policy expires. Google's appetite for continuances will persist for as long as it can make such requests with a straight face. And there is evidence that Google's motion is tactical. Google wants more time for the Federal Circuit to rule

on its petition for mandamus, and ammunition to seek a reconsideration of the PTAB's denial of its IPR petitions. Those are not valid reasons for a continuance. This Court is able to conduct trials during the current pandemic, and Google does not deserve an exception to this policy for itself.

PMC will be ready to vindicate its rights on October 19, or as soon thereafter as feasible, and respectfully requests that Google's motion be denied.

I. LEGAL STANDARD

A motion for a continuance is addressed to the discretion of the trial court, and as with all matters of scheduling, "[t]he district court's discretion is 'exceedingly wide.'" *Johnson v. Potter*, 364 F. App'x 159, 162 (5th Cir. 2010) (quoting *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1193 (5th Cir. 1986)); *see also* Fed. R. Civ. P. 16(b)(4) ("A schedule may be modified only for good cause and with the judge's consent."). In recent decisions on similar motions, this Court has considered the risks posed by the pandemic and the safety protocols available to reduce such risk, the prejudice to the parties that would result from a continuance, the availability of remedial measures to address any due process concerns, and the Court's schedule. *See Optis Wireless Tech., LLC v. Apple Inc.*, No. 2:19-cv-00066-JRG, Dkt. 387 (E.D. Tex. July 21, 2020); *Image Processing Techs., LLC v. Samsung Elecs. Co.*, No. 2:20-cv-00050-JRG-RSP, Dkt. 200 (E.D. Tex. June 29, 2020).

II. THIS COURT HAS ALREADY SHOWN THAT JURY TRIALS CAN BE HELD SAFELY AND FAIRLY DURING THE PANDEMIC

In early August, this Court held a seven-day, in-person jury trial. Plaintiff Optis, like PMC, sought money damages for patent infringement. Defendant Apple, like Google, had in the weeks prior moved to delay the trial, citing the ongoing pandemic. *See Optis Wireless Tech., LLC v. Apple Inc.*, No. 19-cv-00066-JRG, Dkt. 341 (E.D. Tex. July 14, 2020). On July 21, the Court determined that proceeding as scheduled would be "the better choice," and instituted a full slate of precautionary measures to protect the health and safety of everyone in the courtroom. *Optis*

Wireless Tech., LLC v. Apple Inc., No. 19-cv-00066-JRG, Dkt. 387 (E.D. Tex. July 21, 2020). And, after the trial was over, the lawyers involved commended those measures, as well as the decision to move forward:

> The verdict is wonderful, but if we would have lost or gotten $50, I still think it would have been a wonderful thing . . . . It shows there's something else, that we can keep going. I think that's super important: There's a path forward in our lives, it's not just this virus every single day.

Ex. 2 at 1 (quoting attorney for Optis); *see also id.* (attorney comments that "the court's precautions made them feel perfectly safe"); Ex. 3 at 1 ("'The court was very careful and conscious of how the jury was spaced,' said Optis's lawyer, Jason Sheasby at Irell & Mandella. 'Everyone was wearing face masks, and the court was totally focused on health of the jurors and health of the witnesses.'").

Remarkably, Google's sole reference to *Optis* is to the timing of Apple's motion to continue trial, which Google contrasts unfavorably with the timing of its own motion. *See* Mot. at 14. Google fails to even acknowledge that the *Optis* trial actually occurred, and only obliquely refers to the measures that were implemented to ensure both fairness and safety, such as: (1) screening each person entering the courthouse for known COVID-19 risks; (2) limiting counsel's table to three persons per side; (3) requiring trial counsel and members of the jury to wear face shields; (4) encouraging all participants to follow CDC guidelines; (5) arranging for daily sanitation of Courthouse facilities, as well as daily deep cleaning of the jury room, jury box, and juror restrooms; (6) allowing a witness with travel restrictions to testify by real time video; (7) requiring non-local trial counsel to stay in Marshall from the pretrial conference through the end of trial; (8) erecting a barrier to separate witnesses from the rest of the courtroom during testimony; (9) keeping members of the jury socially distanced in the jury box; and (10) setting up a live video feed to another courtroom for members of the public. *See Optis*, Dkt. 387 at 4-5, 8; Ex. 2 at 2.

