No. 2021-105

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

IN RE INTEL CORPORATION,
Petitioner.

On Petition for Writ of Mandamus to the United States District Court for the Western District of Texas in Case No. 1:19-cv-977, Judge Alan D. Albright

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RESPONDENT VLSI TECHNOLOGY LLC'S OPPOSITION TO PETITIONER INTEL CORPORATION'S "EMERGENCY MOTION FOR A STAY OF THE DISTRICT COURT'S RETRANSFER ORDER PENDING RESOLUTION OF MANDAMUS PETITION, EXPEDITED BRIEFING SCHEDULE, AND/OR TEMPORARY STAY"

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December 18, 2020

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Exhibit 1: December 15, 2020 Transcript of Proceedings Before Hon. Alan D. Albright, Intel's Motion to Continue/Stay (Via Zoom).

I. INTRODUCTION

Plaintiff/Respondent VLSI Technology LLC ("VLSI") has no objection to this Court ruling expeditiously on Defendant/Petitioner Intel Corporation's ("Intel") pending mandamus petition, which petition is already fully briefed and involves no disputed findings of fact. However, VLSI respectfully submits that Intel's motion to stay Judge Albright's challenged order pending this Court's resolution of the mandamus petition lacks merit and should be denied for multiple reasons.

First, Intel's motion to stay is wholly unnecessary provided this Court rules on Intel's mandamus petition prior to January 5, 2021, because the first act that is called for under the challenged order is a pre-trial conference on January 5. Since Intel's mandamus petition is already fully briefed and involves a single issue with no disputed facts, VLSI respectfully submits this Court's time is better spent addressing Intel's mandamus petition rather than this motion to stay which, as Intel's counsel told Judge Albright, was being filed in the hopes of prompting this Court to expedite its ruling on Intel's mandamus petition. Ex. 1, December 15, 2020 Transcript of Proceedings at 21:17-22:3; 22:23-23:3.

Second, Intel has not met its burden of demonstrating that it has a strong case on the merits of its mandamus petition. Among other problems, Intel has not cited a single decision that reversed a district judge's decision to move a trial to another courthouse in the same district, to be presided over by the same judge, let alone

where the reason for the decision was that the first courthouse is closed indefinitely. Moreover, although Intel suggests it was somehow improper for Judge Albright to set a trial date in January in light of concerns over COVID-19, those arguments were not presented to Judge Albright in connection with the order that Intel has challenged in its mandamus petition, and are not properly before this Court now.[1]

Third, Judge Albright already found that further continuing the trial set for January 11 would be prejudicial to VLSI and would not serve the public interest (*e.g.*, Intel Appx6), and Intel has not shown (or even argued) that those findings are clearly erroneous. Accordingly, a stay should presumptively be denied here unless this Court is firmly convinced that Intel's mandamus petition is meritorious (which VLSI respectfully submits it is not).

In short, Intel's mandamus petition lacks merit and should be denied, which would moot this motion to stay. Relatedly, provided that this Court rules upon

[1] After Judge Albright entered the challenged order setting the case for trial in Waco if the Austin courthouse remains closed, Intel filed a separate motion before Judge Albright seeking to continue the January 11, 2021 trial date on the basis that, according to Intel, COVID-19 conditions in Waco, Texas make it unsafe to proceed with the trial. VLSI opposed that motion with substantial evidence, including the sworn declaration of an expert epidemiologist who personally inspected the Waco courthouse and testified that a trial in January will be safe provided that safety protocols are followed. On December 15, 2020, Judge Albright held a lengthy hearing on Intel's motion to continue the trial date based on COVID-19, and then denied the motion. Ex. 1 at 35:18-36:15. Judge Albright noted at the hearing that his own wife works as an emergency room nurse in Waco, and thus he is well familiar with the seriousness of COVID-19. *Id.* at 9:20-10:7.

Intel's mandamus petition prior to January 5, the relief requested in Intel's motion to stay is unnecessary. Further, and in any event, this motion to stay lacks merit and entering a stay would be prejudicial to VLSI and would not serve the public interest.

II. BRIEF STATEMENT OF FACTS

VLSI incorporates herein by reference its statement of facts in VLSI's response to Intel's pending mandamus petition, and will not repeat those facts here. *E.g.*, ECF No. 6 at 13-15.

This matter is set for trial on January 11, 2021, with a pre-trial conference set for January 5, 2021.

On December 15, 2020, Judge Albright held a hearing via Zoom on Intel's motion to stay his challenged order setting the January 11 trial for the Waco courthouse if the Austin courthouse remains closed. At that hearing, counsel for Intel told Judge Albright that holding argument on Intel's motion to stay was unnecessary and requested that Judge Albright simply deny Intel's motion to stay so that Intel could file its motion to stay in this Court. Ex. 1 at 37:2-22. Intel's counsel also told Judge Albright that Intel hoped that filing this motion would prompt this Court to expedite its ruling on Intel's mandamus petition. *Id.* at 21:17-22:3; 22:23-23:3. Judge Albright complied with Intel's request and orally denied Intel's motion to stay at the hearing. *Id.* at 37:2-22. Intel filed its motion with this Court the same day, and this Court immediately set an expedited briefing schedule.

III. LEGAL STANDARD

VLSI agrees with Intel that in deciding whether to stay district court proceedings pending appellate review, this Court generally considers "(1) whether the stay applicant has made a strong showing that it is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of a stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 425-426 (2009) (*quoting Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)).

IV. ARGUMENT

A. Intel Has Not Made A Strong Showing That It Is Likely To Succeed On The Merits

Intel's mandamus petition presents a single issue, namely whether a district court judge may hold a trial at another federal courthouse in the same district, at a courthouse where the judge routinely sits, and where the plaintiff originally filed the case, when the courthouse at which the trial would otherwise be held is closed indefinitely. Intel cites not one case reversing a district court's decision to hold a trial at another courthouse in the same district, let alone one based on a finding that the first courthouse is closed indefinitely.

Intel's mandamus petition is based first and foremost on the Fifth Circuit's decision in *In re Cragar Indus., Inc*., 706 F.2d 503 (5th Cir. 1983). As discussed in VLSI's response to Intel's mandamus petition (ECF No. 6, which is incorporated

herein by reference), *Cragar* involved a plaintiff who successfully moved to transfer venue to a court in a different district and then, unhappy with the new venue, moved the second court to retransfer the case back to the first court. *Cragar*, 706 F.2d at 504-505. The Fifth Circuit noted the problems inherent in allowing one district judge to review the transfer order of another and ruled that under the circumstances, the plaintiff had to show "most impelling circumstances" to support retransfer back to the first court. *Id.* at 505.

Here, the facts are very different than in *Cragar*. VLSI originally filed the action in Waco. Intel, not VLSI, moved Judge Albright to keep the case on his docket but to transfer it to Austin (where Judge Albright also routinely sits). *E.g.*, Intel Appx197-200. Intel argued that transferring the case to Austin would expedite its resolution. *E.g.*, Intel Appx200. Subsequently, not only was the Austin courthouse closed indefinitely, but other factors that Intel had previously argued supported moving the case to Austin turned out either to be non-factors or to favor Waco over Austin. *E.g.*, Intel Appx300-303. Accordingly, after notice and briefing by the parties, Judge Albright ordered that if the Austin courthouse remains closed in January, the trial will instead be held at the Waco courthouse. *E.g.*, Intel Appx3, 5-6.

Since Judge Albright has had the case throughout and is not transferring it to another judge but rather merely setting the place of trial at another (open) courthouse

in the same district, *Cragar* simply does not apply here. Moreover, even if *Cragar* does apply, Judge Albright found that the COVID-19 pandemic and related indefinite closure of the Austin courthouse constitutes exactly the type of "impelling circumstance" described in *Cragar* that warrants retransfer. Intel Appx6-8.

Intel's contention that Judge Albright erred by ordering that the trial be held at the nearest open federal courthouse in the same district also fails for many additional reasons, which are briefly summarized below:

- Numerous authorities squarely state that district courts have authority and discretion to set the place of trial anywhere within the district, including numerous decisions cited in Judge Albright's challenged Order (*e.g.*, Intel Appx4-5) and in VLSI's response to Intel's mandamus petition (*e.g.*, ECF No. 6 at 16-17).

