

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION**

IN RE: 3M COMBAT ARMS
EARPLUG PRODUCTS LIABILITY
LITIGATION

Case No. 3:19-md-02885-MCR-GRJ

Judge M. Casey Rodgers
Magistrate Judge Gary R. Jones

This Document Relates to:

Sloan, Case No. 7:20-cv-00001
Wayman, Case No. 7:20-cv-00149

DEFENDANTS' MOTION FOR CONTINUANCE

This motion comes to the Court in extraordinary circumstances during an extraordinary time. As of this morning, at least three on-site trial team members have tested positive for COVID-19, the entire trial team has been exposed, and most of the team members have now sequestered to their hotel rooms to avoid further risk to themselves and others. While the Court and parties were able to address the one positive case as of the date of the pretrial conference by shifting participation to Zoom, the situation has now worsened. Even after taking all reasonable precautions, Defense counsel cannot participate in trial on Monday without creating a substantial risk that the virus will be spread to others.

At the same time, the COVID-19 outbreak has substantially detracted from the team's ability to finalize its trial presentation in the critical pretrial period, to the prejudice of Defendants. The team is geographically isolated and many are anxious

about their health. Those who are able are devoting their time to obtaining tests, monitoring for symptoms, and working to minimize further exposure to members of the team, staff, and vendors.

Proceeding to trial on Monday will exacerbate these problems and preclude a full, fair, and complete trial. The existence of these issues may narrow the jury pool in ways that, at the very least, compromise its representativeness. And the highly contagious Omicron variant that makes no exception for the fully vaccinated makes the possibility of a mistrial over the course of the next month—either because lawyers or jurors test positive—a real possibility, if not a probability, given the length of this trial.

Defendants appreciate the Court's desire to progress this litigation through the bellwether process. The completion of ten bellwether trials in an unprecedented timeframe has accomplished that, while allowing the Court and the parties some flexibility to approach this exigent situation appropriately and safely without compromising the inroads that have already been made. Defendants respectfully request a modest continuance of the consolidated trial in *Sloan*, Case No. 7:20-cv-00001, and *Wayman*, Case No. 7:20-cv-00149, scheduled to begin on January 10,

2022.¹ A brief continuance of at least one week likely would not extend the trial schedule beyond the initially scheduled trial dates, *see* Jan. 5, 2022 Tr. at 111 (Sloan/Wayman Pretrial Conference) (observing that the trial “should finish by the 31st [of January] at the latest”), and is consistent with revised public-health guidance that exposed individuals should quarantine for five days.

LEGAL STANDARD

Pursuant to Federal Rule of Civil Procedure 16(b)(5), the Court may modify the trial schedule for “good cause.” *See Bassler v. George Weston Bakeries Distrib. Inc.*, 2009 WL 10670778, at *2 (M.D. Fla. Nov. 25, 2009) (granting motion to continue trial upon showing of good cause). In exercising its discretion to grant a continuance, the Court should balance “the interests in favor of a fair trial” against the “interests in favor of an immediate trial.” *Smith-Weik Mach. Corp. v. Murdock Mach. & Eng’g Co.*, 423 F.2d 842, 844-45 (5th Cir. 1970) (reversing district court’s denial of motion for a continuance due to counsel’s illness). The Court may grant a continuance at any point—even after the jury has been impaneled. *See Fowler v. Jones*, 899 F.2d 1088, 1094 (11th Cir. 1990) (reversing denial of motion for a

¹ Contemporaneously with the filing of this Document, Defendants’ counsel will email the Court a confidential, *ex parte* listing of the vaccination and booster status of Defendants’ counsel.

continuance even though at the time the motion was made the “jury had already been selected and reconvened for the trial”).

ARGUMENT

Defendants’ counsel are in the midst of an active COVID-19 outbreak that has exposed the entire trial team to the virus and has already resulted in three positive COVID-19 cases. Those extraordinary circumstances amount to good cause for a continuance of the trial scheduled to start on Monday. Since the start of the pandemic, courts have recognized the need for continuances in light of COVID-19, premised mostly on a generalized fear of exposure to the virus. The case for a continuance is manifestly stronger here, as Defendants’ trial team has in fact been exposed, with several members having already tested positive and the rest still within the virus’s incubation period. And on top of the health risks that alone justify a continuance, proceeding to trial on Monday would risk wasted resources and prejudice Defendants’ ability to present its case.