These precautions—and/or any others stemming from the Court's experience in the *Optis*

trial—should likewise help the Court conduct the trial in this case safely and effectively. Indeed, in light of the current downward trend in active COVID-19 cases in Harrison County, *see* Chen Decl. ¶ 4 (screenshot of Harrison County Judge Facebook post from September 8, 2020, showing downward trend in "active cases" since late July), proceeding with the current October 19 trial date presents less risk than what the Court faced in *Optis*.

III. GOOGLE HAS NOT SHOWN THAT A CONTINUANCE IS WARRANTED

Google's motion presents two alternatives, neither of them acceptable. First, Google asks for "jury selection to be continued for 90 days," Mot. at 2, though its motion notably does not ask for a new trial date. Google says instead that "the COVID-19 situation can be reassessed" in January. *Id.* As discussed below, Google's stated reasons for this continuance are unconvincing, while its unstated reasons are targeted at prejudicing PMC. Second, should trial proceed on October 19, Google asks the Court to require *all* witnesses for *both* parties to appear remotely. *Id.* at 14-15. Google has offered even less authority for adopting this drastic measure and forcing PMC to give up *its* rights because of *Google's* corporate work-at-home policy. Google has identified only two witnesses for whom in-person testimony might present a hardship, *see id.* at 6, and PMC has thus far identified none. Special measures to accommodate remote witnesses on a case-by-case basis, as the Court implemented in *Optis*, is a reasonable solution to Google's concerns. Depriving PMC of its ability to present its witnesses to the jury in person, while requiring the Court and jury to stare at a screen for days on end, is not.

A. Google's Stated Reasons for a 90-Day Continuance Are Unconvincing

1. Generic and/or Speculative Risks Do Not Constitute Good Cause for Continuing the October Trial

Google asks this Court to grant its motion because "a later trial date could save lives and avoid unnecessary peril," but presents no expert testimony or medical opinions in support of this

contention. Mot. at 5. Instead, Google relies entirely on Internet sources, some of them months out-of-date, and attorney argument, much of it wholly speculative.

In *Optis*, the Court observed that "generic challenges associated with conducting an in-person trial during the COVID-19 pandemic," even when presented by a medical professional, were of limited usefulness when unaccompanied by any opinion on "when . . . an in-person jury trial might be able to go forward." *Optis*, Dkt. 387 at 2, 3. Opinions that were not "tied to this location" (*i.e.*, the Marshall Division) were similarly unhelpful. *Id.* at 2. This makes sense. The risks associated with COVID-19 are situation dependent, and the specific question presented here is not whether proceeding with trial in October has no risks, but whether continuing the trial for 90 days will result in a significant improvement to the existing risks.

Google does little to answer this question. It cites the CDC for the uncontroversial proposition that large, in-person gatherings in locations with high levels of community transmission pose more risks than certain other types of gatherings. *See* Mot. at 5. But Google misses the point of the CDC's guidelines, which is to "provide event planners and individuals with *actions to help lower the risk* of COVID-19 exposure and spread during gatherings and events." Ex. 4 at 3 (emphasis added). Many of the "prevention principles" detailed by the CDC were implemented by the Court in *Optis*. *Compare, e.g.*, *id.* at 6 (suggesting the use of "physical barriers, such as sneeze guards and partitions, in areas where it is difficult for individuals to remain at least 6 feet apart" and "[c]hanging seating layout or availability of seating so that people can remain at least 6 feet apart"), *with supra* pp. 3. Notably, the CDC does not suggest that events be canceled or indefinitely postponed—even events in the "highest risk" category—and furthermore, the risk category for an in-person jury trial will likely be the same in January as it is now.