- Intel's mandamus petition does not challenge *any* of Judge Albright's factual findings contained in the Order – not one – let alone show that any of those findings are clearly erroneous.

- Intel suggests in its mandamus petition that Judge Albright somehow erred by setting the case for trial on January 11 in light of the COVID-19 pandemic, but Intel's only argument on this issue in connection with the challenged Order was that, in Intel's view, it was impossible to know whether it would be safer to hold trial in Austin or in Waco in January. Intel Appx284-285. Intel cannot properly present

new arguments or evidence concerning COVID-19 to this Court that were not raised before Judge Albright in connection with the challenged order.

Likewise, an examination of Intel's cases cited in support of its mandamus petition underscores that Judge Albright did not err here. For example, Intel cites *Gorzynski v. JetBlue Airways Corp*., 10 F. Supp. 3d 408 (W.D.N.Y. 2014) as supposedly supporting Intel's position under *Cragar*. It does not. In *Gorzynski*, a district judge *sua sponte* transferred the action to another judge in a different division of the same district. *Id.* at 410. However, the plaintiff was unhappy with the transfer, and moved the second judge to retransfer the case back to the first judge. *Id.* at 412. The second judge denied the motion, noting that retransfers are disfavored under *Cragar* and other cases, and found that:

> Here, Plaintiff has not identified any post-transfer events that would frustrate the original purpose of the transfer. ***The original purpose of the transfer was to expedite the trial of this action. Trial is now scheduled to commence in less than one month. As a result, the purpose of the transfer has been achieved.***

Id. at 413 (emphasis added).

Unlike in *Gorzynski*, here, Judge Albright has not transferred the case to another judge, nor is he being asked to second-guess a transfer order entered by a different court. Moreover, the district court in *Gorzynski* found that transfer back to

the first district was not warranted *because the purpose of the transfer, namely to expedite trial, had not been frustrated*. 10 F. Supp. 3d at 413. But exactly the opposite is true here: Judge Albright has found that the purpose of his original order transferring the case from Waco to Austin *will* be frustrated because the Austin courthouse is now closed indefinitely. Intel Appx5-8. Thus, *Gorzynski* fully supports Judge Albright's order, and provides no support for Intel's interpretation of *Cragar*.

Unable to cite cases involving even remotely analogous facts in which any district court was reversed for moving a trial to another courthouse in the same district, Intel instead resorts to citing several inapposite decisions involving unrelated parties in which Judge Albright was reversed for *denying motions to transfer cases to federal courts in other districts*. Those decisions involve unrelated issues, facts and parties, and have no relevance or applicability here whatsoever other than to unfairly attack Judge Albright personally.

B. A Stay Is Not Necessary, Including Because This Motion Will Be Moot If This Court Rules On Intel's Mandamus Petition By January 5, 2021

At the December 15, 2020 hearing on Intel's motion to stay before Judge Albright, Intel's counsel stated that a main reason for filing Intel's motion to stay in this Court is to prompt this Court to issue its ruling on Intel's pending mandamus petition before the pre-trial conference set for January 5, 2020. Ex. 1 at 21:17-22:3;

22:23-23:3. In other words, the only way a stay is even potentially necessary here is if this Court is unable to consider Intel's mandamus petition before January 5. However, since Intel's mandamus petition is already fully briefed (based on this Court's directions), raises only a single issue, and does not involve any disputed findings of fact, there is every reason to believe that this Court intends to consider Intel's mandamus petition before January 5. If so, this motion to stay will be moot.

C. Judge Albright Has Already Found VLSI Would Be Prejudiced By Another Continuance (Which Would Be The Result of Intel's Requested Stay)

In Judge Albright's challenged order finding that the trial should be held in Waco if the Austin courthouse remains closed, Judge Albright found that "because the trial dates for the [related] -00255 and -00256 cases [between VLSI and Intel] are two and four months, respectively, after the trial date for the -00254 case, delaying the trial date of the -00254 case not only delays the trial date of that case, but it has a multiplicative effect by delaying the trial dates of the other two cases by the same amount of time." Intel Appx.6. Judge Albright further found that "because patents have a limited term, the Court does not believe it should unnecessarily delay a trial date, especially when an alternate venue is available." *Id.*

Intel ignores these adverse findings, and asserts that a further continuance of the trial date will cause no prejudice to VLSI. Intel is wrong. Judge Albright's recent findings of potential prejudice to VLSI apply with equal force to Intel's

motion to stay, since the net result if a stay were entered would be that the trial date would be continued again, potentially indefinitely.

Moreover, a continuance would also prejudice VLSI because Intel is simultaneously suing VLSI in another court (namely, the United States District Court for the Northern District of California) on antitrust allegations that are based on Intel's contention that VLSI's patent claims in this action lack merit.[2] Intel is thus seeking to delay resolution of the merits of VLSI's claims in this case, while arguing in another case that VLSI's claims here are so meritless that they somehow give rise to an antitrust claim. Such litigation tactics by Intel are prejudicial to VLSI and underscore that Intel lacks good cause to stay the challenged order.

D. The Public Interest Will Not Be Served By A Stay

In the challenged order, Judge Albright found that the public interest will be served by moving forward with trial in January rather than waiting for the Austin courthouse to someday reopen, when Austin will face a still-growing glut of backlogged trials. Intel Appx5-7. Again, Intel ignores that adverse finding and argues that the public interest will be served by a stay, because (Intel argues) otherwise there is a chance that the case would have to be retried if this Court later grants Intel's mandamus petition.

[2] *Intel Corp., et al. v. Fortress Investment Group, et al.*, Case No. 3:19-cv-07651-EMC (N.D. Cal.).

As explained above, based on the briefing schedule established by this Court, this Court will seemingly have ample time to act upon Intel's mandamus petition before the pretrial conference set for January 5. Moreover, and in any event, the proposed stay would only benefit the public interest if Intel's mandamus petition had merit – which it does not. If the petition lacks merit (which it does), a further delay would only serve to further increase the backlog of cases in Austin and to prejudice VLSI, and would not serve the public interest at all.

Also, as expressly anticipated by Judge Albright in the challenged order setting the trial for Waco if the Austin courthouse remains closed, on December 10, 2020, Chief Judge Garcia of the Western District of Texas entered his Eleventh Supplemental Order Regarding Court Operations Under the Exigent Circumstances Created by the COVID-19 Pandemic for the Western District of Texas ("Eleventh Supplemental COVID-19 Order").[3] The Eleventh Supplemental COVID-19 Order extends the closure of the Austin courthouse at least through January 31, 2021, but otherwise is substantively identical to the Ninth Supplemental COVID-19 Order that is discussed at length in Judge Albright's challenged order (Intel Appx2-3), including that it gives district court judges such as Judge Albright the option of

[3] *See* Eleventh Suppl. Order Regarding Court Operations Under the Exigent Circumstances Created by the COVID-19 Pandemic (W.D. Tex. Dec. 10, 2020), https://www.txwd.uscourts.gov/wp-content/uploads/2020/12/OrderEleventh SupplementalCOVID121020.pdf (visited Dec. 15, 2020).

moving forward with trials in other courthouses in the Western District of Texas. The Eleventh Supplemental COVID-19 Order further demonstrates that moving forward with the trial in Waco is not only reasonable under the circumstances, but is in fact necessary in order to avoid an indefinite delay not only in this case, but for Judge Albright's entire trial docket.

V. CONCLUSION

Intel's motion to stay will be moot once this Court rules on Intel's pending mandamus petition. Thus, provided that this Court expects to rule on Intel's mandamus petition prior to the January 5, 2021 pretrial conference in this court, this motion to stay is mere surplusage. Furthermore, and in any event, Intel's motion to stay lacks merit and should be denied for all of the reasons set forth above.

