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Attorneys for Plaintiff Black Card LLC

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING**

BLACK CARD LLC,)	
)	
Plaintiff,)	
vs.)	Case No. 2:15-CV-00027-SWS
)	
VISA USA INC.,)	
JOHN DOE CORPORATIONS I-X and)	
JOHN DOES I-X,)	
)	
Defendant.)	

**PLAINTIFF BLACK CARD LLC’S RESPONSE
TO DEFENDANT VISA U.S.A. INC.’S MOTION TO CONTINUE TRIAL**

Plaintiff Black Card LLC (“Black Card”) respectfully submits this Response in Opposition to Defendant Visa U.S.A. Inc.’s (“Visa”) Motion to Continue Trial (“Motion”), Doc. 365.

INTRODUCTION

This case has now been pending for almost six years. As Visa’s Motion acknowledges, “for several months” the parties have “been diligently preparing for the upcoming trial” long scheduled to begin on November 9. Motion at 1; Doc. 272, Fourth and Final Scheduling Order dated Jan. 3, 2020. The parties have been litigating against the backdrop of COVID-19 throughout the year. The parties have worked together cooperatively (with limited judicial intervention) to make necessary scheduling adjustments and adequately prepare for and conduct nine fact and expert depositions remotely on an accelerated schedule during the pandemic. Now, on the eve of trial and after much of the work to prepare for trial is complete, Visa seeks a continuance of some six months—a delay that could be far longer based on the Court’s availability and the application of Visa’s own subjective criteria for when trial could be conducted without risk. Visa concedes that “it is impossible to know when the risk will be reduced,” yet “Visa suggests the Court tentatively reset the pretrial conference and the trial for April 2021 or as soon thereafter as the Court and counsel are available.” Motion at 3.

Black Card appreciates the potentially serious health risks posed by COVID-19 in general and the recent increase in cases in Wyoming in particular. Yet, despite the pandemic, the orderly administration of justice in Wyoming has continued, and jury trials like this one *can continue safely* with appropriate protections in place. Black Card trusts that, as this Court’s series of orders have made clear, the Court has been closely monitoring the COVID-19 pandemic and has implemented appropriate mitigation protocols to continue functioning safely, including for convening grand and petit juries. *See* Gen. Orders 2020-01 through 10. As this Court’s detailed jury protocol sets out, the risk posed by COVID-19 can be mitigated through the use of face

coverings, physical distance, proper hygiene, and other measures such as plexiglass barriers in the courtroom and jury box.¹

Visa’s argument to put off the trial by six months is predicated on two main propositions—both unsound. First, Visa argues that the recent increase in COVID-19 cases has turned Wyoming from “a relatively safe place to have a trial” to an unacceptably risky place to do so. Motion at 2. Visa ignores, however, that since July and continuing to the present numerous jury trials have been conducted in Wyoming with proper safety measures and Wyoming courts remain open to jury trials. COVID-19 has been present throughout the U.S. for many months, and courts around the country—like this Court—have engaged in careful planning to continue to administer justice safely and without undue delay *despite* the ongoing pandemic. The same should happen here, consistent with prevailing public health guidelines and court practices in Wyoming.

Visa, nonetheless, rests a substantial portion of its argument on the assumption that both Visa and Black Card will need to bring large teams to Casper and to the trial itself, which would create health risks for personnel due to travel, along with the potential for broader health risk at the trial. Visa’s reliance on uncontroversial statements from CDC guidelines, Motion at 5-9, about the risk of certain events misses the point of these guidelines, which is not to bar such events but to “provide event planners and individuals with actions to help lower the risk of COVID-19 exposure and spread during gatherings and events.”² All of the “prevention

¹ See *Court Protocol for Criminal Trials* (July 22, 2020), https://www.wyd.uscourts.gov/sites/wyd/files/Criminal_Trial_Protocol.pdf; *Notice to Bar* (May 20, 2020) (outlining measures to ensure safety after in-person proceedings resumed June 1, 2020), https://www.wyd.uscourts.gov/sites/wyd/files/Notice_to_Bar_May%202020.pdf.

² CDC, *Considerations for Events and Gatherings* (updated July 7, 2020), available at <https://www.cdc.gov/coronavirus/2019-ncov/community/large-events/considerations-for-events-gatherings.html>.

principles” detailed by the CDC guidance cited by Visa are already embodied in the Court’s jury protocol. Notably, the CDC does not recommend that events be canceled or postponed—even events in the “highest risk” category.

