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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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09:05 1 (December 15, 2020, 9:05 a.m.)

09:05 2 DEPUTY CLERK: Motion hearing in Civil Action 1:19-CV-977,
09:05 3 styled VLSI Technology LLC versus Intel Corporation.

09:06 4 MR. MANN: Your Honor, good morning. Mark Mann and Andy
09:06 5 Tindel from Mann, Tindel & Thompson for VLSI, and my colleagues
09:06 6 from Irell & Manella who will be doing the speaking today are
09:06 7 Morgan Chu, Ben Hattenbach, Ian Jablon, Alan Heinrich, Ian
09:06 8 Washburn, Amy Proctor, Babak Redjaian, Dominik Slusarczyk and
09:06 9 Charlotte Wen. And I think that's everybody, Your Honor, that
09:06 10 will be speaking. And we do have a client representative on
09:06 11 the phone from VLSI and, by video, our CEO Michael Stolarski.
09:06 12 And that's it, Your Honor.

09:06 13 THE COURT: Well, thank you.

09:06 14 MR. RAVEL: Steve Ravel for Intel.

09:06 15 THE COURT: One second, Mr. Ravel, if I can. I'd like to
09:06 16 thank the client representative for attending, as I always try
09:06 17 to do. And I look forward to hearing from all the counsel for
09:07 18 VLSI.

09:07 19 Mr. Ravel?

09:07 20 MR. RAVEL: Your Honor, Steve Ravel for Intel. Our client
09:07 21 representative on the line this morning, Mashood Rassam. A
09:07 22 second rep may arrive later, Kimberly Schmitt.

09:07 23 Our speakers today are Bill Lee, Joe Mueller, Mindy
09:07 24 Sooter, Amanda Major, Louis Tompros and Jim Wren. A number of
09:07 25 other Wilmer lawyers will attend to observe. Their names have

09:07 1 been given to Kristie to help her in monitoring the private
09:07 2 Zoom line and the integrity of it.

09:07 3 We're ready to proceed.

09:07 4 THE COURT: Very good.

09:07 5 And so everyone knows, I have five law clerks attending,
09:07 6 all of whom helped me on the different briefings. So this is a
09:07 7 very collaborative effort on the Court's part. We spent a lot
09:08 8 of time preparing on this.

09:08 9 And the briefs, as always, were just the platinum standard
09:08 10 for briefing. I wish every case could be briefed this well.
09:08 11 So it's -- it was very enjoyable.

09:08 12 I'll hear first from Intel with respect to the motion to
09:08 13 continue or to stay.

09:08 14 MR. CHU: Your Honor, just a quick note. This is Morgan
09:08 15 Chu. I and some of my colleagues are in what we call the Irell
09:08 16 courtroom that was set up for virtual matters. We've had a
09:08 17 virtual trial -- a real trial, but done on Zoom. And so when I
09:08 18 sit down and move away from the podium, you might not see me
09:08 19 personally or my colleagues, but we're all in this room
09:08 20 socially distanced from one another. Just wanted to let you
09:08 21 know that.

09:08 22 THE COURT: Okay.

09:08 23 MR. CHU: Thank you.

09:08 24 THE COURT: Mr. Ravel or Mr. Lee?

09:08 25 MR. LEE: Your Honor, it's Bill Lee. I'll take up the

09:09 1 first two motions with Your Honor's permission.

09:09 2 THE COURT: Yes, sir.

09:09 3 MR. LEE: Let me turn first, Your Honor, to the motion to
09:09 4 continue. We recognize that Your Honor has indicated your
09:09 5 desire to move the trial forward in January. The decision to
09:09 6 move for a continuance, we want you to know, is not one that we
09:09 7 have taken lightly or without careful consideration. We
09:09 8 respectfully submit that it is one that we needed to take for
09:09 9 the health and safety of everyone involved in the trial.

09:09 10 We take this step to avoid the potentially dire outcome
09:09 11 for any particular person's health or life. And we take the
09:09 12 step to avoid what we believe could be a substantial waste of
09:09 13 the Court's and the parties' resources.

09:09 14 Your Honor, I've been trying cases for 45 years. I have
09:09 15 never confronted a set of circumstances and asymmetric risks
09:09 16 such as those that are presented here. I've never filed a
09:10 17 motion to continue like this; I surely hope that I never have
09:10 18 to do it again.

09:10 19 This Court and some others were able to open your doors to
09:10 20 jury trials over the fall when it appeared the COVID-19
09:10 21 pandemic in Waco and elsewhere was ebbing and cases were not as
09:10 22 widespread as the peak of the summer. We recognize and
09:10 23 appreciate that Your Honor kept multiple safety precautions and
09:10 24 held trials without reported incident.

09:10 25 But the situation currently facing the country and

09:10 1 currently facing McLennan County in Texas is dramatically worse
09:10 2 than it was just a few months ago, and by all accounts is
09:10 3 expected to get even worse over the next month, especially
09:10 4 after Christmas and shortly after the new year.

09:10 5 We have provided the Court with substantial evidence
09:10 6 supported by the declaration of a local epidemiologist,
09:10 7 Dr. Cristie Columbus of Baylor Scott & White and Baylor
09:10 8 University Medical Center, that even if the Court were to take
09:10 9 every proposed precaution, the current state of pandemic means
09:11 10 there's a significant risk of COVID spreading during a two-week
09:11 11 trial to be held in January 2021.

09:11 12 This is, as Your Honor knows, a substantial case; billions
09:11 13 of dollars are at stake. The parties also have dozens of
09:11 14 lawyers, consultants, staff, witnesses, clients, others, that
09:11 15 will be traveling from across the country and in fact from
09:11 16 other countries to attend the trial. Several on my team
09:11 17 themselves have conditions that put them at high risk or have
09:11 18 family members that are in that circumstance.

09:11 19 These discussions and considerations that we're offering
09:11 20 to the Court are not offered in a vacuum. We are having them
09:11 21 in the context of a difficult state of affairs over the next
09:11 22 month or two or three in Waco and elsewhere.

09:11 23 As I'll show you in a second, the local Waco hospitals are
09:11 24 nearly at full capacity, and there're nearly no ICU beds
09:12 25 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

09:13 1 of the court personnel and attorneys, witnesses and
09:13 2 representatives are higher than just money. And we are asking
09:13 3 respectfully the Court to consider those and continue the trial
09:13 4 for a matter of months.

09:14 5 If we proceed in April, for example, the case will have
09:14 6 proceeded to trial faster than the average times for any other
09:14 7 district. Some of the patents were in the original Delaware
09:14 8 case who will have proceeded to trial faster than if the case
09:14 9 had stayed in Delaware where it was originally brought by VLSI.