Dated: December 18, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The foregoing filing complies with the relevant type-volume limitation of the Federal Rules of Appellate Procedure and Federal Circuit Rules because:

1. The filing has been prepared using a proportionally-spaced typeface and includes 3,807 words.

2. The brief has been prepared using Microsoft Word for Office 365 in 14-point Times New Roman font. As permitted by Fed. R. App. P. 32(g), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

Dated: December 18, 2020

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CERTIFICATE OF INTEREST

Counsel for Respondent VLSI Technology LLC ("VLSI") certifies the following:

1. **Represented Parties.** Fed. Cir. R. 47.4(a)(1). The full name of every party represented by the undersigned counsel in this case is:

VLSI Technology LLC.

2. **Real Party In Interest.** Fed. Cir. R. 47.4(a)(2). Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities.

None.

3. **Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3). All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party represented by the undersigned counsel are:

CF VLSI Holdings LLC.[4]

4. **Legal Representatives.** Fed. Cir. R. 47.4(a)(4). List all law firms, partners, and associates that (a) appeared for the entities in the originating court or

[4] CF VLSI Holdings LLC, a private entity, was inadvertently referred to as "VLSI Technology Holdings LLC" in Respondent's Certificate of Interest filed with VLSI's response to Intel's pending mandamus petition.

agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court.

Irell & Manella LLP: Morgan Chu, Benjamin Hattenbach, Amy Proctor, Alan Heinrich, Christopher Abernethy, Iian Jablon, Keith Orso; Ian Washburn; Dominik Slusarczyk; Babak Redjaian; Brian Weissenberg, Charlotte Wen, Jordan Nafekh; and Benjamin Monnin.

MT2 Law Group: Mark Mann; Andy Tindel.

5. **Related Cases.** Fed. Cir. R. 47.4(a)(5). The title and number of any case known to me to be pending in this or any other court of agency that will directly affect or be directly affected by this court's decision in the pending appeal are:

VLSI Technology LLC v. Intel Corp., No. 6:19-cv-00254 (W.D. Tex.);

VLSI Technology LLC v. Intel Corp., No. 6:19-cv-00255 (W.D. Tex.);

VLSI Technology LLC v. Intel Corp., No. 6:19-cv-00256 (W.D. Tex.).

6. Organizational Victims and Bankruptcy Cases. Fed. Cir. R. 47.4(a)(6). Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees).

None.

Dated: December 18, 2020

Respectfully submitted,

IRELL & MANELLA LLP

By: /s/ Iian D. Jablon
Iian D. Jablon

Attorneys for Respondent VLSI Technology LLC

CERTIFICATE OF SERVICE

I hereby certify that, on this 18th day of December, 2020, I filed the foregoing with the Clerk of the United States Court of Appeals for the Federal Circuit via the CM/ECF system, which will send notice of such filing to all registered CM/ECF users.

Dated: December 18, 2020

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EXHIBIT 1

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

VLSI TECHNOLOGY LLC *
*
VS. * CIVIL ACTION NO. AU-19-CV-977
*
INTEL CORPORATION * December 15, 2020

BEFORE THE HONORABLE ALAN D ALBRIGHT, JUDGE PRESIDING
MOTION TO CONTINUE/STAY HEARING (via Zoom)

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Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

09:05 (December 15, 2020, 9:05 a.m.)

DEPUTY CLERK: Motion hearing in Civil Action 1:19-CV-977, styled VLSI Technology LLC versus Intel Corporation.

MR. MANN: Your Honor, good morning. Mark Mann and Andy Tindel from Mann, Tindel & Thompson for VLSI, and my colleagues from Irell & Manella who will be doing the speaking today are Morgan Chu, Ben Hattenbach, Ian Jablon, Alan Heinrich, Ian Washburn, Amy Proctor, Babak Redjaian, Dominik Slusarczyk and Charlotte Wen. And I think that's everybody, Your Honor, that will be speaking. And we do have a client representative on the phone from VLSI and, by video, our CEO Michael Stolarski. And that's it, Your Honor.

THE COURT: Well, thank you.

MR. RAVEL: Steve Ravel for Intel.

THE COURT: One second, Mr. Ravel, if I can. I'd like to thank the client representative for attending, as I always try to do. And I look forward to hearing from all the counsel for VLSI.

Mr. Ravel?

MR. RAVEL: Your Honor, Steve Ravel for Intel. Our client representative on the line this morning, Mashood Rassam. A second rep may arrive later, Kimberly Schmitt.

Our speakers today are Bill Lee, Joe Mueller, Mindy Sooter, Amanda Major, Louis Tompros and Jim Wren. A number of other Wilmer lawyers will attend to observe. Their names have

been given to Kristie to help her in monitoring the private Zoom line and the integrity of it.

We're ready to proceed.

THE COURT: Very good.

And so everyone knows, I have five law clerks attending, all of whom helped me on the different briefings. So this is a very collaborative effort on the Court's part. We spent a lot of time preparing on this.

And the briefs, as always, were just the platinum standard for briefing. I wish every case could be briefed this well. So it's -- it was very enjoyable.

I'll hear first from Intel with respect to the motion to continue or to stay.

MR. CHU: Your Honor, just a quick note. This is Morgan Chu. I and some of my colleagues are in what we call the Irell courtroom that was set up for virtual matters. We've had a virtual trial -- a real trial, but done on Zoom. And so when I sit down and move away from the podium, you might not see me personally or my colleagues, but we're all in this room socially distanced from one another. Just wanted to let you know that.

THE COURT: Okay.

MR. CHU: Thank you.

THE COURT: Mr. Ravel or Mr. Lee?

MR. LEE: Your Honor, it's Bill Lee. I'll take up the

first two motions with Your Honor's permission.

THE COURT: Yes, sir.

MR. LEE: Let me turn first, Your Honor, to the motion to continue. We recognize that Your Honor has indicated your desire to move the trial forward in January. The decision to move for a continuance, we want you to know, is not one that we have taken lightly or without careful consideration. We respectfully submit that it is one that we needed to take for the health and safety of everyone involved in the trial.

We take this step to avoid the potentially dire outcome for any particular person's health or life. And we take the step to avoid what we believe could be a substantial waste of the Court's and the parties' resources.

Your Honor, I've been trying cases for 45 years. I have never confronted a set of circumstances and asymmetric risks such as those that are presented here. I've never filed a motion to continue like this; I surely hope that I never have to do it again.

This Court and some others were able to open your doors to jury trials over the fall when it appeared the COVID-19 pandemic in Waco and elsewhere was ebbing and cases were not as widespread as the peak of the summer. We recognize and appreciate that Your Honor kept multiple safety precautions and held trials without reported incident.

But the situation currently facing the country and

currently facing McLennan County in Texas is dramatically worse than it was just a few months ago, and by all accounts is expected to get even worse over the next month, especially after Christmas and shortly after the new year.

We have provided the Court with substantial evidence supported by the declaration of a local epidemiologist, Dr. Cristie Columbus of Baylor Scott & White and Baylor University Medical Center, that even if the Court were to take every proposed precaution, the current state of pandemic means there's a significant risk of COVID spreading during a two-week trial to be held in January 2021.

This is, as Your Honor knows, a substantial case; billions of dollars are at stake. The parties also have dozens of lawyers, consultants, staff, witnesses, clients, others, that will be traveling from across the country and in fact from other countries to attend the trial. Several on my team themselves have conditions that put them at high risk or have family members that are in that circumstance.

These discussions and considerations that we're offering to the Court are not offered in a vacuum. We are having them in the context of a difficult state of affairs over the next month or two or three in Waco and elsewhere.

