



February 1, 2021

VIA E-FILING

The Honorable Leonard P. Stark
J. Caleb Boggs Federal Building
844 N. King Street
Room 6124, Unit 26
Wilmington, DE 19801-3556

Re: *3G Licensing, S.A., et al. v. BlackBerry Corporation, et al.*, C.A. No. 17-cv-82-LPS
3G Licensing, S.A., et al. v. HTC Corporation, C.A. No. 17-cv-83-LPS
3G Licensing, S.A., et al. v. Lenovo Holding Co. Inc. et al., C.A. No. 17-cv-84-LPS
Koninklijke KPN N.V. v. LG Electronics Inc. et al., C.A. No. 17-cv-85-LPS
Koninklijke KPN N.V. v. Sierra Wireless, Inc., et al., C.A. No. 17-cv-90-LPS

Dear Chief Judge Stark:

Plaintiffs in the above matters write to respectfully request a teleconference to discuss with the Court whether, in light of current COVID-19 conditions, the Court anticipates that the first trial in these matters will take place in April as currently scheduled. If not, Plaintiffs further would appreciate the Court's direction as to when a first trial likely is to take place so that they can work with Defendants to propose an amended schedule that better reflects the Court's expectations regarding a first trial date and avoids the need for the parties to begin exchanging pre-trial materials on February 26.

The Sierra Wireless Defendants in 17-cv-90 join Plaintiffs' request for a teleconference.

Defendant HTC Corporation ("HTC") in 17-cv-83 also joins in Plaintiffs' request and further notes that Plaintiffs have indicated their intent to go to trial against HTC last among the above captioned cases (*i.e.*, after two trials on the KPN patent in 17-cv-85 and -90 and two trials on the 3G Licensing patents in 17-cv-82 and -84). As part of the requested teleconference, HTC requests the opportunity to discuss with the Court whether pre-trial disclosures for HTC should occur prior to those trials considering the significant possibility that pre-trial issues and trial preparation as it pertains to HTC's trial(s) against KPN and/or 3G Licensing will evolve based on each of the earlier trials.

Plaintiff 3G Licensing S.A. has indicated its intent to go to trial against the Lenovo Defendants (case 17-cv-84) second to last among the remaining defendants, thus the Lenovo Defendants join Plaintiff 3G Licensing S.A.'s request for a teleconference.

LGE's Position: The LGE Defendants join in Plaintiff's request and provide their concerns about holding an April trial date before the teleconference so that the Court may factor in those concerns in determining whether trial should proceed in April.

Unfortunately, the current conditions for the COVID-19 pandemic are still fluid and remain of great concern. With even more infectious variants now being identified, there is no guarantee that circumstances will be any different over the next few months. Against this backdrop, it is simply not practical to conduct an in-person jury trial beginning on April 12, 2021. This is especially true given the new U.S. requirement of a negative COVID-19 test before entry into the

country, which has the potential to affect the ability of corporate representatives and certain key witnesses from being able to travel to the U.S. for trial. Moreover, a partially or fully remote trial poses serious due process concerns and would prejudice LGE.

There is also no reason to rush to hold a trial in April. The lone patent in the case expired in 2016, and any relief is limited to monetary damages. KPN thus will not suffer prejudice from a temporary postponement. LGE respectfully requests that the Court postpone the April 2021 jury trial date for a later date when the trial can be safely conducted in-person.

The dangers and impracticalities of an in-person trial warrant postponement

An in-person trial in April 2021 would create significant practical concerns and health risks for LGE's witnesses. Most, if not all, of LGE's expected trial witnesses are located in Korea and would have to travel to Delaware for trial. As of January 26, 2021, the United States requires proof of a negative COVID-19 test, taken within three calendar days of departure or proof of recovery from the virus within the 90 days preceding the flight. COVID-19 Testing Required for U.S. Entry, *available at* <https://travel.state.gov/content/travel/en/traveladvisories/ea/covid-testing-required-us-entry.html>. This new restriction creates the possibility that LGE's corporate representative or key witnesses may not be able to enter the United States because they cannot satisfy the new restriction. The absence of those witnesses would severely prejudice LGE.