09:14 10 And while I'm concerned for all those involved, I am
09:14 11 specifically concerned for the members of our team, because I
09:14 12 feel personally responsible for the witnesses and the lawyers
09:14 13 and the members of their family. I'll be at the trial no
09:14 14 matter what. I've given each of them the opportunity to tell
09:14 15 me if they're uncomfortable being here. And as I will tell you
09:14 16 in a few minutes, some of them are; they'll be able to make
09:14 17 their own decisions.

09:14 18 So let me go into things a little bit more specifically
09:14 19 and offer Your Honor some slides and some specific evidence.

09:14 20 First, the objective evidence confirms that the number of
09:15 21 COVID-19 infections and deaths is at a high point in the
09:15 22 pandemic nationally and in Waco. There's no disagreement
09:15 23 between VLSI and our expert and us.

09:15 24 As Dr. Columbus explained, McLennan County has experienced
09:15 25 a surge in cases, along with the rest of Texas and the United

09:15 1 States. Slide 1 demonstrates just this, and Mr. Lee will put
09:15 2 it on the screen, Your Honor. And I know that you have copies
09:15 3 as well.

09:15 4 Slide 2 shows the same is true in Texas. The reduction in
09:15 5 cases we saw in late summer is gone and the surge is nearing
09:15 6 record levels.

09:15 7 If I turn you to Slide 3, the surge continues in McLennan
09:15 8 County specifically. On December 12th there were 147 new cases
09:15 9 which has continued a trend of over 100 cases a day on most
09:16 10 days for some time. The local death rate has been increasing
09:16 11 in a very worsened way. On December 7th the number of deaths
09:16 12 reported was nine, the highest total since August 7th.

09:16 13 The burden on Waco of these high numbers of deaths and
09:16 14 COVID cases is substantial. If I turn you to Slide 4, you will
09:16 15 see that the County is at nearly 100 percent ICU capacity.
09:16 16 Data from the Center for Disease Control confirmed that as of
09:16 17 December 7th --

09:16 18 THE COURT: Mr. Lee?

09:16 19 MR. LEE: Yes, sir.

09:16 20 THE COURT: Just to let you know, as you're talking, I
09:16 21 think everyone should know, my wife is a nurse. She's working
09:16 22 right now in Ascension in the ICU. I have a probably better
09:16 23 than anyone on this phone call, firsthand information about
09:16 24 what's going on inside the hospitals -- at least her
09:17 25 hospital -- with respect to what's happening in ICUs. She was

09:17 1 there the last few days. So I'm pretty up to speed on what's
09:17 2 going on.

09:17 3 You can keep going. I just wanted everyone to know,
09:17 4 including the clients, that you know, I have a very personal
09:17 5 viewpoint into what's happening in McLennan County, especially
09:17 6 what's happening in the ICU and in the hospitals. So you may
09:17 7 continue.

09:17 8 MR. LEE: Your Honor, we knew that and we appreciate it.
09:17 9 I think two things. First, I think for purposes of the record
09:17 10 it's important for us to offer the evidence that we have from
09:17 11 the external sources so the record's complete. And while my
09:17 12 personal knowledge is not in the Baylor Scott & White Center, I
09:17 13 have two brothers, three nieces and a nephew, all of whom have
09:17 14 been working in COVID ICU wards in different locations. And
09:17 15 that honestly educates a little bit my presentation to you as
09:18 16 well.

09:18 17 THE COURT: And also with regard to the ICU beds that
09:18 18 you're showing here -- and my wife works at Providence. The 52
09:18 19 in use are not all -- they're not all COVID beds.

09:18 20 MR. LEE: Actually, Your Honor, that's what I was just
09:18 21 about to say. 90 percent of the inpatient beds were in use but
09:18 22 20 and 29 percent of those beds were occupied by COVID
09:18 23 patients, so you're correct.

09:18 24 The problem you have is that if a significant number of
09:18 25 the beds are occupied now, the availability of beds for new

09:18 1 COVID patients, or actually patients who are not suffering from
09:18 2 COVID but need ICU, as you know from -- as you know, causes
09:18 3 issues. In fact, Your Honor, that's one of the reasons that
09:18 4 Governor Abbott has asked hospitals to cancel elective
09:18 5 surgeries.

09:19 6 These numbers are only expected to increase and get worse
09:19 7 over the course of the winter, with another spike expected
09:19 8 after Christmas and New Year's. You don't have to take my word
09:19 9 for it. You don't have to take Dr. Columbus' word for it.
09:19 10 VLSI has offered to you the declaration of Dr. Troisi, and I'm
09:19 11 going to show you in the next few slides what she has said
09:19 12 about the issues that we're trying to address with Your Honor
09:19 13 now.

09:19 14 So if I take you to Slide No. 12, you will see that she
09:19 15 has said that there is a lot of concern about the holidays and
09:19 16 the surge that is expected to follow. And, Your Honor, as you
09:19 17 know, the final pretrial conference is scheduled for
09:19 18 January 5th. In order for people to attend the conference to
09:19 19 be prepared, they're going to have to be traveling within the
09:19 20 next two and a half to three weeks, precisely the period that
09:20 21 Dr. Troisi is talking about.

09:20 22 In fact, on the same day that she submitted a declaration
09:20 23 to you, if I turn you to Slide 13, she gave an interview to the
09:20 24 New York Times. And she was quoted as explaining that, "The
09:20 25 worst is yet to come in the next several weeks," precisely the

09:20 1 time when people will have to be traveling to attend the final
09:20 2 pretrial conference and prepare for trial.

09:20 3 Now, VLSI is not disputing that she has said these things
09:20 4 before. They're not disputing about what appears to be the
09:20 5 situation for December and January. The suggestion instead is
09:20 6 that April won't make a difference. But April can make a
09:20 7 difference; April will likely make a difference. And many of
09:20 8 the people who are most at risk are likely to be able to be
09:21 9 vaccinated, likely to be able to attend the trial.

09:21 10 Second, Your Honor, even with stringent safeguards such as
09:21 11 those suggested in the declaration provided to you, there will
09:21 12 not be enough protection to protect people confined for two to
09:21 13 three weeks during the present surge. VLSI submitted a
09:21 14 declaration from an epidemiologist who came to Your Honor's
09:21 15 courtroom and proposed safety measures. And we appreciated the
09:21 16 list that she provided. It is comprehensive and more likely
09:21 17 anything than anybody could get done. It is not materially
09:21 18 different than what Dr. Columbus said, and Dr. Columbus
09:21 19 reviewed her declaration and provided you her reply.

09:21 20 Most importantly, Dr. Columbus explains in her reply that
09:21 21 there are two sets of problems with what Dr. Troisi proposes.
09:21 22 The first is what her list doesn't cover, and the second is
09:22 23 that the list has limitations on its own.