To the extent a large trial contingent is necessary, this risk can be mitigated by permitting remote trial participation, including live testimony by remote video connection. Visa’s in-house counsel and witnesses can participate in the trial through those means, and video can also be deployed for out-of-court preparation during trial, another concern cited by Visa. Testimony by real-time video may also be requested for Black Card’s expert witnesses. Video has worked well for expert depositions, for dispositive and Daubert motion practice, and for all manner of trial preparation tasks. Black Card sees no reason why video cannot be used in and out of the courtroom to safely proceed with this trial.

This leads to the second problem with Visa’s motion. Visa contends it would be unfairly *prejudiced* by opting to participate remotely. Motion at 2, 11-12. Visa’s concerns are unfounded and speculative. Visa could opt to produce certain witnesses live, while limiting any health risks by having supporting personnel and certain witnesses participate remotely. Moreover, to the extent live remote testimony may be perceived by the jury as less impactful and important—a proposition that is at best uncertain—that may impact Black Card’s case as well because it may opt to produce its experts by live remote video to limit travel and health risks. The jury would be unlikely to draw negative inferences from *any* witness or counsel’s decision to participate remotely in light of concerns about COVID-19 (or for any other valid reason), and clear instructions from the court can mitigate that risk further. In any event, these arguments fall far short of good cause to justify a six-month (and likely longer) delay of the trial, while ignoring the

very real inconvenience and potentially substantial prejudice that Black Card would suffer from indefinite delay.

There is no question that the COVID-19 pandemic poses health challenges that the Court and the parties must address—as they have been for many months. But it is equally clear that the COVID-19 pandemic will likely persist well past April 2021. As such, Visa’s request could indefinitely delay this case that has already been pending long enough. While the recent spread of COVID-19 in Wyoming merits a thoughtful and careful approach to conducting this trial at this time, Visa has not shown that it would be “unreasonabl[y] risk[y],” Motion at 2, 13, to hold a civil jury trial here so long as the Court’s strict safety protocols are followed.

LEGAL STANDARD

Local Rule 40.1(b) provides that “No continuances shall be allowed absent a showing of good cause.” Similarly, Federal Rule of Civil Procedure 16 instructs that a trial schedule should not be modified except upon a showing of good cause. Fed. R. Civ. P. 16(b)(4) (“A schedule may be modified only for good cause and with the judge’s consent.”). The “Tenth Circuit has outlined four primary factors that should be considered to determine if a continuance is necessary.” *Ace Am. Ins. Co. v. Dish Network, LLC*, No. 13-CV-00560-REB-MEH, 2016 WL 687461, at *2 (D. Colo. Feb. 19, 2016). Courts should consider “the diligence of the party requesting the continuance; the likelihood that the continuance, if granted, would accomplish the purpose underlying the party’s expressed need for the continuance; the inconvenience to the opposing party, its witnesses, and the court resulting from the continuance; the need asserted for the continuance and the harm that appellant might suffer as a result of the district court’s denial of the continuance.” *United States v. West*, 828 F.2d 1468, 1470 (10th Cir. 1987). Courts have applied these same factors in cases involving COVID-19. *See, e.g., Oglesby v. Masse*

Contracting, Inc., No. CV 19-2360-WBV-JCW, 2020 WL 3063849, at *2 (E.D. La. June 9, 2020) (finding no good cause to modify scheduling order or jury trial); *Optis Wireless Tech., LLC v. Apple Inc.*, No. 2:19-cv-00066-JRG, Dkt. 387 (E.D. Tex. July 21, 2020), Ex. A (same).

ARGUMENT

I. The Risk of Exposure to COVID-19 During Trial Is Not Unreasonable

Visa's motion focuses on: (a) the risk of transmission posed by the length of the trial, (b) out-of-state travel to Wyoming, (c) the increase in local cases, and finally, (d) the potential impact to the jury. Motion at 5-10.

At the outset, Black Card acknowledges that the COVID-19 pandemic poses potentially serious health consequences, that the virus can be spread through the air by individuals who are only mildly ill or asymptomatic, and that it has reached virtually all areas of the U.S. Black Card also acknowledges that the number of cases has been increasing recently in Wyoming, and that this backdrop must be taken into account as the Court and the parties plan and prepare for this trial. *See* Motion at 3-4.