As I'll show you in a second, the local Waco hospitals are nearly at full capacity, and there're nearly no ICU beds available. Waco has had to secure a mobile morgue because they

09:12 1 expect more guests than can be accommodated by the local
09:12 2 mortuaries. It is, I think we all would agree, worse now than
09:12 3 it was in October or even early November.
09:12 4 To be clear -- and I think Your Honor knows this -- Intel
09:12 5 is not seeking an indefinite continuance. We're just asking
09:12 6 that the case be continued for a few months so that the
09:12 7 high-risk people who very much want to participate in this
09:12 8 trial can get vaccinated and we can get past this current
09:12 9 stage.
09:12 10 A first vaccine was approved by the FDA just a few days
09:12 11 ago; distribution has begun. Another is going to be approved
09:12 12 this Friday and distribution will begin. Vaccinations for
09:12 13 those with high risk conditions should be available and should
09:12 14 occur before April. And after these winter months pass, the
09:12 15 current surge hopefully will be such that the combination of
09:13 16 multiple vaccines and lower spread will make it safer to
09:13 17 proceed.
09:13 18 This litigation is, as Your Honor knows, about patents
09:13 19 that issued almost a decade ago. It is about products. It is
09:13 20 about products some of which came to market six or seven years
09:13 21 ago. It's about patents that were acquired by VLSI recently
09:13 22 but asserted seven or eight years after the patents issued,
09:13 23 seven or eight years after the product came to market.
09:13 24 The stakes are money damages, and that's all that the
09:13 25 stakes are. The stakes for the jurors, the Waco community, all

of the court personnel and attorneys, witnesses and representatives are higher than just money. And we are asking respectfully the Court to consider those and continue the trial for a matter of months.

If we proceed in April, for example, the case will have proceeded to trial faster than the average times for any other district. Some of the patents were in the original Delaware case who will have proceeded to trial faster than if the case had stayed in Delaware where it was originally brought by VLSI.

And while I'm concerned for all those involved, I am specifically concerned for the members of our team, because I feel personally responsible for the witnesses and the lawyers and the members of their family. I'll be at the trial no matter what. I've given each of them the opportunity to tell me if they're uncomfortable being here. And as I will tell you in a few minutes, some of them are; they'll be able to make their own decisions.

So let me go into things a little bit more specifically and offer Your Honor some slides and some specific evidence.

First, the objective evidence confirms that the number of COVID-19 infections and deaths is at a high point in the pandemic nationally and in Waco. There's no disagreement between VLSI and our expert and us.

As Dr. Columbus explained, McLennan County has experienced a surge in cases, along with the rest of Texas and the United

09:15 States. Slide 1 demonstrates just this, and Mr. Lee will put it on the screen, Your Honor. And I know that you have copies as well.

Slide 2 shows the same is true in Texas. The reduction in cases we saw in late summer is gone and the surge is nearing record levels.

If I turn you to Slide 3, the surge continues in McLennan County specifically. On December 12th there were 147 new cases which has continued a trend of over 100 cases a day on most days for some time. The local death rate has been increasing in a very worsened way. On December 7th the number of deaths reported was nine, the highest total since August 7th.

The burden on Waco of these high numbers of deaths and COVID cases is substantial. If I turn you to Slide 4, you will see that the County is at nearly 100 percent ICU capacity. Data from the Center for Disease Control confirmed that as of December 7th --

THE COURT: Mr. Lee?

MR. LEE: Yes, sir.

THE COURT: Just to let you know, as you're talking, I think everyone should know, my wife is a nurse. She's working right now in Ascension in the ICU. I have a probably better than anyone on this phone call, firsthand information about what's going on inside the hospitals -- at least her hospital -- with respect to what's happening in ICUs. She was

there the last few days. So I'm pretty up to speed on what's going on.

You can keep going. I just wanted everyone to know, including the clients, that you know, I have a very personal viewpoint into what's happening in McLennan County, especially what's happening in the ICU and in the hospitals. So you may continue.

MR. LEE: Your Honor, we knew that and we appreciate it. I think two things. First, I think for purposes of the record it's important for us to offer the evidence that we have from the external sources so the record's complete. And while my personal knowledge is not in the Baylor Scott & White Center, I have two brothers, three nieces and a nephew, all of whom have been working in COVID ICU wards in different locations. And that honestly educates a little bit my presentation to you as well.

THE COURT: And also with regard to the ICU beds that you're showing here -- and my wife works at Providence. The 52 in use are not all -- they're not all COVID beds.

MR. LEE: Actually, Your Honor, that's what I was just about to say. 90 percent of the inpatient beds were in use but 20 and 29 percent of those beds were occupied by COVID patients, so you're correct.

The problem you have is that if a significant number of the beds are occupied now, the availability of beds for new

09:18 COVID patients, or actually patients who are not suffering from
09:18 COVID but need ICU, as you know from -- as you know, causes
09:18 issues. In fact, Your Honor, that's one of the reasons that
09:18 Governor Abbott has asked hospitals to cancel elective
09:18 surgeries.

09:19 These numbers are only expected to increase and get worse
09:19 over the course of the winter, with another spike expected
09:19 after Christmas and New Year's. You don't have to take my word
09:19 for it. You don't have to take Dr. Columbus' word for it.
09:19 VLSI has offered to you the declaration of Dr. Troisi, and I'm
09:19 going to show you in the next few slides what she has said
09:19 about the issues that we're trying to address with Your Honor
09:19 now.

09:19 So if I take you to Slide No. 12, you will see that she
09:19 has said that there is a lot of concern about the holidays and
09:19 the surge that is expected to follow. And, Your Honor, as you
09:19 know, the final pretrial conference is scheduled for
09:19 January 5th. In order for people to attend the conference to
09:19 be prepared, they're going to have to be traveling within the
09:19 next two and a half to three weeks, precisely the period that
09:20 Dr. Troisi is talking about.

09:20 In fact, on the same day that she submitted a declaration
09:20 to you, if I turn you to Slide 13, she gave an interview to the
09:20 New York Times. And she was quoted as explaining that, "The
09:20 worst is yet to come in the next several weeks," precisely the

09:20 time when people will have to be traveling to attend the final
09:20 pretrial conference and prepare for trial.
09:20 Now, VLSI is not disputing that she has said these things
09:20 before. They're not disputing about what appears to be the
09:20 situation for December and January. The suggestion instead is
09:20 that April won't make a difference. But April can make a
09:20 difference; April will likely make a difference. And many of
09:20 the people who are most at risk are likely to be able to be
09:21 vaccinated, likely to be able to attend the trial.
09:21 Second, Your Honor, even with stringent safeguards such as
09:21 those suggested in the declaration provided to you, there will
09:21 not be enough protection to protect people confined for two to
09:21 three weeks during the present surge. VLSI submitted a
09:21 declaration from an epidemiologist who came to Your Honor's
09:21 courtroom and proposed safety measures. And we appreciated the
09:21 list that she provided. It is comprehensive and more likely
09:21 anything than anybody could get done. It is not materially
09:21 different than what Dr. Columbus said, and Dr. Columbus
09:21 reviewed her declaration and provided you her reply.
09:21 Most importantly, Dr. Columbus explains in her reply that
09:21 there are two sets of problems with what Dr. Troisi proposes.
09:21 The first is what her list doesn't cover, and the second is
09:22 that the list has limitations on its own.
09:22 So let me talk first about what the list doesn't cover.
09:22 There are two things that the in-court protections cannot

09:22 cover. No matter how many protections -- precautions we take,
09:22 it's impossible to ensure or to require that every attendee be
09:22 protected when not in the courtroom.
09:22 The trial is scheduled to take place over two to three
09:22 weeks if you include the pretrial conference and jury
09:22 selection. There's a holiday weekend in between. There's much
09:22 happening in the locale, as VLSI acknowledges. Football games
09:22 are happening, restaurants are opening. There are -- the
09:22 precautions the Court might take in the courtroom will not be
09:22 occurring outside the courtroom.
09:22 If I turn you to the next slide, Slide 5 -- it's actually
09:22 back to Slide 5 -- Dr. Troisi herself has suggested that during
09:23 this period doing what we would normally do is not a wise and
09:23 prudent idea. This is what she said. Things that we have done
09:23 in the summer when the number of cases were low, like go to the
09:23 grocery store, might be risky because the number of cases in
09:23 the community are so much higher.
09:23 Second thing that Dr. Troisi's declaration doesn't address
09:23 is the question of all the people traveling to Waco to attend
09:23 the trial. Witnesses, lawyers, staff.
09:23 If I turn you to Slide 6 , Your Honor, in another
09:23 proceeding Dr. Troisi gave another declaration, and in that
09:23 other declaration she said that there is a high risk of
09:23 contracting and spreading the virus or traveling through
09:23 airports using air travel. And in fact, Your Honor, if I take

this Slide 7, the CDC, within the last two weeks, has issued a set of guidelines on travel for November, December and January. And it has said -- it's issued a set of questions and said that if you answer yes to these questions, you should delay travel till after this period of time. For most of the trial participants, the answer would be yes to six out of the seven questions at least.