09:22 24 So let me talk first about what the list doesn't cover.
09:22 25 There are two things that the in-court protections cannot

09:22 1 cover. No matter how many protections -- precautions we take,
09:22 2 it's impossible to ensure or to require that every attendee be
09:22 3 protected when not in the courtroom.

09:22 4 The trial is scheduled to take place over two to three
09:22 5 weeks if you include the pretrial conference and jury
09:22 6 selection. There's a holiday weekend in between. There's much
09:22 7 happening in the locale, as VLSI acknowledges. Football games
09:22 8 are happening, restaurants are opening. There are -- the
09:22 9 precautions the Court might take in the courtroom will not be
09:22 10 occurring outside the courtroom.

09:22 11 If I turn you to the next slide, Slide 5 -- it's actually
09:22 12 back to Slide 5 -- Dr. Troisi herself has suggested that during
09:23 13 this period doing what we would normally do is not a wise and
09:23 14 prudent idea. This is what she said. Things that we have done
09:23 15 in the summer when the number of cases were low, like go to the
09:23 16 grocery store, might be risky because the number of cases in
09:23 17 the community are so much higher.

09:23 18 Second thing that Dr. Troisi's declaration doesn't address
09:23 19 is the question of all the people traveling to Waco to attend
09:23 20 the trial. Witnesses, lawyers, staff.

09:23 21 If I turn you to Slide 6 , Your Honor, in another
09:23 22 proceeding Dr. Troisi gave another declaration, and in that
09:23 23 other declaration she said that there is a high risk of
09:23 24 contracting and spreading the virus or traveling through
09:23 25 airports using air travel. And in fact, Your Honor, if I take

09:23 1 this Slide 7, the CDC, within the last two weeks, has issued a
09:24 2 set of guidelines on travel for November, December and January.
09:24 3 And it has said -- it's issued a set of questions and said that
09:24 4 if you answer yes to these questions, you should delay travel
09:24 5 till after this period of time. For most of the trial
09:24 6 participants, the answer would be yes to six out of the seven
09:24 7 questions at least.

09:24 8 The second set of problems, Your Honor, is what is the
09:24 9 list of protections that VLSI proposes. Testing is helpful
09:24 10 without any doubt at all, and there's no doubt it can be
09:24 11 effectively used to mitigate risks, but the testing that's
09:24 12 proposed by Dr. Troisi is not going to mitigate the risk. She
09:24 13 proposes that negative tests five days before trial, but a lot
09:24 14 can happen in five days with a 14-day incubation period.
09:24 15 Having a negative test reduces risk, but it does not eliminate
09:25 16 it.

09:25 17 Again, you don't have to take our word for it. Here's
09:25 18 what Dr. Troisi says on Slide 8 in another context. "Testing
09:25 19 is a good thing, but it does not make you bulletproof."

09:25 20 Rapid testing can be helpful too in some circumstances,
09:25 21 but it has a high negative/false negative rate. Again,
09:25 22 Dr. Troisi agrees. If you turn to Slide 9, Your Honor, you
09:25 23 will see that she confirmed that rapid antigen tests have high
09:25 24 false negative rates.

09:25 25 It's also not clear to us how VLSI would propose arranging

09:25 1 to get rapid tests for everyone, other than having folks go to
09:25 2 a local testing facility. It's not clear that we could order
09:25 3 the jurors to go to a local testing facility; it's not clear
09:25 4 that local testing facilities would have the resources. And in
09:26 5 any event those are circumstances that might expose people to
09:26 6 the COVID-19 virus.

09:26 7 Your Honor, I also suggest using N95 masks, which are
09:26 8 usually reserved, as Your Honor knows, for frontline health
09:26 9 care workers. The supplies of those masks and hospitals is in
09:26 10 short supply.

09:26 11 And in terms of the courtroom setup, there are surely
09:26 12 steps that can be taken, as Your Honor has done before, but
09:26 13 there are some fundamental facts that don't change for a two-
09:26 14 to three-week trial, and one is that large indoor gatherings
09:26 15 where people are speaking and interacting for long periods of
09:26 16 time are dangerous.

09:26 17 And again I'm going to quote from Dr. Troisi. She has
09:26 18 submitted a declaration in another proceeding, and what she
09:26 19 says is, "The very nature of a trial setting itself would
09:27 20 create an environment that elevates the risk of transmitting
09:27 21 COVID-19, as gathering people indoors increases the risk of
09:27 22 COVID-19 transmission."

09:27 23 Now, she has also said -- if I turn you to Slide 11, she's
09:27 24 explained just why that is true. Now, without belaboring the
09:27 25 details, Slide 11 puts -- has what Dr. Troisi has said about

09:27 1 COVID-19 aerosols remaining infectious for 16 hours and how
09:27 2 that could affect transmission in the courtroom.

09:27 3 We appreciate that, Your Honor, as I said, has conducted
09:27 4 trials without incident, and VLSI cites that or suggests that
09:27 5 most of the trials conducted over the fall didn't evidence
09:27 6 things either. But the problem is those trials occurred before
09:27 7 the current surge and before the fact that vaccines were not
09:28 8 only on the horizon but in fact being approved as we speak.

09:28 9 So if I turn you to Slide 15, Your Honor. Slide 15
09:28 10 captures the difference between imperative time, Your Honor, at
09:28 11 the Roku trial and today. The difference is almost 100 percent
09:28 12 different. And since that time there was the trial that Judge
09:28 13 Mazzant had where 15 people became infected, resulted in a
09:28 14 mistrial, and we understand his trial has been reset for later
09:28 15 in January.

09:28 16 There is a risk assessment tool that is used by many
09:28 17 people in the field of Dr. Columbus and Dr. Troisi. It's from
09:28 18 Georgia Tech, and if you use that tool as we have shown on
09:28 19 Slide 16, there's a 52-percent chance that at least one person
09:28 20 in a crowd of 25 should be a small -- a portion of the trial
09:29 21 will get COVID-19, and this doesn't account for travel to and
09:29 22 from Waco for the trial.

09:29 23 Recognizing these risks, courts in Texas and throughout
09:29 24 the country have decided to continue trials not indefinitely
09:29 25 but for some period of time, March, April. Judge Schroeder has

09:29 1 done it. Judge Gilstrap has done it. And on Slide 17 we have
09:29 2 just provided for the record and for Your Honor the comparative
09:29 3 data of cases per 10,000 in these different jurisdictions.

09:29 4 Third, Your Honor, I don't think there's any real dispute
09:29 5 about prejudice that could result from a short continuance.
09:29 6 The increase in severity of pandemic means that we will not
09:29 7 likely be able to present to you a case to the best of our
09:30 8 ability in January.