A. Many Courts Have Held That The COVID-19 Pandemic Provides Good Cause For A Continuance.

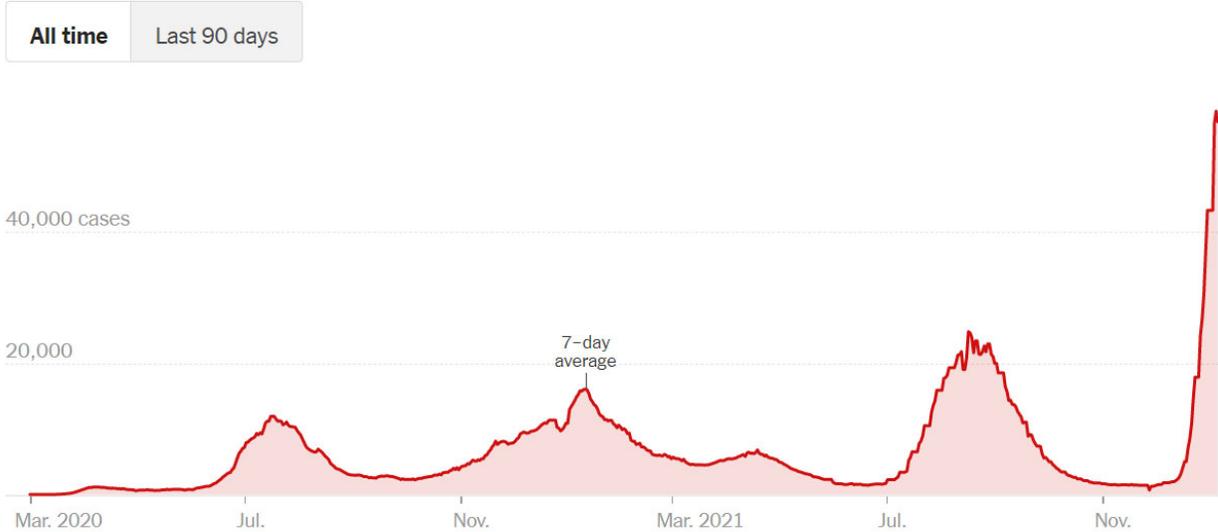
There can be no serious question that the global pandemic—which has plagued our nation for nearly two years and taken a dramatic turn for the worse with the recent Omicron variant—provides good cause for continuing a trial. Over the past week, courts across the country have continued *all* jury trials in light of the rapidly spreading and highly contagious Omicron variant. *See, e.g., Montgomery*

County Jury Trials Canceled Amid COVID-10 Concerns, WSFA.com, <https://bit.ly/3G4pjK1> (Dec. 30, 2021); Denise Dillon, *Jury Trials Halted in Cobb County Again Due to Omicron Wave of COVID-19*, FOX5-Atlanta, <https://bit.ly/3t4fSGU> (Jan. 4, 2022); Matt Sledge & John Simerman, *New Orleans Criminal & Civil Courts Halt Jury Trials Due to COVID*, Nola.com, <https://bit.ly/3q1BUYQ> (Jan. 5, 2022).

The decisions by those courts reflect the severity of the new variant, which is spreading at an unprecedented pace—including here in Pensacola, and including among the participants in this trial—and is transmissible even by the fully vaccinated and boosted. As of four days ago, Escambia County’s COVID-19 cases have skyrocketed 302%, while statewide cases have surged 142%. Mike Stucka, *Escambia County’s COVID Cases Up 302%; Florida’s Cases Surge 142%*, Pensacola News Journal, <https://bit.ly/3HD9ieo> (Jan. 3, 2022). Last week alone, the County reported 2,159 new cases, having reported 537 cases a week earlier. *Id.* And there are more cases statewide than ever:

Updated Jan. 7, 2022

New reported cases



Latest Map & Case Count, N.Y. TIMES, <https://nyti.ms/3qVFpzx> (updated Jan. 7, 2022). Since the pandemic began, more than 4.2 million Floridians have tested positive for COVID-19, and nearly 63,000 have died. *Id.* As the Southern District of Florida recently put it, “Over the last year-and-a-half, COVID-19 has caused almost universal suffering,” having “killed hundreds of thousands of Americans, forced millions of others to quarantine in their homes, and disrupted the operations of our most treasured institutions.” *United States v. Dunn*, 2021 WL 4516138, at *1 (S.D. Fla. Oct. 1, 2021).

It comes as no surprise, then, that since the onset of the pandemic, courts in this District and others have seen fit to continue trials—both *sua sponte* and at the request of the parties—to minimize the risk of exposure and accommodate other