Even if LGE's witnesses are permitted entry into the United States, they face hurdles getting back into Korea. Travelers returning to Korea must provide proof of a negative COVID-19 test issued within 72 hours of their departure to gain re-entry and face a mandatory 14-day quarantine once they get back to Korea. COVID-19 Information, *available at* <https://kr.usembassy.gov/022420-covid-19-information/>. LGE's witnesses will have to travel from Korea, and LGE's counsel will travel from California and Texas. LGE's expert witnesses will have to travel from California, Massachusetts, and North Carolina. These participants face an increased risk of contracting COVID-19 either during travel or trial. In the Eastern District of Texas, a district court judge was forced to declare a mistrial after a COVID-19 outbreak with 15 trial participants contracting COVID-19. *See* "COVID-19 Outbreak Leads to Mistrial in EDTX," *available at* <https://www.law360.com/articles/1329617/covid-19-outbreak-leads-to-mistrial-in-edtx>. COVID-19 spread at this jury trial even though the Eastern District of Texas had taken extensive measures to ensure the safety of jurors, counsel, and court personnel. *See id.* (discussing temperature checks, social distancing, and mask mandates).

A fully or partially remote trial would be an inadequate substitute for live testimony

Presenting witnesses via videoconference would place LGE at a substantial disadvantage, and LGE objects to converting the trial to a partially and/or fully remote trial. Proceeding with witness testimony via video also raises significant fairness concerns where, as here, jurors would be compelled to be physically present in the courthouse and may resent witnesses who are not forced to face the same compulsory attendance requirements.

Video testimony may particularly prejudice LGE in this case, because most, if not all, of LGE's witnesses will need interpreters. The interpreter will have to translate questions from English to Korean for the witness, and translate the witness' answers from Korean to English for

the jury and the Court. The need for interpreters complicates remote testimony and leads to the potential for words to be lost in translation due to connection and other issues inherent in remote testimony. Further, a remote trial is both impractical and prejudices LGE because of the time zone difference between Korea and Delaware: LGE's corporate representative and witnesses who reside in Korea would be participating overnight from approximately 11 pm until 7 am local time in Korea (assuming a 9 am start time in Delaware).

As the Advisory Committee Notes to the 1996 Amendments to the Federal Rule of Civil Procedure 43 state: "The importance of presenting live testimony in the courtroom can never be forgotten. The very ceremony of trial and the presence of the fact finder may exert a powerful force for truth-telling." Thus, one court has determined that despite the COVID-19 pandemic, "[v]ideo and audio conferencing, used for hearings, are not available for trials." *United States v. Shaw*, Case No. 4:20-cr-00012-DN, 2020 WL 3216496, at *2 (D. Utah June 15, 2020).

LGE respectfully submits that the importance of live testimony at jury trial cannot be overstated. *See* Fed. R. Civ. P. 43 Adv. Cm. Notes to 1996 Amendment ("The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition."). Courts have recognized that video testimony is not an adequate substitute for in person testimony. *See generally Stoner v. Sowders*, 997 F.3d 209, 213 (6th Cir. 1993) ("The immediacy of a living person is lost."); *United States v. Lawrence*, 248 F.3d 300, 304 (4th Cir. 2001) ("[W]atching an event on the screen remains less than the complete equivalent of actually attending it.").

The COVID-19 Pandemic Precludes Empaneling a Fair and Representative Jury

Given that prospective jurors would need to complete a COVID-19 questionnaire, it is highly likely that certain classes of jurors—older jurors or others who are in high-risk categories—would be excluded from serving on a jury altogether. *See, e.g., Shaw*, 2020 WL 3216494, at *2 (continuing jury trial because, *inter alia*, "there is a significantly reduced ability to obtain an adequate spectrum of jurors" due to the pandemic"). Jury selection necessarily would be biased in favor of individuals or groups who are less risk-averse to, or less at risk from, COVID-19, either due to age, race, sex, access to healthcare, or pre-existing health conditions. Any resulting jury could be so unrepresentative of the Delaware community that it would violate LGE's due process rights. *See, e.g., United States v. Sullivan*, No. 3:20-cr-00337-WHO-1, 2020 WL 4584201, at *9 (E.D. La. Aug. 10, 2020) (noting defendant's "concern[] that the COVID-19 pandemic and its disproportionate impact upon African Americans unfairly impacted the process utilized by the Clerk's Office in summoning (and excusing) grand jurors," and granting discovery request because juror selection issues could potentially violate due process rights).

These same issues were before the Court in the co-pending *3G Licensing v. BlackBerry Corp.* case a month ago. This case was filed jointly with that case, and LGE requests that the trial scheduling issues here should be resolved the same way as the co-pending companion case, particularly before the Court, parties, and witnesses expend significant resources making extraordinary arrangements for travel and trial preparation. Accordingly, LGE respectfully requests that the Court postpone the April trial date until a time when trial can be conducted safely in person. Counsel for LGE is happy to provide additional information at the Court's request and can be available for a status teleconference to discuss these issues if that would be helpful to the Court.

Respectfully submitted,

/s/ Brian E. Farnan

Brian E. Farnan

cc: Counsel of Record (Via E-Filing)