09:30 9 We've already told Your Honor that two of Intel's expert
09:30 10 witnesses for health and age reasons will not be able to attend
09:30 11 the trial. I have been in touch with all of our witnesses and
09:30 12 several, as we get closer to the trial and as events continue
09:30 13 to occur and as the situation continues to worsen, are
09:30 14 expressing concerns about traveling and are expressing concerns
09:30 15 about appearing at the trial.

09:30 16 We understand that Your Honor has suggested that it might
09:30 17 be possible to have people testify remotely, but having some
09:30 18 people testify remotely and some people not is not a solution
09:30 19 in a case of this magnitude.

09:30 20 And as I said, if Your Honor goes forward on January 5th
09:30 21 and January 11th, I'll be there. But in fairness to our team,
09:30 22 the young folks that work with me, I've given them each the
09:31 23 opportunity to decide for themselves whether they should take
09:31 24 the risk and whether their families should take the risk.

09:31 25 Our inability to bring all of our witnesses to trial, our

09:31 1 ability to have some of them testify only remotely and our
09:31 2 ability not to have our entire team here raises concerns that
09:31 3 are beyond just prudential concerns. They are -- if I turn you
09:31 4 to Slide 19, and as we said in our reply, real due process the
09:31 5 Seventh Amendment concerns that other courts have confronted in
09:31 6 similar circumstances.

09:31 7 And without belaboring the point, what Slide 19 depicts or
09:31 8 demonstrates is that due process safeguards that Your Honor
09:31 9 protects -- provides Intel a full and fair opportunity to
09:31 10 litigate. The Hardy case cited in our opening brief on this
09:31 11 issue is very instructive. If the trial proceeds in January
09:32 12 and Intel witnesses cannot testify in person, we submit that
09:32 13 under Hardy and due process deprives Intel of that right to a
09:32 14 full and fair opportunity.

09:32 15 If all of VLSI's witnesses will testify in person while
09:32 16 some of Intel's witnesses will not, that further compounds the
09:32 17 problem. In fact, in the Guardant Health case that we cited,
09:32 18 Your Honor, the Court required all witnesses to testify
09:32 19 remotely in order to avoid an inference and prejudice.

09:32 20 Relatedly, remote presentation poses some -- just by
09:32 21 Intel, poses some risk of jury prejudice because the jurors
09:32 22 will have to be there in person. If one party is presenting
09:32 23 witnesses all in person, one party cannot, and we will not be
09:32 24 able to, there is real risk the jury will view that in a way
09:32 25 not beneficial to Intel. The same implications, as we suggest

09:33 1 from the slide, are implicated by the Seventh Amendment for the
09:33 2 reasons articulated in the cases we have provided to you.

09:33 3 Your Honor, that has to be balanced against the cases
09:33 4 before you, and I understand completely the issues you've
09:33 5 raised about backlog and desire to get to trial, but if I could
09:33 6 turn to Slide 18, so we could really have a reality check on
09:33 7 the asymmetric risk of going forward with the trial in January.

09:33 8 The three patents at issue in this case as depicted on
09:33 9 Slide 18 issued in April 2009, May 2010, and April 2012, the
09:33 10 first of the products accused of infringement issued almost
09:33 11 nine years ago in February of 2012.

09:34 12 The patents were acquired by VLSI almost seven or eight
09:34 13 years later, and then this case was commenced before Your Honor
09:34 14 in April of 2019. The patents are seven to ten years old.
09:34 15 Accused products are in some cases eight years old, and patents
09:34 16 were only acquired by VLSI in the last two or three years. All
09:34 17 that's sought is damages. A continuance until March or April
09:34 18 will not prejudice VLSI in any way, given this chronology on
09:34 19 this frame.

09:34 20 As I said, vaccines are beginning distribution. Hopefully
09:34 21 things will subside over the winter months. For a case pinning
09:34 22 billions of dollars on this chronology that's before Your
09:34 23 Honor, weighing a three month or so delay against the
09:35 24 asymmetric risk to the participants and others leads us to
09:35 25 suggest that a continuance is compelled.

09:35 1 Now, we understand and appreciate that Your Honor wants to
09:35 2 get the case going and the pandemic has already ground many
09:35 3 things to a halt. But we also know the community nationally
09:35 4 and in Waco is in a situation where things are getting worse.
09:35 5 We all share and want this to be over. We all want business to
09:35 6 proceed as usual.

09:35 7 The suggestion that we, Intel, or I, Bill Lee, are somehow
09:35 8 afraid to try this case is just wrong. We are coming to Your
09:35 9 Honor because a delay of three or four months could
09:35 10 substantially mitigate personal health and safety risks to
09:36 11 folks, while doing nothing other than delaying a trial where if
09:36 12 VLSI prevails, it will recover many damages with perhaps
09:36 13 prejudgment interest that will fully compensate them.

09:36 14 Both public health experts that have provided Your Honor
09:36 15 with declarations, the VLSI expert, our expert have said the
09:36 16 next month is not the time to travel. The next month or two is
09:36 17 not the time to have large gatherings. The next two or three
09:36 18 months is a time to wait, and hopefully after that two or three
09:36 19 months, we'll be in a bit different and better situation.

09:36 20 And it's for those reasons, Your Honor, that we suggest
09:36 21 that the public interest favors a continuance, and I'll end by
09:36 22 quoting Dr. Troisi on Slide 14. She specifically urges all of
09:37 23 us to follow the CDC guidelines. That includes the CDC
09:37 24 guidelines that would tell us that having people to travel at
09:37 25 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 1 will have to start traveling within two to three weeks, and
09:39 2 that's sort of right in the target zone for the most
09:39 3 problematic time.

09:39 4 THE COURT: So I think you may have thought you answered,
09:39 5 but you probably just know a lot more about Federal. I had one
09:39 6 Federal Circuit argument which I won. I left -- I quit at one
09:39 7 and 0, but I'm not -- so what I care about is, do we know
09:39 8 when -- are you able to have an idea of when the Circuit might
09:39 9 resolve this for us? I don't know enough about the Federal
09:39 10 Circuit practice.

09:39 11 MR. LEE: Your Honor, when you're one and 0, it's always a
09:39 12 good time to quit.

09:39 13 (Laughter.)

09:39 14 MR. LEE: You know, you win one and you never put a zero
09:39 15 on the side of the ledger.

09:39 16 THE COURT: Rule 36. You know, before I got out, it was
09:39 17 good.

09:39 18 MR. LEE: It's even better. That's exactly the right time
09:39 19 to quit.

09:39 20 Your Honor, on average the mandamus petitions take a
09:39 21 couple of months to decide, but, you know, they have different
09:40 22 time imperatives and different motion panels.