Google also argues that the safety precautions to be implemented by the Court are

insufficient, pointing to articles about COVID-19 outbreaks in other contexts (such as summer camps), the prevalence of asymptomatic transmission, and the effectiveness of face shields as compared to masks. *See* Mot. at 6-7. Again, there is no indication that delaying trial for 90 days will do anything to change these considerations. For instance, the extent to which COVID-19 can spread "silently" as a result of asymptomatic carriers will hardly change between now and January. But some of the measures implemented by the Court in *Optis* would have mitigated that risk—*e.g.*, preventing persons likely to have been exposed to the virus from entering the courthouse, even if they do not display symptoms—would reduce the chance that an asymptomatic person could silently spread the virus to others. The Court could also implement additional measures for this trial, such as measures premised on the increased availability of COVID-19 testing. *See, e.g.*, Chen Decl. ¶ 6 (announcement of free testing on September 9 in the Marshall Convention Center).

Next, Google asserts that COVID-19 infection rates in Texas and travel from other states with high infection rates, such as California, "dramatically increase" the risks associated with this trial. *See* Mot. at 7-9. Google specifically references a "recent spike in COVID-19 cases" and "recent surges in COVID-19 cases in Texas," *id.* at 9, and presents disease statistics for the United States, California, Texas, and certain regions within Texas, *id.* at 6-7. These statistics are undeniably sobering and provide an important reminder of the need to stringently follow the safety precautions implemented by the Court. It is important, however, to consider what each statistic actually means in relation to the issue at hand. The raw number of new cases or deaths on a particular day, or the total death toll since the beginning of the pandemic, *see* Mot. at 8 (citing the number of new cases and deaths in the United States, the number of cases per capita in Texas, and the total number of fatalities in Texas, East Texas, and Harrison County), are less helpful for assessing what the risk will be on October 19 than trends showing how the numbers are progressing

over time. This is why governmental guidelines for reopening after the initial COVID-19 shutdown have largely set the criteria for each reopening "phase" not in terms of overall numbers, but in terms of downward trajectories. *See, e.g.*, Ex. 5 at 24 (CDC proposal of "gating" indicators such as "[d]ownward trajectory of documented COVID-19 cases within a 14-day period"). These trends tell a very different story than the one Google presents.

In the United States, the overall trend in daily confirmed new cases has steadily decreased since mid-July, and the same is true for the state of Texas. *See* Chen Decl. ¶¶ 8-9; *see also id.* ¶¶ 10-11 (showing declines in the Houston region and California starting in early to mid-August). As for what might be the most relevant statistic—COVID-19 cases in Harrison County—the trend in "active cases" has likewise pointed downward since late July. *See supra* p. 4; *see also Optis*, Dkt. 387 at 2 (granting little weight to expert opinion not "tied to this location").[1] There is little evidence to substantiate Google's claims of a "recent spike in COVID-19 cases" or "recent surges in COVID-19 cases in Texas." Mot. at 9.

As for the "bring[ing] together" of each party's trial team and witnesses from various states across the country, including two of the "worst" states, Mot. at 9 (describing Texas and California in these terms), that is a necessary component of an in-person jury trial regardless of when it is held. Likewise, there will be a "risk of transmission" to the families and acquaintances of the trial attendees upon the conclusion of trial whether it occurs in October or January. Mot. at 7. But the former risk can be mitigated by requiring non-local attendees to stay in Marshall from the pretrial

[1] Thus, decisions on scheduling jury trials from the District of Colorado or District of Utah, *see* Mot. at 9, are of limited relevance to a trial to be held in the Eastern District of Texas. Moreover, Google's assertion that "the District of Colorado and the District of Utah *just* suspended all criminal and civil jury trials" is mystifying, Mot. at 9 (emphasis added), as the cited source reports only that jury trials set to start before October 2 (Colorado) and October 1 (Utah) are currently postponed. *See* Ex. 10 (Law360 article on court closures) at 7, 20. It is not clear when those decisions were made, and regardless, the trial in this case is set to start on October 19.