The second set of problems, Your Honor, is what is the list of protections that VLSI proposes. Testing is helpful without any doubt at all, and there's no doubt it can be effectively used to mitigate risks, but the testing that's proposed by Dr. Troisi is not going to mitigate the risk. She proposes that negative tests five days before trial, but a lot can happen in five days with a 14-day incubation period. Having a negative test reduces risk, but it does not eliminate it.

Again, you don't have to take our word for it. Here's what Dr. Troisi says on Slide 8 in another context. "Testing is a good thing, but it does not make you bulletproof."

Rapid testing can be helpful too in some circumstances, but it has a high negative/false negative rate. Again, Dr. Troisi agrees. If you turn to Slide 9, Your Honor, you will see that she confirmed that rapid antigen tests have high false negative rates.

It's also not clear to us how VLSI would propose arranging

09:25 to get rapid tests for everyone, other than having folks go to
09:25 a local testing facility. It's not clear that we could order
09:25 the jurors to go to a local testing facility; it's not clear
09:25 that local testing facilities would have the resources. And in
09:26 any event those are circumstances that might expose people to
09:26 the COVID-19 virus.
09:26 Your Honor, I also suggest using N95 masks, which are
09:26 usually reserved, as Your Honor knows, for frontline health
09:26 care workers. The supplies of those masks and hospitals is in
09:26 short supply.
09:26 And in terms of the courtroom setup, there are surely
09:26 steps that can be taken, as Your Honor has done before, but
09:26 there are some fundamental facts that don't change for a two-
09:26 to three-week trial, and one is that large indoor gatherings
09:26 where people are speaking and interacting for long periods of
09:26 time are dangerous.
09:26 And again I'm going to quote from Dr. Troisi. She has
09:26 submitted a declaration in another proceeding, and what she
09:26 says is, "The very nature of a trial setting itself would
09:27 create an environment that elevates the risk of transmitting
09:27 COVID-19, as gathering people indoors increases the risk of
09:27 COVID-19 transmission."
09:27 Now, she has also said -- if I turn you to Slide 11, she's
09:27 explained just why that is true. Now, without belaboring the
09:27 details, Slide 11 puts -- has what Dr. Troisi has said about

09:27 COVID-19 aerosols remaining infectious for 16 hours and how that could affect transmission in the courtroom.

09:27 We appreciate that, Your Honor, as I said, has conducted trials without incident, and VLSI cites that or suggests that most of the trials conducted over the fall didn't evidence things either. But the problem is those trials occurred before the current surge and before the fact that vaccines were not only on the horizon but in fact being approved as we speak.

09:28 So if I turn you to Slide 15, Your Honor. Slide 15 captures the difference between imperative time, Your Honor, at the Roku trial and today. The difference is almost 100 percent different. And since that time there was the trial that Judge Mazzant had where 15 people became infected, resulted in a mistrial, and we understand his trial has been reset for later in January.

09:28 There is a risk assessment tool that is used by many people in the field of Dr. Columbus and Dr. Troisi. It's from Georgia Tech, and if you use that tool as we have shown on Slide 16, there's a 52-percent chance that at least one person in a crowd of 25 should be a small -- a portion of the trial will get COVID-19, and this doesn't account for travel to and from Waco for the trial.

09:29 Recognizing these risks, courts in Texas and throughout the country have decided to continue trials not indefinitely but for some period of time, March, April. Judge Schroeder has

09:29 done it. Judge Gilstrap has done it. And on Slide 17 we have
09:29 just provided for the record and for Your Honor the comparative
09:29 data of cases per 10,000 in these different jurisdictions.
09:29 Third, Your Honor, I don't think there's any real dispute
09:29 about prejudice that could result from a short continuance.
09:29 The increase in severity of pandemic means that we will not
09:29 likely be able to present to you a case to the best of our
09:30 ability in January.
09:30 We've already told Your Honor that two of Intel's expert
09:30 witnesses for health and age reasons will not be able to attend
09:30 the trial. I have been in touch with all of our witnesses and
09:30 several, as we get closer to the trial and as events continue
09:30 to occur and as the situation continues to worsen, are
09:30 expressing concerns about traveling and are expressing concerns
09:30 about appearing at the trial.
09:30 We understand that Your Honor has suggested that it might
09:30 be possible to have people testify remotely, but having some
09:30 people testify remotely and some people not is not a solution
09:30 in a case of this magnitude.
09:30 And as I said, if Your Honor goes forward on January 5th
09:30 and January 11th, I'll be there. But in fairness to our team,
09:30 the young folks that work with me, I've given them each the
09:31 opportunity to decide for themselves whether they should take
09:31 the risk and whether their families should take the risk.
09:31 Our inability to bring all of our witnesses to trial, our

09:31 ability to have some of them testify only remotely and our
09:31 ability not to have our entire team here raises concerns that
09:31 are beyond just prudential concerns. They are -- if I turn you
09:31 to Slide 19, and as we said in our reply, real due process the
09:31 Seventh Amendment concerns that other courts have confronted in
09:31 similar circumstances.
09:31 And without belaboring the point, what Slide 19 depicts or
09:31 demonstrates is that due process safeguards that Your Honor
09:31 protects -- provides Intel a full and fair opportunity to
09:31 litigate. The Hardy case cited in our opening brief on this
09:31 issue is very instructive. If the trial proceeds in January
09:32 and Intel witnesses cannot testify in person, we submit that
09:32 under Hardy and due process deprives Intel of that right to a
09:32 full and fair opportunity.
09:32 If all of VLSI's witnesses will testify in person while
09:32 some of Intel's witnesses will not, that further compounds the
09:32 problem. In fact, in the Guardant Health case that we cited,
09:32 Your Honor, the Court required all witnesses to testify
09:32 remotely in order to avoid an inference and prejudice.
09:32 Relatedly, remote presentation poses some -- just by
09:32 Intel, poses some risk of jury prejudice because the jurors
09:32 will have to be there in person. If one party is presenting
09:32 witnesses all in person, one party cannot, and we will not be
09:32 able to, there is real risk the jury will view that in a way
09:32 not beneficial to Intel. The same implications, as we suggest

09:33 from the slide, are implicated by the Seventh Amendment for the
09:33 reasons articulated in the cases we have provided to you.
09:33 Your Honor, that has to be balanced against the cases
09:33 before you, and I understand completely the issues you've
09:33 raised about backlog and desire to get to trial, but if I could
09:33 turn to Slide 18, so we could really have a reality check on
09:33 the asymmetric risk of going forward with the trial in January.
09:33 The three patents at issue in this case as depicted on
09:33 Slide 18 issued in April 2009, May 2010, and April 2012, the
09:33 first of the products accused of infringement issued almost
09:33 nine years ago in February of 2012.
09:34 The patents were acquired by VLSI almost seven or eight
09:34 years later, and then this case was commenced before Your Honor
09:34 in April of 2019. The patents are seven to ten years old.
09:34 Accused products are in some cases eight years old, and patents
09:34 were only acquired by VLSI in the last two or three years. All
09:34 that's sought is damages. A continuance until March or April
09:34 will not prejudice VLSI in any way, given this chronology on
09:34 this frame.
09:34 As I said, vaccines are beginning distribution. Hopefully
09:34 things will subside over the winter months. For a case pinning
09:34 billions of dollars on this chronology that's before Your
09:34 Honor, weighing a three month or so delay against the
09:35 asymmetric risk to the participants and others leads us to
09:35 suggest that a continuance is compelled.

09:35 Now, we understand and appreciate that Your Honor wants to get the case going and the pandemic has already ground many things to a halt. But we also know the community nationally and in Waco is in a situation where things are getting worse. We all share and want this to be over. We all want business to proceed as usual.