09:40 23 I think that, you know, we're hopeful they'll realize that
09:40 24 with the January trial coming up that they need to get to it
09:40 25 sooner rather than later. I think one of the reasons we would

09:40 1 move to stay the order this week, if Your Honor didn't stay it,
09:40 2 is basically to emphasize the time imperative so that we can
09:40 3 get a decision.

09:40 4 THE COURT: And let me make sure you understand.

09:40 5 I fully understand why Intel's taking this action with the
09:40 6 Circuit. It doesn't upset me. I think you've got to do the --
09:40 7 I've told you all this on the record.

09:40 8 I think your firm and the others need to be doing
09:40 9 everything they can to protect their clients' interests, and I
09:40 10 understand we are a in very unique time with me trying to
09:40 11 figure out how to get to trial and you all wanting to protect
09:40 12 your clients' interest and Mr. Chu wanting to protect his.

09:41 13 So I'm not unhappy at all that you all have taken this up
09:41 14 with the Circuit to protect your clients' rights. It won't
09:41 15 affect me at all if you try and stay it this week. Clarity
09:41 16 from the Circuit is always good for me.

09:41 17 I'm doing the very best I can to do what I think is best,
09:41 18 but that's the way our system works, is the Circuit -- this
09:41 19 is -- I think this is a fairly novel -- you know, we haven't
09:41 20 had to set trials during pandemics before. We haven't had to
09:41 21 decide where the trial ought to be during pandemics before, and
09:41 22 so I look forward to any guidance the Circuit gives me on
09:41 23 anything that I do.

09:41 24 So I just want you to know, number one, I don't think
09:41 25 you're afraid to try the case. That has never crossed my mind.

09:41 1 Number two, I bear no unhappiness at all for your efforts to
09:42 2 have the Circuit deal with this. This is novel ground for
09:42 3 plowing, in my opinion. So it's -- I'm just curious. It's
09:42 4 helpful for me to know what's going on.

09:42 5 By the way, you know, when the Circuit grants mandamus,
09:42 6 they don't tell me. So, I mean, it's -- you know, and so I may
09:42 7 learn about it in the press or from texts I get. But it's
09:42 8 not -- so whenever I do, I want you all to feel comfortable
09:42 9 that I respect your right to take these issues up and just --
09:42 10 and let me know if anything that happens with what you're
09:42 11 doing.

09:42 12 MR. LEE: Your Honor, let me say two things. We
09:42 13 appreciate this. When this issue first came up in a
09:42 14 conference, you said exactly the same thing, and that's one of
09:42 15 the reasons we put the footnote in our first motion to say that
09:42 16 we, you know, from your days as a practicing lawyer but now as
09:42 17 a judicial officer, we appreciate your understanding that we
09:43 18 need to take what steps we need to to protect the clients'
09:43 19 rights but also the people we're working with. We appreciate
09:43 20 that a great deal.

09:43 21 What we will commit to you is we won't know how they rule
09:43 22 until they rule. They don't tell anybody. But to the extent
09:43 23 that there are events occur so that if we decide to move to
09:43 24 stay the order, we will let you know and provide courtesy
09:43 25 copies to your chambers immediately so that you at least know

09:43 1 what the current state of affairs is.

09:43 2 THE COURT: Appreciate that.

09:43 3 Mr. Chu?

09:43 4 MR. JABLON: Good morning, Your Honor. This is Iian
09:43 5 Jablon on behalf of VLSI to argue the motion to continue and
09:43 6 the motion to stay. And we appreciate the opportunity to speak
09:43 7 with you this morning about these -- about these motions.

09:43 8 I'd like to make three basic points about Intel's motion
09:43 9 to continue, and then I'd like to briefly respond to some of
09:43 10 the comments that Mr. Lee made here this morning.

09:43 11 First, we strongly agree with Intel that this motion to
09:43 12 continue was not filed in a vacuum. Intel has a track record
09:44 13 in this case and other litigations between Intel and VLSI of
09:44 14 wanting to defer a ruling on the merits for as long as it can.
09:44 15 And this new motion to continue is entirely consistent with
09:44 16 Intel's strategic position of wanting to delay the case.

09:44 17 And Intel has a lot of very smart attorneys, and they've
09:44 18 done a lot of hard work trying to convince the Court that it's
09:44 19 not safe to proceed. From our perspective a lot of that is
09:44 20 advocacy, Your Honor, and needs to be taken with a grain of
09:44 21 salt.

09:44 22 Second, Your Honor, as our expert's declaration makes
09:44 23 clear, we believe a trial can be conducted safely in January in
09:44 24 Waco. We believe Your Honor's already established the trial
09:44 25 can be conducted safely in Waco through actual trials where, to

09:44 1 the best of our knowledge, none of the participants were
09:44 2 sickened. And we think that's a critical factor, Your Honor.

09:45 3 Our expert has 40 years of experience in epidemiology.
09:45 4 She's a true expert on viruses. We encourage Your Honor to
09:45 5 take a look at her resume. She's the gold standard of experts
09:45 6 who would be in a position to testify about this.

09:45 7 She's actually gone down and visited Your Honor's
09:45 8 courtroom in Waco. And her testimony under oath before this
09:45 9 Court is that it will be safe to proceed in January if we
09:45 10 follow the precautions. And we believe that's critical, Your
09:45 11 Honor.

09:45 12 And I also want to say, Your Honor, needless to say,
09:45 13 Mr. Chu, Mr. Hattenbach, myself, the rest of the VLSI team, we
09:45 14 have no interest in participating in a trial if we didn't think
09:45 15 it was going to be safe. So we absolutely believe in the word
09:45 16 of our expert that this trial can be conducted safely for all
09:45 17 the participants.

09:45 18 Third, and I think this is also very important, we don't
09:46 19 believe that moving this trial to March or April is going to
09:46 20 make a material difference. All the problems that Intel has
09:46 21 identified with proceeding with the trial in January are very
09:46 22 likely still going to be with us in March and April.

09:46 23 And just for starters, as Your Honor is aware, the vaccine
09:46 24 is not going to be available to the entire United States by
09:46 25 March or April, nothing like it. And even when the vaccine is

09:46 1 available broadly, it's going to require two doses, it's going
09:46 2 to require six weeks.

09:46 3 And so even in a hypothetical world, Your Honor, where the
09:46 4 vaccine was available broadly by April, realistically that
09:46 5 would put us into the summer in terms of when people would
09:46 6 actually be safe who'd had the vaccine.

09:46 7 And then on top of that, as Your Honor's well aware,
09:46 8 there's lots of literature out there indicating that a big
09:46 9 percentage of the population has no intention of getting the
09:47 10 vaccine. So pushing the trial off for several months really
09:47 11 isn't going to make -- isn't going to make this materially
09:47 12 safer for anybody.