conference, currently scheduled for September 24 and 25, through the end of trial, as the Court did in *Optis*. Any cases resulting from exposure to COVID-19 in the trial attendees' home states would likely become known prior to the first day of trial. Furthermore, PMC plans to safeguard its own trial attendees by engaging an industrial hygienist and following the applicable governmental guidelines, and Google will undoubtedly implement similar measures to protect its attendees. After the trial is over, the risk to attendees' families and acquaintances can be mitigated by following self-quarantine procedures upon returning home; for example, the state of New York, where some of PMC's counsel reside, currently requires travelers from most states in the country, including Texas, to self-quarantine for 14 days. *See* Ex. 6 at 2. And, while PMC wholeheartedly agrees with Google that "we must avoid 'COVID-19 fatigue," Mot. at 8, any such fatigue will almost certainly be more acute 3 more months into the pandemic than it is now.

Finally, Google claims that "[f]lu season *will* also make the COVID-19 situation riskier," Mot. at 9 (emphasis added), but this is another overstatement. What medical professionals and public health officials have actually said is that they have no idea what will happen—in fact, "the U.S. could either see a record drop in flu cases *or* a dangerous viral storm." Ex. 7 at 1 (emphasis added); *see also id.* at 1-2 ("To get an idea of how the flu season might go, public health officials in the U.S. often look to Australia and other countries in the southern hemisphere . . . . This season so far in Australia, COVID-19 precautions have served to curb the pandemic while also protecting residents against the flu."). Current concerns about the combination of flu season and COVID-19 relate to the capacity of the overall healthcare system *if* both viruses surge at the same time, *see id.* at 2, not each individual person's likelihood of contracting COVID-19 during the winter months. Additionally, as "flu season generally peaks between December and February," *id.*, an October trial would better address Google's concerns about the flu than waiting until January.

2. The Specific Risks Identified by Google Can Be Effectively Mitigated

The one specific concern that Google raises in its motion relates to two of its expert witnesses who belong to "high-risk" populations. Mot. at 6, 10. However, there is no conflict between accommodating these witnesses' individual health needs and maintaining the scheduled October 19 trial date. In *Optis*, the Court permitted one expert witness who lives in Germany to testify by live video, and would have allowed other experts from France and Italy to do the same, had they actually been called at trial. *See Optis*, Dkt. 387 at 5-7. PMC does not oppose the use of live video for [redacted] and Mr. Hartson—which Google would have known prior to filing its motion, if it had actually met and conferred with PMC.

Google, however, never asked PMC if it would consent to remote testimony from these two witnesses. *See* Grinstein Decl. ¶ 6. In fact, the first time PMC ever heard about [redacted] was just before 11 p.m. Central on September 2, when Google inserted that information into the Joint Proposed Pretrial Order that was due to be filed that same night. *Id.* ¶¶ 3-4.[2] This disclosure, however, was not made for the purpose of requesting accommodations for [redacted]. Instead, Google sought to strongarm PMC into a sweeping stipulation that *all* witnesses be permitted to testify remotely, using [redacted], as well as the looming filing deadline, as leverage. *See* Dkt. 354 at 11-12 (Joint Proposed Pretrial Order, as filed, with the contested "stipulation"). Google's bullying tactics continue with the instant motion, which falsely claims that "PMC will not even agree that witnesses with concerns due to COVID-19 can appear remotely." Mot. at 10. That has never been PMC's position, as borne out by the Joint Proposed Pretrial Order. Dkt. 354 at 11-12. That document reflects what Google

[2] Similarly, Google never informed PMC that Mr. Hartson also had health concerns or asked for a remote testimony accommodation before filing the instant motion. Grinstein Decl. ¶¶ 3, 5-6.

actually proposed for remote witnesses: that every witness be allowed to testify by videoconference regardless of their individual circumstances. *Id.*; *see also* Grinstein Decl. ¶ 6. PMC's refusal to stipulate to all-purpose remote witness provision is neither "manifestly unreasonable" nor "inhumane." Mot. at 10. In any event, [redacted] and Mr. Hartson might be permitted to testify by live video; there is no reason to continue the entire trial on this basis.