09:35 The suggestion that we, Intel, or I, Bill Lee, are somehow afraid to try this case is just wrong. We are coming to Your Honor because a delay of three or four months could substantially mitigate personal health and safety risks to folks, while doing nothing other than delaying a trial where if VLSI prevails, it will recover many damages with perhaps prejudgment interest that will fully compensate them.

09:36 Both public health experts that have provided Your Honor with declarations, the VLSI expert, our expert have said the next month is not the time to travel. The next month or two is not the time to have large gatherings. The next two or three months is a time to wait, and hopefully after that two or three months, we'll be in a bit different and better situation.

09:36 And it's for those reasons, Your Honor, that we suggest that the public interest favors a continuance, and I'll end by quoting Dr. Troisi on Slide 14. She specifically urges all of us to follow the CDC guidelines. That includes the CDC guidelines that would tell us that having people to travel at the end of this month at the beginning of January from other

09:37 1 countries, from Arizona, from California, from Oregon, from
09:37 2 Massachusetts, from New York, is not the prudent thing to do.
09:37 3 For all those reasons, Your Honor, we would ask you to
09:37 4 continue the case until March or April. We think it's in the
09:37 5 best interest for all involved but, most importantly, it's in
09:37 6 best interests of the public health and safety of the community
09:37 7 and all the participants. Thank you.
09:37 8 THE COURT: Can you tell me, if you know, what the current
09:37 9 status is of the Circuit deciding what you've asked them to
09:37 10 decide?
09:37 11 MR. LEE: Yes, Your Honor. Briefing was completed
09:38 12 yesterday, so it's with whoever the panel is now -- we don't
09:38 13 know who the panel is because we don't know who the motions
09:38 14 panel is for the month. I think that, you know, now that they
09:38 15 have it -- last week was argument week. Now that they have it,
09:38 16 we would hope that it would be a prompt decision.
09:38 17 I think, you know, in the interest of full disclosure,
09:38 18 Your Honor, the second motion which after VLSI addresses the
09:38 19 first is the motion to stay the order, is a much shorter
09:38 20 argument.
09:38 21 I think that if Your Honor was not inclined to grant that,
09:38 22 we would actually move the Federal Circuit this week, just stay
09:38 23 the order until it decided the issue itself. But I think that
09:38 24 time imperative is primarily that without a stay of the order
09:38 25 with the possibility at the pretrial on January the 5th, people

09:39 will have to start traveling within two to three weeks, and
09:39 that's sort of right in the target zone for the most
09:39 problematic time.
09:39 THE COURT: So I think you may have thought you answered,
09:39 but you probably just know a lot more about Federal. I had one
09:39 Federal Circuit argument which I won. I left -- I quit at one
09:39 and 0, but I'm not -- so what I care about is, do we know
09:39 when -- are you able to have an idea of when the Circuit might
09:39 resolve this for us? I don't know enough about the Federal
09:39 Circuit practice.
09:39 MR. LEE: Your Honor, when you're one and 0, it's always a
09:39 good time to quit.
09:39 (Laughter.)
09:39 MR. LEE: You know, you win one and you never put a zero
09:39 on the side of the ledger.
09:39 THE COURT: Rule 36. You know, before I got out, it was
09:39 good.
09:39 MR. LEE: It's even better. That's exactly the right time
09:39 to quit.
09:39 Your Honor, on average the mandamus petitions take a
09:39 couple of months to decide, but, you know, they have different
09:40 time imperatives and different motion panels.
09:40 I think that, you know, we're hopeful they'll realize that
09:40 with the January trial coming up that they need to get to it
09:40 sooner rather than later. I think one of the reasons we would

09:40 move to stay the order this week, if Your Honor didn't stay it, is basically to emphasize the time imperative so that we can get a decision.

THE COURT: And let me make sure you understand.

I fully understand why Intel's taking this action with the Circuit. It doesn't upset me. I think you've got to do the -- I've told you all this on the record.

I think your firm and the others need to be doing everything they can to protect their clients' interests, and I understand we are a in very unique time with me trying to figure out how to get to trial and you all wanting to protect your clients' interest and Mr. Chu wanting to protect his.

So I'm not unhappy at all that you all have taken this up with the Circuit to protect your clients' rights. It won't affect me at all if you try and stay it this week. Clarity from the Circuit is always good for me.

I'm doing the very best I can to do what I think is best, but that's the way our system works, is the Circuit -- this is -- I think this is a fairly novel -- you know, we haven't had to set trials during pandemics before. We haven't had to decide where the trial ought to be during pandemics before, and so I look forward to any guidance the Circuit gives me on anything that I do.

So I just want you to know, number one, I don't think you're afraid to try the case. That has never crossed my mind.

09:41 Number two, I bear no unhappiness at all for your efforts to
09:42 have the Circuit deal with this. This is novel ground for
09:42 plowing, in my opinion. So it's -- I'm just curious. It's
09:42 helpful for me to know what's going on.
09:42 By the way, you know, when the Circuit grants mandamus,
09:42 they don't tell me. So, I mean, it's -- you know, and so I may
09:42 learn about it in the press or from texts I get. But it's
09:42 not -- so whenever I do, I want you all to feel comfortable
09:42 that I respect your right to take these issues up and just --
09:42 and let me know if anything that happens with what you're
09:42 doing.
09:42 MR. LEE: Your Honor, let me say two things. We
09:42 appreciate this. When this issue first came up in a
09:42 conference, you said exactly the same thing, and that's one of
09:42 the reasons we put the footnote in our first motion to say that
09:42 we, you know, from your days as a practicing lawyer but now as
09:42 a judicial officer, we appreciate your understanding that we
09:43 need to take what steps we need to to protect the clients'
09:43 rights but also the people we're working with. We appreciate
09:43 that a great deal.
09:43 What we will commit to you is we won't know how they rule
09:43 until they rule. They don't tell anybody. But to the extent
09:43 that there are events occur so that if we decide to move to
09:43 stay the order, we will let you know and provide courtesy
09:43 copies to your chambers immediately so that you at least know

what the current state of affairs is.

THE COURT: Appreciate that.

Mr. Chu?

MR. JABLON: Good morning, Your Honor. This is Iian Jablon on behalf of VLSI to argue the motion to continue and the motion to stay. And we appreciate the opportunity to speak with you this morning about these -- about these motions.

I'd like to make three basic points about Intel's motion to continue, and then I'd like to briefly respond to some of the comments that Mr. Lee made here this morning.

First, we strongly agree with Intel that this motion to continue was not filed in a vacuum. Intel has a track record in this case and other litigations between Intel and VLSI of wanting to defer a ruling on the merits for as long as it can. And this new motion to continue is entirely consistent with Intel's strategic position of wanting to delay the case.

And Intel has a lot of very smart attorneys, and they've done a lot of hard work trying to convince the Court that it's not safe to proceed. From our perspective a lot of that is advocacy, Your Honor, and needs to be taken with a grain of salt.

Second, Your Honor, as our expert's declaration makes clear, we believe a trial can be conducted safely in January in Waco. We believe Your Honor's already established the trial can be conducted safely in Waco through actual trials where, to

09:44 the best of our knowledge, none of the participants were
09:44 sickened. And we think that's a critical factor, Your Honor.
09:45 Our expert has 40 years of experience in epidemiology.
09:45 She's a true expert on viruses. We encourage Your Honor to
09:45 take a look at her resume. She's the gold standard of experts
09:45 who would be in a position to testify about this.
09:45 She's actually gone down and visited Your Honor's
09:45 courtroom in Waco. And her testimony under oath before this
09:45 Court is that it will be safe to proceed in January if we
09:45 follow the precautions. And we believe that's critical, Your
09:45 Honor.
09:45 And I also want to say, Your Honor, needless to say,
09:45 Mr. Chu, Mr. Hattenbach, myself, the rest of the VLSI team, we
09:45 have no interest in participating in a trial if we didn't think
09:45 it was going to be safe. So we absolutely believe in the word
09:45 of our expert that this trial can be conducted safely for all
09:45 the participants.
09:45 Third, and I think this is also very important, we don't
09:46 believe that moving this trial to March or April is going to
09:46 make a material difference. All the problems that Intel has
09:46 identified with proceeding with the trial in January are very
09:46 likely still going to be with us in March and April.
09:46 And just for starters, as Your Honor is aware, the vaccine
09:46 is not going to be available to the entire United States by
09:46 March or April, nothing like it. And even when the vaccine is

09:46 available broadly, it's going to require two doses, it's going to require six weeks.