09:47 13 So we don't believe that a three-month continuance is
09:47 14 going to solve the problem. And in fact what we would expect
09:47 15 is if Your Honor continues the trial to March or April, that
09:47 16 Intel would just be back with another motion to continue at
09:47 17 that time, saying it's still too dangerous to proceed.

09:47 18 And so really we view Intel's motion as an invitation for
09:47 19 Your Honor to kick the can down the road so that Intel can seek
09:47 20 another delay later.

09:47 21 I also want to respond briefly to Intel's criticisms of
09:47 22 Dr. Troisi. Dr. Troisi has spoken many times about COVID in
09:47 23 many different contexts. And from our perspective Intel has
09:47 24 presented snippets of some of her statements that are taken out
09:48 25 of context to suggest that her opinions offered in this case

09:48 1 are not reliable.

09:48 2 And just for example, Intel showed you some quotes in its
09:48 3 slides from various media sources where Dr. Troisi was talking
09:48 4 about settings where masks and other precautions aren't being
09:48 5 used. And that's not the situation she's talking about for
09:48 6 this case. And not surprisingly, Dr. Troisi's opined that
09:48 7 those other settings where people aren't wearing masks can be
09:48 8 dangerous.

09:48 9 But again that's not what she's talking about here. In
09:48 10 this case she's addressing the safety of a trial in Waco using
09:48 11 a certain set of safety protocols. And her opinion is that the
09:48 12 trial would be safe if those protocols are followed.

09:48 13 Intel's counsel also showed you some snippets of a
09:48 14 declaration that Dr. Troisi signed back in July in a case
09:49 15 involving Apple. And in that case Dr. Troisi offered the
09:49 16 opinion that the trial should be continued from the summer to
09:49 17 the fall.

09:49 18 And what Intel didn't show you was the reason she gave for
09:49 19 that opinion. She had two reasons in that declaration for
09:49 20 giving the opinion. And the first one was, in her opinion in
09:49 21 July there were going to be fewer cases in Texas in the fall.
09:49 22 And it turns out she was right.

09:49 23 Intel's third slide in the slide deck that they presented
09:49 24 to Your Honor shows that the case numbers went down by more
09:49 25 than 50 percent between July and September. So she was

09:49 1 correct. Based on the information available at the time, she
09:49 2 believed cases were going to go down and it would be safer.
09:49 3 She was right. That's not her opinion now. Her opinion now is
09:50 4 that there isn't going to be much of a change between January
09:50 5 and March or early April.

09:50 6 Second of all, Dr. Troisi offered the opinion back in July
09:50 7 that it made sense to put off that trial involving Apple,
09:50 8 because there was another trial scheduled for August 3rd at
09:50 9 which new precautions were going to be taken for the first
09:50 10 time. And Dr. Troisi offered the opinion back in July we
09:50 11 should let that trial go forward and we should see if the
09:50 12 precautions worked. We should see if the safety precautions
09:50 13 worked.

09:50 14 And they did. As Your Honor's well aware, there have been
09:50 15 more than 20 jury trials conducted in Texas in federal courts
09:50 16 since September. And to the best of our knowledge, only one of
09:50 17 the 20-plus trials resulted in any infections.

09:50 18 And so now almost five months after submitting that
09:50 19 declaration in the Apple case, Dr. Troisi's opinion is based on
09:51 20 actual trials that have taken place in Texas, including in Your
09:51 21 Honor's courtroom, she believes the trial can be conducted
09:51 22 safely in January, provided we follow those precautions.

09:51 23 Now, Intel's also suggested that even if the trial could
09:51 24 be safe, the travel to Texas won't be safe. And we have a few
09:51 25 issues with that. Number one, there's lots of literature

09:51 1 indicating that air travel is actually extremely safe, far
09:51 2 safer than people might expect.

09:51 3 However, there is risk in going to public airports and
09:51 4 other public aspects of travel. Those risks can be
09:51 5 substantially mitigated by taking the same types of precautions
09:51 6 that we would take in a court setting, masks, social
09:51 7 distancing, et cetera.

09:51 8 But more to the point, if that was what was really driving
09:52 9 Intel's concern, the concern that traveling to Texas would be
09:52 10 unduly safe in a commercial setting, Intel could have paid for
09:52 11 its entire trial team and all its witnesses to travel privately
09:52 12 to the trial in Waco for a lot less than its cost to litigate
09:52 13 this motion to continue.

09:52 14 And in the context of this case with these parties, where
09:52 15 Intel can certainly afford to arrange for private transport for
09:52 16 its attorneys and other participants if it chooses to, Intel's
09:52 17 discussion of the potential risks of commercial travel is just
09:52 18 a red herring, Your Honor. And it actually just underscores
09:52 19 the tactical nature of Intel's motion, because what Intel's
09:52 20 really seeking here is a delay.

09:52 21 I also want to speak briefly about the issue of prejudice,
09:52 22 Your Honor. Intel argues that it would be prejudiced if the
09:52 23 trial proceeds in January, because a couple of its witnesses
09:52 24 who have not even been identified, the subject matter of their
09:53 25 testimony has not been presented to Your Honor. There's a

09:53 1 possibility that a couple of their witnesses might choose not
09:53 2 to attend in person.

09:53 3 Your Honor, from our perspective, that type of a generic
09:53 4 statement where the witnesses aren't even identified, where
09:53 5 it's not clear that they won't attend is certainly not
09:53 6 sufficient to show prejudice sufficient to warrant yet another
09:53 7 continuance of the trial date here.

09:53 8 And we would also respectfully submit that if a couple of
09:53 9 Intel's experts choose to testify by video rather than
09:53 10 appearing in person, there's no reason to think that's going to
09:53 11 make a material difference in the trial.

09:53 12 I would also encourage Your Honor to look at the cases
09:53 13 that Intel cites in its slide talking about the constitutional
09:53 14 ramifications of continuing -- failing to continue the trial.
09:53 15 From our perspective those cases do not support Intel's
09:54 16 position. Intel's not going to be able to show that the jury
09:54 17 pool has been tainted because of COVID. Intel's not going to
09:54 18 be able to show it was denied a fair trial because a couple of
09:54 19 witnesses it fails to identify in its motion may choose not to
09:54 20 come in person.

09:54 21 So in conclusion, Your Honor, we strongly believe a trial
09:54 22 can be conducted safely in January. We believe Your Honor's
09:54 23 already demonstrated a trial can be conducted safely. We
09:54 24 believe that moving the trial to late March or early April, as
09:54 25 Intel suggests, isn't going to solve anything. And it's simply

09:54 1 going to add prejudice to VLSI and further impact this Court's
09:54 2 docket for strategic reasons for Intel.