3. Google Offers No Evidence that Delaying by 90 Days Will Allow Better Assessment of COVID-19 Risks

Google also speculates that a 90-day continuance will "ensure additional information is available to better assess the COVID-19 risks," though it provides little to support this claim. Mot. at 12-13. The COVID-19 pandemic has been marked by an extraordinary amount of conflicting guidance from governmental and public health officials. Though the hope is that January will bring more clarity, that is hardly a given. And, even if more information were available 90 days from now, there is no telling how much of it will be actionable. For example, though more information might be available on the risks of in-person instruction in schools, *see id.* at 13 ("[S]chools around the country will have been in session for half of the school year."), the significant differences between schools and jury trials—such as, *inter alia*, the level of compliance with safety precautions to be expected of children vs. college students vs. adult participants in a formal court proceeding—could limit the usefulness of any such data.

Google also suggests that a vaccine for COVID-19 might be available by the end of the year, citing a July 31 statement from Dr. Anthony Fauci that he "feel[s] cautiously optimistic that we will have a vaccine by the end of this year and as we go into 2021." *Id.* at 13-14 & n.27; Ex. 8 at 2. While Dr. Fauci's cautious optimism may turn out to be justified, the complexities of vaccine development and distribution should not be underestimated. *See, e.g.*, Ex. 9 at 1 (reporting on September 8 that AstraZeneca "halted large, late-stage global trials of its coronavirus vaccine").

The bottom line is that no one knows what the future might hold. What *is* known is that the Court recently conducted an in-person jury trial with safety precautions that were effective, and there is no reason to believe that the same cannot be done with the trial in this case.

B. PMC Would be Prejudiced by a 90-Day Continuance

What Google proposes—canceling the October 19 trial and "reassess[ing]" the situation in 90 days—would be significantly prejudicial to PMC. As in *Optis*, where there is no "assurance[] that a delay would indeed be brief," any continuance may stretch indefinitely:

> [T]he effect of the current pandemic has drastically compacted and complicated the Court's trial schedule well into the next year. Thus, the two-month continuance requested by Apple is likely to, in reality, result in a delay of many months, pushing this trial well into 2021 or 2022. Such a lengthy delay would clearly cause prejudice to Optis, placing both sides in a posture of limbo where they would languish unduly without the vindication of a public trial or a final resolution.

Optis, Dkt. 387 at 7. Google's proposed continuance is even longer than Apple's, and unlike Apple, Google does not even hide its intent to delay trial well beyond its current proposal. *See* Mot. at 2 ("Accordingly, Google requests that jury selection be continued for 90 days, *at which point the COVID-19 situation can be reassessed*." (emphasis added)). This is compounded by Google's casual dismissal of the prejudice a delay would cause PMC. *See id.* at 10 ("This case concerns intellectual property, not civil liberties, personal liberties, or privacy such that delay might have a negative impact on the parties. Instead, here, monetary damages are sought. Plus, the patents at issue in this case originated from applications filed in the 1980s. And they started issuing a decade ago. PMC is not a competitor of Google. There is no rush here."). Its motion does not explain why patent rights originating from applications filed more than 30 years ago are less deserving of care than more recent ones, or why how long a patent has been issued is at all relevant.

Moreover, Google cannot seriously deny that it will use any continuance to support its efforts to further delay trial or escape it altogether. Its motion acknowledges one such escape