And so even in a hypothetical world, Your Honor, where the vaccine was available broadly by April, realistically that would put us into the summer in terms of when people would actually be safe who'd had the vaccine.

And then on top of that, as Your Honor's well aware, there's lots of literature out there indicating that a big percentage of the population has no intention of getting the vaccine. So pushing the trial off for several months really isn't going to make -- isn't going to make this materially safer for anybody.

So we don't believe that a three-month continuance is going to solve the problem. And in fact what we would expect is if Your Honor continues the trial to March or April, that Intel would just be back with another motion to continue at that time, saying it's still too dangerous to proceed.

And so really we view Intel's motion as an invitation for Your Honor to kick the can down the road so that Intel can seek another delay later.

I also want to respond briefly to Intel's criticisms of Dr. Troisi. Dr. Troisi has spoken many times about COVID in many different contexts. And from our perspective Intel has presented snippets of some of her statements that are taken out of context to suggest that her opinions offered in this case

are not reliable.

And just for example, Intel showed you some quotes in its slides from various media sources where Dr. Troisi was talking about settings where masks and other precautions aren't being used. And that's not the situation she's talking about for this case. And not surprisingly, Dr. Troisi's opined that those other settings where people aren't wearing masks can be dangerous.

But again that's not what she's talking about here. In this case she's addressing the safety of a trial in Waco using a certain set of safety protocols. And her opinion is that the trial would be safe if those protocols are followed.

Intel's counsel also showed you some snippets of a declaration that Dr. Troisi signed back in July in a case involving Apple. And in that case Dr. Troisi offered the opinion that the trial should be continued from the summer to the fall.

And what Intel didn't show you was the reason she gave for that opinion. She had two reasons in that declaration for giving the opinion. And the first one was, in her opinion in July there were going to be fewer cases in Texas in the fall. And it turns out she was right.

Intel's third slide in the slide deck that they presented to Your Honor shows that the case numbers went down by more than 50 percent between July and September. So she was

09:49 correct. Based on the information available at the time, she
09:49 believed cases were going to go down and it would be safer.
09:49 She was right. That's not her opinion now. Her opinion now is
09:50 that there isn't going to be much of a change between January
09:50 and March or early April.
09:50 Second of all, Dr. Troisi offered the opinion back in July
09:50 that it made sense to put off that trial involving Apple,
09:50 because there was another trial scheduled for August 3rd at
09:50 which new precautions were going to be taken for the first
09:50 time. And Dr. Troisi offered the opinion back in July we
09:50 should let that trial go forward and we should see if the
09:50 precautions worked. We should see if the safety precautions
09:50 worked.
09:50 And they did. As Your Honor's well aware, there have been
09:50 more than 20 jury trials conducted in Texas in federal courts
09:50 since September. And to the best of our knowledge, only one of
09:50 the 20-plus trials resulted in any infections.
09:50 And so now almost five months after submitting that
09:50 declaration in the Apple case, Dr. Troisi's opinion is based on
09:51 actual trials that have taken place in Texas, including in Your
09:51 Honor's courtroom, she believes the trial can be conducted
09:51 safely in January, provided we follow those precautions.
09:51 Now, Intel's also suggested that even if the trial could
09:51 be safe, the travel to Texas won't be safe. And we have a few
09:51 issues with that. Number one, there's lots of literature

indicating that air travel is actually extremely safe, far safer than people might expect.

However, there is risk in going to public airports and other public aspects of travel. Those risks can be substantially mitigated by taking the same types of precautions that we would take in a court setting, masks, social distancing, et cetera.

But more to the point, if that was what was really driving Intel's concern, the concern that traveling to Texas would be unduly safe in a commercial setting, Intel could have paid for its entire trial team and all its witnesses to travel privately to the trial in Waco for a lot less than its cost to litigate this motion to continue.

And in the context of this case with these parties, where Intel can certainly afford to arrange for private transport for its attorneys and other participants if it chooses to, Intel's discussion of the potential risks of commercial travel is just a red herring, Your Honor. And it actually just underscores the tactical nature of Intel's motion, because what Intel's really seeking here is a delay.

I also want to speak briefly about the issue of prejudice, Your Honor. Intel argues that it would be prejudiced if the trial proceeds in January, because a couple of its witnesses who have not even been identified, the subject matter of their testimony has not been presented to Your Honor. There's a

possibility that a couple of their witnesses might choose not to attend in person.

Your Honor, from our perspective, that type of a generic statement where the witnesses aren't even identified, where it's not clear that they won't attend is certainly not sufficient to show prejudice sufficient to warrant yet another continuance of the trial date here.

And we would also respectfully submit that if a couple of Intel's experts choose to testify by video rather than appearing in person, there's no reason to think that's going to make a material difference in the trial.

I would also encourage Your Honor to look at the cases that Intel cites in its slide talking about the constitutional ramifications of continuing -- failing to continue the trial. From our perspective those cases do not support Intel's position. Intel's not going to be able to show that the jury pool has been tainted because of COVID. Intel's not going to be able to show it was denied a fair trial because a couple of witnesses it fails to identify in its motion may choose not to come in person.

So in conclusion, Your Honor, we strongly believe a trial can be conducted safely in January. We believe Your Honor's already demonstrated a trial can be conducted safely. We believe that moving the trial to late March or early April, as Intel suggests, isn't going to solve anything. And it's simply

09:54 going to add prejudice to VLSI and further impact this Court's
09:54 docket for strategic reasons for Intel.
09:54 And for all those reasons, Your Honor, we respectfully
09:54 submit that the motion to continue should be denied.
09:55 THE COURT: Mr. Lee?
09:55 MR. LEE: Yes, Your Honor. I'll quickly respond briefly.
09:55 First, I hope Your Honor expects me to categorically
09:55 reject the notion that there's some nefarious strategic purpose
09:55 to the motion. I mean, not everything that a lawyer does has
09:55 to be for some illegitimate nefarious motive. As Your Honor
09:55 said, this is an unprecedented set of circumstances. It's not
09:55 a --
09:55 THE COURT: Mr. Lee, I will tell you, somehow when I was
09:55 either born or through my work as a lawyer I just developed
09:55 this filter where I kind of tune out all of that stuff in both
09:55 directions. You know, I have a discovery hearing where someone
09:55 complains about what the other side did and how awful they
09:55 were, and then the other side has to respond to why they're not
09:55 awful and all that. And I tend to not -- I just tend to zone
09:56 out on that.
09:56 Look, what I clearly care about here is, you know, can I
09:56 handle this in a fair manner? Can your folks get here in a
09:56 safe way? Would it be fair to have witnesses appear by Zoom?
09:56 And those are the things I'd have you focus on.
09:56 MR. LEE: Yeah. So, Your Honor, let pass on my first

09:56 point and make just three points in rebuttal.

09:56 The first is on the travel, all we have to do is look at the CDC guidelines. They have explicitly discouraged travel for December into January into February. They have explicitly provided guidelines on when you shouldn't travel if you can avoid it, and those are the guidelines we put in the slides. That is the answer to the question of whether there should be travel.

09:56 And, Your Honor, we have lawyers and witnesses coming from multiple states as we've described to you in the papers. Each of those different states have different quarantine requirements now, different stay-at-home orders now. The travel issue is a substantial issue, particularly given that folks are going to have to start traveling, as I said, in two and a half weeks.

09:57 The second point is this: We'd be lying to Your Honor, we'd be less than candid if any of us could say we could predict what's going to happen in March and April, but I think what we can say -- and actually what both experts have told Your Honor is things look differently now than they did back in November, and they look differently now than they're going to look in January.

09:57 The vaccines are not someone's wish nor prior there. They're real things that are being put into people as we speak. And there are people who are going to -- who want to

participate in this trial, who are going to be the beneficiaries of those vaccines in February and March.