09:54 3 And for all those reasons, Your Honor, we respectfully
09:54 4 submit that the motion to continue should be denied.

09:55 5 THE COURT: Mr. Lee?

09:55 6 MR. LEE: Yes, Your Honor. I'll quickly respond briefly.

09:55 7 First, I hope Your Honor expects me to categorically
09:55 8 reject the notion that there's some nefarious strategic purpose
09:55 9 to the motion. I mean, not everything that a lawyer does has
09:55 10 to be for some illegitimate nefarious motive. As Your Honor
09:55 11 said, this is an unprecedented set of circumstances. It's not
09:55 12 a --

09:55 13 THE COURT: Mr. Lee, I will tell you, somehow when I was
09:55 14 either born or through my work as a lawyer I just developed
09:55 15 this filter where I kind of tune out all of that stuff in both
09:55 16 directions. You know, I have a discovery hearing where someone
09:55 17 complains about what the other side did and how awful they
09:55 18 were, and then the other side has to respond to why they're not
09:55 19 awful and all that. And I tend to not -- I just tend to zone
09:56 20 out on that.

09:56 21 Look, what I clearly care about here is, you know, can I
09:56 22 handle this in a fair manner? Can your folks get here in a
09:56 23 safe way? Would it be fair to have witnesses appear by Zoom?
09:56 24 And those are the things I'd have you focus on.

09:56 25 MR. LEE: Yeah. So, Your Honor, let pass on my first

09:56 1 point and make just three points in rebuttal.

09:56 2 The first is on the travel, all we have to do is look at
09:56 3 the CDC guidelines. They have explicitly discouraged travel
09:56 4 for December into January into February. They have explicitly
09:56 5 provided guidelines on when you shouldn't travel if you can
09:56 6 avoid it, and those are the guidelines we put in the slides.
09:56 7 That is the answer to the question of whether there should be
09:56 8 travel.

09:56 9 And, Your Honor, we have lawyers and witnesses coming from
09:56 10 multiple states as we've described to you in the papers. Each
09:57 11 of those different states have different quarantine
09:57 12 requirements now, different stay-at-home orders now. The
09:57 13 travel issue is a substantial issue, particularly given that
09:57 14 folks are going to have to start traveling, as I said, in two
09:57 15 and a half weeks.

09:57 16 The second point is this: We'd be lying to Your Honor,
09:57 17 we'd be less than candid if any of us could say we could
09:57 18 predict what's going to happen in March and April, but I think
09:57 19 what we can say -- and actually what both experts have told
09:57 20 Your Honor is things look differently now than they did back in
09:57 21 November, and they look differently now than they're going to
09:57 22 look in January.

09:57 23 The vaccines are not someone's wish nor prior there.
09:57 24 They're real things that are being put into people as we speak.
09:57 25 And there are people who are going to -- who want to

09:57 1 participate in this trial, who are going to be the
09:58 2 beneficiaries of those vaccines in February and March.

09:58 3 And, you know, at the end of the day, Your Honor, as I
09:58 4 said, you know, these cases were in Delaware before they
09:58 5 arrived on Your Honor's docket. A trial in April or May is
09:58 6 going to get them to trial faster than they ever would have
09:58 7 gotten to trial in Delaware.

09:58 8 Requiring us to have the trial earlier and have
09:58 9 witnesses -- and I should say on the witnesses, Your Honor, as
09:58 10 we said in our papers, we haven't identified them specifically.
09:58 11 We will if the Court wants, but I'm -- intend to do is to wait
09:58 12 till closer to the time of trial, and if they're still
09:58 13 unwilling to come, we will provide Your Honor with the
09:58 14 declarations that describe their preexisting health conditions
09:58 15 and the reason they can't come.

09:58 16 But I don't really understand VLSI's suggesting that we're
09:58 17 making it up; we're not. And at the end of the day, I think
09:59 18 the question is this, is it worth taking a damages case that
09:59 19 could have been brought by someone multiple years ago, waiting
09:59 20 for three months, which still would be getting it to trial very
09:59 21 quickly, Judge, by any District Court's standard, is it worth
09:59 22 doing that to avoid the asymmetric risk that someone could
09:59 23 contract COVID-19 and, worse yet, that someone could have
09:59 24 long-term health conditions that result or worse yet, someone
09:59 25 who could die? No one wants that to happen. But it's not

09:59 1 worth the risk.

09:59 2 THE COURT: Any response?

09:59 3 MR. JABLON: Just very briefly, Your Honor, to note that
09:59 4 again, not only has our expert testified under oath that it
09:59 5 wouldn't be safe to proceed in January but that in her opinion
10:00 6 it will make very little difference if we move the trial to
10:00 7 late March or early April as Intel suggested.

10:00 8 So for those reasons, we believe the motion should be
10:00 9 denied.

10:00 10 THE COURT: I'll be back in a few seconds.

10:00 11 (Pause in proceedings.)

10:06 12 THE COURT: We're going back on the record.

10:06 13 Can everyone hear me?

10:06 14 Mr. Ravel, I'll ask you.

10:06 15 MR. RAVEL: Judge, let me unmute and say we can hear you
10:07 16 loud and clear.

10:07 17 THE COURT: Thank you very much.

10:07 18 The Court is not going to continue the case. The Court is
10:07 19 very sympathetic to the arguments made by Intel. I do believe
10:07 20 that Intel can make arrangements to get witnesses who do want
10:07 21 to attend here in a safe manner.

10:07 22 Also with regard to the appearance by Zoom of witnesses,
10:07 23 we did that during the Roku trial, and we talked to the jurors
10:07 24 afterwards. The jurors thought that there was no difference in
10:07 25 the credibility of the witnesses who appeared. There's that

10:07 1 option.

10:07 2 We also at the Roku trial had a witness who wanted to
10:07 3 attend who had special conditions that made it perilous for
10:07 4 him, but he wanted to attend. It was his decision. So we made
10:07 5 accommodations for him to come in through the back of the
10:08 6 courthouse by himself up through the stairs. He came in
10:08 7 through the back of the courtroom. He was seated in the
10:08 8 witness chair surrounded by Plexiglass. He then left and left
10:08 9 through the back of the courthouse, and we were informed by
10:08 10 everyone that he felt that he felt comfortable in being able to
10:08 11 appear in that manner where he didn't have to interact with
10:08 12 anyone.

10:08 13 So I've heard all of Mr. Lee's concerns. They certainly
10:08 14 are things that I've worried about for months, but I think I
10:08 15 need to move forward with this trial.