Despite COVID-19, however, civic and commercial life in Wyoming goes on—subject to certain restrictions.³ The day after Visa filed its motion, on October 14, 2020, the Wyoming State Health Officer updated statewide guidance. That guidance continues to allow many activities where people congregate—including businesses such as restaurants, bars, movie theaters, gyms, and providers of personal services—to remain open subject to health and safety

³ *See* Wyoming Dep't of Health, *COVID-19 Orders and Guidance*, <https://health.wyo.gov/publichealth/infectious-disease-epidemiology-unit/disease/novel-coronavirus/covid-19-orders-and-guidance/>.

protocols.⁴ Indoor gatherings of up to 50 people remain permissible.⁵ The State Health Officer recently relaxed certain guidance, including concerning quarantining in schools in case of exposure to known cases of COVID-19. Now, so long as those exposed were wearing masks, quarantine is no longer required.⁶ In addition, recent changes to the guidance no longer require restaurants to space out seating in booths and increases the permitted number at a table from 6 to 8 people (which also applies to tables at indoor gatherings).⁷

This Court has likewise taken a measured approach. In light of the national emergency declaration in March, the Court imposed a moratorium on civil jury trials until June 1. Since that time, this Court has not conducted any criminal or civil jury trials. Black Card understands that at least one criminal jury has been empaneled, and the Court “found good cause and began

⁴ https://health.wyo.gov/wp-content/uploads/2020/10/FourteenthContinuation_Order1_Oct142020.pdf, and https://health.wyo.gov/wp-content/uploads/2020/10/FourteenthContinuation_Order3_Oct142020.pdf

⁵ https://health.wyo.gov/wp-content/uploads/2020/10/FourteenthContinuation_Order2_Oct142020.pdf (also exempting “Federal, State, and local government facilities” as well as entities such as religious organizations).

⁶ Wyoming Dep’t of Health, Investigations: K-12 Settings, <https://health.wyo.gov/wp-content/uploads/2020/09/wdh-K12-isolation-graphic-9-2020.pdf> (requiring only self-monitoring in the event of exposure where “everyone masked”); see Sheila McGuire, *COVID quarantine guidelines relaxed, pleasing local schools*, Uinta County Herald (Sept. 125, 2020), available at <https://uintacountyherald.com/article/covid-quarantine-guidelines-relaxed-pleasing-local-schools>.

⁷ Wyoming Dep’t of Health News, *Governor and Health Officer Loosen Restrictions on Restaurants and Keep Public Safe* (Sept. 29, 2020), available at <https://health.wyo.gov/governor-and-health-officer-loosen-restrictions-on-restaurants-and-keep-public-safe/>; COVID-19: Guidance for Restaurants, Bars, and Other Businesses from the Wyoming Department of Health (Oct. 1, 2020), available at <https://health.wyo.gov/wp-content/uploads/2020/10/WDH-COVID-19-Guidance-for-Restaurants-10.1.2020-b.pdf>; COVID-19: Guidance for Large Indoor and Outdoor Events from the Wyoming Department of Health (Oct. 1, 2020), <https://health.wyo.gov/wp-content/uploads/2020/10/WDH-COVID-19-Guidance-for-Large-Outdoor-Indoor-Gatherings-10.1.2020.pdf>.

facilitating grand jury sessions on May 19, 2020.”⁸ Naturalization ceremonies using physical distancing, physical barriers, and face coverings have been safely held by the Court throughout the pandemic.⁹ At the same time, in state courts, numerous jury trials in criminal cases have been held since July 1, including three in Natrona County (including one that finished on October 15), four in Campbell County, three in Sweetwater, and two each in Sheridan and Uinta counties.¹⁰ Courts all over the country are balancing their critical public service function—including preserving public access and the jury trial as the cornerstone of the judicial process—with the need to reduce the risk of COVID-19 transmission.

With this context in mind, the question of “good cause” to be decided in this case comes down to whether a jury trial can be safely conducted in November in Wyoming. Visa’s motion fails to offer a non-speculative reason to show that such a trial cannot be safely conducted.¹¹ Wyoming state courts have been conducting jury trials and Wyoming federal courts continue to accommodate jury trials. Courts throughout the country have resumed jury trials, and there is no evidence that these proceedings have become “superspreader” events—nor would that be an

⁸ See Gen. Order 2020-09 (July 15, 2020).

⁹ U.S. District Court, Dist. of Wyoming, *Programs & Services*, <https://www.wyd.uscourts.gov/programs-services> (showing Sept. 14, 2020 naturalization ceremony in Casper conducted with face coverings and physical distancing in place).

¹⁰ See Declaration of Mistee Elliott dated October 17, 2020, ¶¶ 2-7.

¹¹ While the incidence of COVID-19 in Wyoming and the Casper region merit serious consideration, the rate of infection here remains comparable to that in other parts of the country. Currently, San Francisco and New York—where certain counsel and witnesses are located—are seeing comparatively lower levels of cases, while other areas such as Las Vegas, where counsel for both Visa and Black Card maintain offices, and Denver, where one of Visa’s witnesses is located, have seen higher rates. The fact is that indoor gatherings such as court proceedings must maintain strict protocols *in all parts of the country* regardless of the local fluctuation in infection rates, for the duration of the pandemic.

expected outcome where rigorous safety measures are in place.¹² Black Card is prepared to meet and confer with Visa to ensure mutual compliance with the Court’s protocols and suggest any additional procedures to ensure that jurors and all other participants are protected throughout the trial. Lastly, to the extent the scope and duration of this trial presents risks, the parties can eliminate many of those risks by producing some of their witnesses to testify live by remote video and having participants whose only role is to monitor proceedings also do so remotely.