And, you know, at the end of the day, Your Honor, as I said, you know, these cases were in Delaware before they arrived on Your Honor's docket. A trial in April or May is going to get them to trial faster than they ever would have gotten to trial in Delaware.

Requiring us to have the trial earlier and have witnesses -- and I should say on the witnesses, Your Honor, as we said in our papers, we haven't identified them specifically. We will if the Court wants, but I'm -- intend to do is to wait till closer to the time of trial, and if they're still unwilling to come, we will provide Your Honor with the declarations that describe their preexisting health conditions and the reason they can't come.

But I don't really understand VLSI's suggesting that we're making it up; we're not. And at the end of the day, I think the question is this, is it worth taking a damages case that could have been brought by someone multiple years ago, waiting for three months, which still would be getting it to trial very quickly, Judge, by any District Court's standard, is it worth doing that to avoid the asymmetric risk that someone could contract COVID-19 and, worse yet, that someone could have long-term health conditions that result or worse yet, someone who could die? No one wants that to happen. But it's not

worth the risk.

THE COURT: Any response?

MR. JABLON: Just very briefly, Your Honor, to note that again, not only has our expert testified under oath that it wouldn't be safe to proceed in January but that in her opinion it will make very little difference if we move the trial to late March or early April as Intel suggested.

So for those reasons, we believe the motion should be denied.

THE COURT: I'll be back in a few seconds.

(Pause in proceedings.)

THE COURT: We're going back on the record.

Can everyone hear me?

Mr. Ravel, I'll ask you.

MR. RAVEL: Judge, let me unmute and say we can hear you loud and clear.

THE COURT: Thank you very much.

The Court is not going to continue the case. The Court is very sympathetic to the arguments made by Intel. I do believe that Intel can make arrangements to get witnesses who do want to attend here in a safe manner.

Also with regard to the appearance by Zoom of witnesses, we did that during the Roku trial, and we talked to the jurors afterwards. The jurors thought that there was no difference in the credibility of the witnesses who appeared. There's that

10:07 option.

10:07 We also at the Roku trial had a witness who wanted to attend who had special conditions that made it perilous for him, but he wanted to attend. It was his decision. So we made accommodations for him to come in through the back of the courthouse by himself up through the stairs. He came in through the back of the courtroom. He was seated in the witness chair surrounded by Plexiglass. He then left and left through the back of the courthouse, and we were informed by everyone that he felt that he felt comfortable in being able to appear in that manner where he didn't have to interact with anyone.

10:08 So I've heard all of Mr. Lee's concerns. They certainly are things that I've worried about for months, but I think I need to move forward with this trial.

10:08 Mr. Lee, I'm happy to hear with you or with respect to a stay, but I think we've -- I think I've already addressed that. I'm certainly comfortable with you and Intel going to the Circuit or doing whatever it is that you need to do to make sure that the Circuit is okay with the movement of the case from Austin to Waco.

10:09 And I don't know, frankly, what the Circuit 's position is on whether they're going to be telling district judges whether or not they can have trials or not, but this is a new era, and they're the ones who grade my papers, so I'm happy for you to

10:09 take up whatever you want to with the Circuit.

10:09 MR. LEE: Your Honor, this would be my suggestion, which is rather than argue the motion to stay, which, you know, much of it would be redundant of what we just argued now, my suggestion would be that given your ruling that you deny the motion to stay so that we can then move with the Federal Circuit promptly, and that will, I think, put us all in the position that we can best be in to get an answer from the Federal Circuit promptly.

10:09 So I think rather than argue, I would ask you to deny the motion for the reasons, you know -- I think you know what my arguments would be.

10:10 THE COURT: I do.

10:10 MR. LEE: I don't think I would surprise you in any way. I don't think they would be successful at this moment in time. But if you would deny the motion, then we could seek the relief of the Federal Circuit.

10:10 THE COURT: Well, I hate to give up an opportunity to hear you argue anything; it's one of the best parts of my job. However, given that we've got, I think, 17 motions to go through today, I think that would be wise. I will deny the motion to stay.

10:10 Something you all ought to be thinking about as well is that I'm skeptical we will get through everything we need to get through today. I am perfectly open to -- we're going to go

10:10 today. I mean, I've got today booked, but I think we should
10:10 schedule a day next week as well, Tuesday or Wednesday. I've
10:10 got a Markman on Monday. But I think we ought to plan on
10:11 scheduling a day Tuesday or Wednesday to finish up whatever
10:11 motions we do not get finished with today.
10:11 If we're close at 5:00 or whatever, that's fine, but I
10:11 don't want to hurry what we're doing today. If you all are
10:11 free Tuesday or Wednesday next week, I would be happy to finish
10:11 them at that time.
10:11 Mr. Lee, I'll start with you.
10:11 MR. LEE: Your Honor, that's fine with us. I wanted to
10:11 remind Your Honor we were in touch with your clerk that at 3:30
10:11 your time today there is a hearing in California in the
10:11 antitrust case.
10:11 THE COURT: Okay.
10:11 MR. LEE: So a couple of us -- Ms. Major and I will step
10:11 out of this hearing, but everybody else that Mr. Ravel
10:11 introduced will be here and can address the motions.
10:11 THE COURT: Okay. Very good. So we are going to start.
10:11 My understanding -- I could be wrong, but my understanding is
10:11 the first motion that we are going to take up is the VLSI
10:12 Daubert to exclude damages related to testimony of Intel
10:12 experts; is that correct?
10:12 MR. CHU: Yes.
10:12 THE COURT: Okay. Mr. Chu, and Mr. Lee, of course, I have

personally reviewed this one. I've been through all of them with my clerks, but I have personally reviewed this one, and I welcome you going -- as I recall, there are several experts that we need to go through. So if you will just -- I don't have a perfect memory, unlike you and Mr. Lee. As you go through, if you will -- as you go through each expert, if you'll give me a little reminder of which issue they are testifying about.

I think, for example, what's off the top of my head is the idea that, you know, the patent is -- has the worth of whatever it was purchased for, plus there's a ceiling on what the patent's worth. I know there's an expert on that.

And so but if you'll go through each one, I've read all of this and we'll take -- why don't we do this? Why don't we take up one Daubert -- why don't we take up one damages expert at a time?

MR. LEE: Your Honor, the motion is actually Mr. Chu's motion.

THE COURT: Yes. I knew that. No. I knew that.

MR. LEE: Whichever order he wants to. I should say that for the three, Mr. Huston, who is our licensing hypothetical negotiation person, I'll make the argument for.
Mr. Pascarella, Mr. Mueller will make the argument. And for Dr. Colwell, Ms. Sooter will make the argument.

THE COURT: No. I was aware it was Mr. Chu's argument for

10:13 sure. Mr. Chu --

MR. TINDEL: Judge, this is Andy Tindel. I hate to interrupt, but just on the record, I believe the parties have agreed at this point that the transcript going forward for the remainder of the motions will be under seal. And I think this is the appropriate time to let the Court and Ms. Davis know that.

THE COURT: Mr. Tindel, I'm going to say this as respectfully as I can, but that tie, I'm actually a little glad that we're on Zoom and I can only see the very top of it. I'm sure it's...

(Collective laughter.)

MR. TINDEL: It's a Versace, Your Honor. That's got to mean something.

THE COURT: It must. At any rate, Mr. Chu, if you would proceed with the first expert that you'd like to take up.

MR. RAVEL: Your Honor, I think at this point both client representatives on both sides need to step out because of the nature of this motion.

THE COURT: Look, I'm leaving it up to you all to police who's on the call and who isn't. So I'm happy for it -- for reminders, and obviously if someone needs to drop off, that's fine with me.

MR. CHU: Thank you very much, Your Honor.

(SEALED PROCEEDINGS HELD.)

UNITED STATES DISTRICT COURT)
WESTERN DISTRICT OF TEXAS)

I, Kristie M. Davis, Official Court Reporter for the United States District Court, Western District of Texas, do certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

I certify that the transcript fees and format comply with those prescribed by the Court and Judicial Conference of the United States.

Certified to by me this 16th day of December 2020.

/s/ Kristie M. Davis

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