hatch—its petition to the Federal Circuit to overrule this Court's venue decision, which, if granted, will likely result in a significantly delayed trial date in the new venue. *See id.* at 15 ("Google's requested 90 day continuance would also allow time for the Federal Circuit to rule on Google's petition . . . ."). What Google *fails* to mention is the PTAB's recent denials of its last-minute petitions for *inter partes* review of the patents-in-suit, which cited the looming trial date as one factor supporting discretionary denial. *See, e.g.*, *Google LLC v. Personalized Media Communications, LLC*, IPR2020-00719, Paper No. 16 (PTAB Aug. 31, 2020).[3] Google now wants to create better facts to support its forthcoming requests for reconsideration, which a continuance would certainly achieve. Indeed, the extent of Google's efforts to limit the PTAB's discretion in just the past two weeks is remarkable. On the same day that the PTAB denied Google's petitions, a "coalition" of 10 technology companies that includes Google, and is represented by some of Google's attorneys in this case, filed an amicus brief asking the Federal Circuit to bar the PTAB from considering co-pending litigation in its institution decisions. *See In re Cisco Sys. Inc.*, No. 20-148, Dkt. 8-2 (Fed. Cir. Aug. 31, 2020). That was also the day that Google filed a complaint against the Director of the PTO in the Northern District of California seeking an injunction for the same relief. *See Apple Inc. et al. v. Andrei Iancu*, No. 5:20-cv-6128, Dkt. 1 (N.D. Cal. Aug. 31, 2020). While Google is free to lobby for changes to the law to benefit itself, it is not free to accuse PMC of "cynically us[ing] this unprecedented pandemic for a litigation advantage," Mot. at 10, while it simultaneously works behind the scenes to give itself another shot at invalidating PMC's patents, and seeks to buy more time for those efforts through its current request for a continuance.

[3] *See also Google LLC v. Personalized Media Communications, LLC*, IPR2020-00720, Paper No. 16 (PTAB Aug. 31, 2020); *Google LLC v. Personalized Media Communications, LLC*, IPR2020-00722, Paper No. 22 (PTAB Aug. 31, 2020); *Google LLC v. Personalized Media Communications, LLC*, IPR2020-00723, Paper No. 22 (PTAB Aug. 31, 2020); *Google LLC v. Personalized Media Communications, LLC*, IPR2020-00724, Paper No. 16 (PTAB Aug. 31, 2020).

Prejudice also arises from Google's delay in seeking this continuance. The parties met and conferred over a month ago, *see* Grinstein Decl. ¶ 1 (describing meet and confer on July 31), and all of the COVID-19 concerns raised in Google's motion were just as, if not more, acute at that time. Google suggests that it deliberately waited until it was "close enough to the trial date to understand the immediate concerns and risks associated with traveling to and attending trial on that date," Mot. at 14, but that only begs the question of why Google moved forward with its motion despite the *decrease* in new COVID-19 cases since the parties met and conferred, *see supra* pp. 4, 7. Was it the fact that Google was invoking a "wait and see" strategy to see what the Federal Circuit and PTAB were going to do first, and then decided to file a motion for continuance only when the Federal Circuit did not stay this case, and when the PTAB denied its petitions? While Google's concerns about the pandemic may well be genuine, its lack of diligence in seeking its requested relief has caused PMC to expend resources to prepare for trial that it might not have, adding to the prejudice suffered by PMC.[4]

C. Proceeding with Trial Will Not Significantly Prejudice Google, and Regardless, Forcing All Witnesses to Testify Remotely Is Not an Appropriate Remedy for Any Such Prejudice

At the same time Google declares that PMC will suffer *no* prejudice from a delay, it claims that an October trial will be "highly prejudicial to Google." Mot. at 10. But the only prejudice Google can identify is an alleged disparity between PMC's trial presentation, with in-person

[4] Google also argues that an October trial will "affect the outcome of the litigation," speculating that flu season will result in one or more trial participants experiencing flu symptoms, which will then disrupt the proceedings. Mot. at 11-12. But there is no reason to believe that this concern is unique to an October trial setting and every reason to believe that this risk will be even more pronounced in January. Google also suggests that jury selection will be difficult and time-consuming and that jurors will be hampered in their ability to judge witness credibility. *Id.* at 12. These concerns will likewise still be present in January, though reports from the *Optis* trial should have alleviated them to a large degree. *See* Ex. 2 at 2 (describing the trial as surprisingly "normal").