The conclusion that Visa has failed to show good cause is reinforced by its failure to address whether a continuance at this time will result in an indefinite delay of this longstanding dispute. In the words of the *West* factors, Visa has not shown “the likelihood that the continuance, if granted, would accomplish the purpose underlying the party’s expressed need for the continuance” *West*, 828 F.2d at 1470. Simply put, there is no basis to conclude that April will be a less risky time to conduct a jury trial with COVID circulating in the United States—especially as Visa points to the risks of the virus not only in Wyoming, but in every location where witnesses or staff may be traveling from. It may or may not be less risky by April 2021, and the stark reality is we are in uncharted waters during this difficult period in our collective history. Yet, the economy and our judicial system must continue to operate, subject to health precautions, and that should apply to this case as it has to other judicial proceedings. The one thing that is certain about a continuance to April (or beyond) is that it will force the parties and the Court to duplicate much of the work that has been done to date.

¹² Message from Chief Judge [of the State of New York] Janet DiFiore (Oct. 12, 2020) (discussing jury trial pilots throughout New York), *available at* <http://www.nycourts.gov/whatsnew/pdf/October12-CJ-Message.pdf>. Courts throughout the country have been deploying thorough protocols to guide jury trials during the pandemic. *See, e.g.*, U.S. Dist. Court, Dist. of Del., Notice of Issuance of Jury Trial Restart Guidelines (Oct. 7, 2020), <https://www.ded.uscourts.gov/news/notice-issuance-jury-trial-restart-guidelines> (providing detailed protocols for conducting jury trials).

Lastly, Visa fares no better with its argument that there is “no urgency” here. Provided that safety measures can be assured, the trial of this longstanding case should proceed. This case was filed in 2015 and Black Card is fully prepared to have a jury adjudicate its claims against Visa. Both parties are entitled to reach a resolution of this dispute without delay—a fact that the Court was aware of when entering its “final” scheduling order in this case in January 2020.

II. Visa’s Claims of Prejudice Are Speculative

After detailing the risks posed by travel to Wyoming both to travelers and local residents, Visa argues that certain measures to reduce travel or accommodate those deemed to be at higher risk of complications from COVID-19 would not be adequate.

Notably, Visa does not raise any formal due process concern with proceeding with the trial as scheduled. Nor is there such a concern, as “[r]eal time live video testimony from . . . witnesses presented via monitors in the courtroom will enable the jury to make instantaneous deductions about each such witness and [their] testimony.” *Optis Wireless Tech., LLC v. Apple Inc.*, No. 2:19-cv-00066-JRG, Dkt. 387 (E.D. Tex. July 21, 2020), Ex. A.

Optis v. Apple is instructive. There, the defendant—Apple—argued that because of the pandemic, continuing the trial would be in the best interests of the health and safety of trial participants and the local community, as well as the parties’ abilities to present a full and fair case. As here, plaintiffs opposed the motion, arguing that the parties and the Court were taking appropriate precautions to limit public health risks and accommodate any barriers to a full and fair trial. The court found that following “precautions will help assure that the trial can go forward to produce a just, speedy resolution to the parties’ disputes while reasonably safeguarding the public health.” Ex. A at 5. The court concluded that the “unpredictability of the state of the pandemic in the future means that a continuance now will result in a delay of

many months or even years . . . which will simply guarantee material prejudice to all parties.” Ex. A at 5 . The court denied the requested continuance after “weighing the precautions crafted, the absolute lack of any reliable information as to when the current pandemic may abate” as well as the public health concerns and the “rights of the parties to resolve” their disputes. Ex. A at 8. Ultimately, the court conducted a week-long jury trial in August in Texas, with counsel and witnesses traveling from across the country, without any reports that participants contracted the virus from the proceedings.¹³

The same outcome should happen in this case.

CONCLUSION

For the foregoing reasons, the Court should deny Visa’s Motion to Continue Trial.

Dated: October 18, 2020

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¹³ Ex. B, Katie Buehler, *Texas Patent Judges Diverge On Pandemic Trial Protocols*, Law360 (Oct 9, 2020) (including comments from the presiding judge that he was unaware of any reported cases of COVID-19 among attorneys or jurors).

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of October 2020, a true and correct copy of the above and foregoing document was served via Court's CM/ECF system on the following counsel of record for Visa U.S.A. Inc.:

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