10:08 16 Mr. Lee, I'm happy to hear with you or with respect to a
10:08 17 stay, but I think we've -- I think I've already addressed that.
10:08 18 I'm certainly comfortable with you and Intel going to the
10:08 19 Circuit or doing whatever it is that you need to do to make
10:09 20 sure that the Circuit is okay with the movement of the case
10:09 21 from Austin to Waco.

10:09 22 And I don't know, frankly, what the Circuit 's position is
10:09 23 on whether they're going to be telling district judges whether
10:09 24 or not they can have trials or not, but this is a new era, and
10:09 25 they're the ones who grade my papers, so I'm happy for you to

10:09 1 take up whatever you want to with the Circuit.

10:09 2 MR. LEE: Your Honor, this would be my suggestion, which
10:09 3 is rather than argue the motion to stay, which, you know, much
10:09 4 of it would be redundant of what we just argued now, my
10:09 5 suggestion would be that given your ruling that you deny the
10:09 6 motion to stay so that we can then move with the Federal
10:09 7 Circuit promptly, and that will, I think, put us all in the
10:09 8 position that we can best be in to get an answer from the
10:09 9 Federal Circuit promptly.

10:09 10 So I think rather than argue, I would ask you to deny the
10:09 11 motion for the reasons, you know -- I think you know what my
10:09 12 arguments would be.

10:10 13 THE COURT: I do.

10:10 14 MR. LEE: I don't think I would surprise you in any way.
10:10 15 I don't think they would be successful at this moment in time.
10:10 16 But if you would deny the motion, then we could seek the relief
10:10 17 of the Federal Circuit.

10:10 18 THE COURT: Well, I hate to give up an opportunity to hear
10:10 19 you argue anything; it's one of the best parts of my job.
10:10 20 However, given that we've got, I think, 17 motions to go
10:10 21 through today, I think that would be wise. I will deny the
10:10 22 motion to stay.

10:10 23 Something you all ought to be thinking about as well is
10:10 24 that I'm skeptical we will get through everything we need to
10:10 25 get through today. I am perfectly open to -- we're going to go

10:10 1 today. I mean, I've got today booked, but I think we should
10:10 2 schedule a day next week as well, Tuesday or Wednesday. I've
10:10 3 got a Markman on Monday. But I think we ought to plan on
10:11 4 scheduling a day Tuesday or Wednesday to finish up whatever
10:11 5 motions we do not get finished with today.

10:11 6 If we're close at 5:00 or whatever, that's fine, but I
10:11 7 don't want to hurry what we're doing today. If you all are
10:11 8 free Tuesday or Wednesday next week, I would be happy to finish
10:11 9 them at that time.

10:11 10 Mr. Lee, I'll start with you.

10:11 11 MR. LEE: Your Honor, that's fine with us. I wanted to
10:11 12 remind Your Honor we were in touch with your clerk that at 3:30
10:11 13 your time today there is a hearing in California in the
10:11 14 antitrust case.

10:11 15 THE COURT: Okay.

10:11 16 MR. LEE: So a couple of us -- Ms. Major and I will step
10:11 17 out of this hearing, but everybody else that Mr. Ravel
10:11 18 introduced will be here and can address the motions.

10:11 19 THE COURT: Okay. Very good. So we are going to start.
10:11 20 My understanding -- I could be wrong, but my understanding is
10:11 21 the first motion that we are going to take up is the VLSI
10:12 22 Daubert to exclude damages related to testimony of Intel
10:12 23 experts; is that correct?

10:12 24 MR. CHU: Yes.

10:12 25 THE COURT: Okay. Mr. Chu, and Mr. Lee, of course, I have

10:12 1 personally reviewed this one. I've been through all of them
10:12 2 with my clerks, but I have personally reviewed this one, and I
10:12 3 welcome you going -- as I recall, there are several experts
10:12 4 that we need to go through. So if you will just -- I don't
10:12 5 have a perfect memory, unlike you and Mr. Lee. As you go
10:12 6 through, if you will -- as you go through each expert, if
10:12 7 you'll give me a little reminder of which issue they are
10:12 8 testifying about.

10:12 9 I think, for example, what's off the top of my head is the
10:12 10 idea that, you know, the patent is -- has the worth of whatever
10:12 11 it was purchased for, plus there's a ceiling on what the
10:12 12 patent's worth. I know there's an expert on that.

10:13 13 And so but if you'll go through each one, I've read all of
10:13 14 this and we'll take -- why don't we do this? Why don't we take
10:13 15 up one Daubert -- why don't we take up one damages expert at a
10:13 16 time?

10:13 17 MR. LEE: Your Honor, the motion is actually Mr. Chu's
10:13 18 motion.

10:13 19 THE COURT: Yes. I knew that. No. I knew that.

10:13 20 MR. LEE: Whichever order he wants to. I should say that
10:13 21 for the three, Mr. Huston, who is our licensing hypothetical
10:13 22 negotiation person, I'll make the argument for.

10:13 23 Mr. Pascarella, Mr. Mueller will make the argument. And for
10:13 24 Dr. Colwell, Ms. Sooter will make the argument.

10:13 25 THE COURT: No. I was aware it was Mr. Chu's argument for

10:13 1 sure. Mr. Chu --

10:13 2 MR. TINDEL: Judge, this is Andy Tindel. I hate to
10:13 3 interrupt, but just on the record, I believe the parties have
10:13 4 agreed at this point that the transcript going forward for the
10:13 5 remainder of the motions will be under seal. And I think this
10:14 6 is the appropriate time to let the Court and Ms. Davis know
10:14 7 that.

10:14 8 THE COURT: Mr. Tindel, I'm going to say this as
10:14 9 respectfully as I can, but that tie, I'm actually a little glad
10:14 10 that we're on Zoom and I can only see the very top of it. I'm
10:14 11 sure it's...

10:14 12 (Collective laughter.)

10:14 13 MR. TINDEL: It's a Versace, Your Honor. That's got to
10:14 14 mean something.

10:14 15 THE COURT: It must. At any rate, Mr. Chu, if you would
10:14 16 proceed with the first expert that you'd like to take up.

10:14 17 MR. RAVEL: Your Honor, I think at this point both client
10:14 18 representatives on both sides need to step out because of the
10:14 19 nature of this motion.

10:14 20 THE COURT: Look, I'm leaving it up to you all to police
10:14 21 who's on the call and who isn't. So I'm happy for it -- for
10:14 22 reminders, and obviously if someone needs to drop off, that's
10:14 23 fine with me.

10:15 24 MR. CHU: Thank you very much, Your Honor.

25 (SEALED PROCEEDINGS HELD.)

1 UNITED STATES DISTRICT COURT)
2 WESTERN DISTRICT OF TEXAS)

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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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