witnesses, and Google's trial presentation, with remote testimony from "at least one of Google's experts and likely other fact witnesses." *Id.* This argument, however, relies on two assumptions. First, Google assumes that the jury will give less weight to remote testimony, *see id.* at 11, but does not acknowledge that remote witnesses are also shielded from in-person confrontation. Second, Google assumes that witnesses other than [redacted] (and possibly Mr. Hartson) would testify remotely, but does not identify those witnesses or the reasons why they cannot attend trial in person. In order to preserve its right to properly confront witnesses, PMC's position is that in-person testimony should be the default, and requests for remote testimony should be made on a case-by-case basis. Here, Google has submitted no declarations, or even any unsworn facts, indicating that any witnesses affected by the pandemic similar to its [redacted]. As such, the only facts available indicate that a few hours, at most, of Google's trial presentation will be conducted remotely, which is not so "highly prejudicial" as to constitute good cause to continue the entire trial. *See Optis*, Dkt. 387 at 6-7. Furthermore, there is little reason to believe that witnesses whose health conditions prevent them from attending an October trial will be able to travel in January.

Google also complains that PMC might "malign" its witnesses for their absence by "falsely" suggesting that witnesses who appear remotely do not actually have health concerns, but instead simply do not "take the proceedings seriously"; it then accuses PMC, with absolutely no basis, of seeking to inflame the jury with the current political situation surrounding COVID-19. Mot. at 11. But PMC has already "offered not to mention COVID-19 as the reason why Google witnesses are absent," Dkt. 352 at 1, which cuts the wind out of those arguments entirely.

What really lies behind Google's claim that an October trial will be "highly prejudicial" is the same thing driving Google's dogged insistence that if some witnesses cannot attend in person, no one should be allowed to. *See* Mot. at 14-15. Google nowhere mentions its corporate work-

from-home policy that extends through July 2021, *see* Ex. 1, and it has indicated to PMC that *none* of its employees is likely to attend an October trial in person, *see* Grinstein Decl. ¶ 2. But a corporation's internal policies should not dictate how this Court manages its schedule or how it chooses to conduct its proceedings. *See Gree, Inc. v. Supercell OY*, No. 2:19-cv-00070-JRG-RSP, Dkt. 453 at 1 (E.D. Tex. Sept. 9, 2020) (refusing to continue trial on defendant's claim that it "does not possess the ability" to make its employees attend, when there was no evidence that defendant had even tried). Moreover, the single authority Google cites in support of this all-remote alternative is an out-of-district order, *see* Mot. at 2, 15 (citing *Sunoco Partners Mktg. & Terminals L.P. v. Powder Springs Logistics, LLC*, No. 17-1390-LPS-CJB, Dkt. 583 (D. Del. July 2, 2020)), which the issuing court has since walked back, after the plaintiff raised serious concerns about the fairness of a jury trial conducted under such conditions, *see Sunoco Partners Mktg. & Terminals L.P. v. Powder Springs Logistics, LLC*, No. 17-1390-LPS-CJB, Dkt. 590 (D. Del. July 10, 2020); *Sunoco Partners Mktg. & Terminals L.P. v. Powder Springs Logistics, LLC*, No. 17-1390-LPS-CJB, Dkt. 596 (D. Del. July 15, 2020); *Sunoco Partners Mktg. & Terminals L.P. v. Powder Springs Logistics, LLC*, No. 17-1390-LPS-CJB, Dkt. 607 (D. Del. Sept. 4, 2020). PMC is not aware of any jury trial that has been conducted solely with remote testimony. Google does not present a compelling reason why this trial should be the first, when this Court has already successfully conducted an in-person trial with appropriate safeguards.

As this Court has previously signaled that even a short continuance is likely to balloon into a much longer one, *see Optis*, Dkt. 387 at 7; *Image Processing Techs.*, Dkt. 200 at 3; *Gree*, Dkt. 453 at 1, and as Google has not shown that a continuance is necessary or even likely to be helpful, PMC requests that the October 19 trial proceed as scheduled.

IV. CONCLUSION

For the foregoing reasons, PMC respectfully requests that Google's motion be denied.

Dated: September 10, 2020

Respectfully submitted,

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Certificate of Authorization to File Under Seal

I hereby certify that this document is being filed under seal pursuant to the terms of the protective order entered in this case because it contains highly confidential information.

/s/ Geng Chen
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Certificate of Service

I certify that on September 10, 2020, I caused the foregoing to be electronically served on counsel of record for Google through email and/or the Court's ECF system.

/s/ Geng Chen
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