COVID-related disruptions. *See, e.g., Arevalo v. Coloplast Corp.*, 2020 WL 3958505 (N.D. Fla. Feb. 4, 2021) (granting motion for continuance in light of COVID-19 concerns); *United States v. Grady*, 2021 WL 3439410, at *2 (W.D. Mo. July 1, 2021) (granting motion to continue in part due to counsel’s concerns related to “ongoing difficulties posed by the COVID-19 pandemic”), *report and recommendation adopted United States v. Grady*, 2021 WL 3423550, at *1 (W.D. Mo. Aug. 5, 2021); *United States v. Jackson*, 2021 WL 1325610, at *1 (D.V.I. Mar. 19, 2021) (granting four-month continuance in light of COVID-19 restrictions). Indeed, courts have continued even criminal trials, notwithstanding the compelling concerns of the Sixth Amendment’s speedy-trial guarantee. *See, e.g., United States v. McKinney*, 2021 WL 3610505, at *1 (M.D. Ala. Aug. 13, 2021); *United States v. Burks*, 2021 WL 354107, at *1 (M.D. Ala. Feb. 2, 2021). “The need to protect the health of the public during a deadly pandemic outweighs the rights of the Defendant and the public to a speedy trial.” *McKinney*, 2021 WL 3610505, at *1. These countless decisions make abundantly clear that the health risks of the pandemic provide good cause for a continuance of trial.

B. The Active COVID-19 Outbreak Among Defense Counsel Plainly Provides Good Cause For A Continuance.

The case for a continuance here is even stronger than the scores of cases that have continued trials already in light of COVID-19. Unlike in cases where the Court orders a continuance based on a generalized concern over the *risk* of exposure to

COVID-19, Defendants’ concern is far more serious and concrete: Defendants’ trial team is in the midst of an *active* COVID-19 outbreak. The *entire* team has been exposed—every partner, associate, paralegal, legal assistant, and vendor—and three team members have already tested positive. Those that have not tested positive are still within the window of time where the virus incubates. “The time from exposure to symptom onset (known as the incubation period) is thought to be two to 14 days.” *If You’ve Been Exposed to the Coronavirus*, Harvard Health Publishing, Harvard Medical School, <https://bit.ly/31xMD3Q> (Jan. 5, 2022). That means that members of the trial team very well could have COVID-19 but be asymptomatic and not yet test positive. As this Court recognized early in the pandemic, “[t]he coronavirus is highly contagious and those who are infected can spread the virus even if they are asymptomatic.” *United States v. Williams*, 2020 WL 1751545, at *2 (N.D. Fla. Apr. 1, 2020). That remains true today, and the vaccine is no answer. The CDC recently explained that “anyone with Omicron infection can spread the virus to others, *even if they are vaccinated or don’t have symptoms.*” *Omicron Variant: What You Need to Know*, CDC.gov, <https://bit.ly/3tdAZ9E> (last visited Jan. 7, 2022) (emphasis added).

In recognition of the reality that the Omicron variant is transmissible even among the vaccinated, the Eleventh Circuit just last week modified its courthouse entry requirements to deny access to even fully vaccinated visitors who tested

positive or are undergoing testing: “Fully vaccinated individuals SHALL NOT BE ALLOWED ACCESS to court facilities” if the individuals, among other reasons, “[t]ested positive for COVID-19 within the previous 10 days,” or “[a]re undergoing testing for COVID-19.” 11th Cir. General Order No. 53, *Requirements To Enter Court Facilities*, <https://bit.ly/3n4Y7Dr> (Dec. 27, 2021). Those circumstances apply to every member of the *Sloan/Wayman* defense trial team.

The on-the-ground concerns about proceeding to trial while members of the team are unhealthy and contagious cannot be overstated. In addition to the members of the trial team who have already tested positive for COVID-19, the exposures several other team members have experienced are potentially serious. Some members of the team have comorbidities that increase their risk of a severe reaction to the virus. Others live with high-risk family members or young children who are not yet eligible for vaccination.

Meanwhile, the full extent of the outbreak remains unknown. Defense counsel and their staff have been working tirelessly to acquire the necessary tests to ascertain the level of exposure. But COVID-19 tests are in high demand and not readily available in the area. *See, e.g., Long Lines For COVID-10 Testing As Ascension Sacred Hart Reopens Drive-Thru Site*, Pensacola News Journal, <https://bit.ly/3F04yOl> (Jan. 5, 2022); Cody Long, *NW Florida Hospitalization Numbers Rise Along With Demand for COVID-19 Tests, Treatments*, WKRG.com,

<https://bit.ly/3zxhWby> (Jan. 4, 2022). Defendants have obtained as many tests as possible, and they have arranged for more.

In short, Defendants' counsel cannot safely continue to prepare for and attend trial next week. Notwithstanding the Court and parties' best efforts to practice social distancing, personal contact at the courthouse and in the courtroom is inevitable. Even after taking reasonable precautions, counsel and staff interact with the U.S. Marshals, the court, courtroom staff, and opposing counsel on numerous occasions, from sharing the lapel mic to exchanging exhibits and demonstratives to conducting sidebars. As the Eleventh Circuit's own rules make clear, allowing even fully vaccinated individuals into the courthouse if they are undergoing testing carries an unacceptable public health risk.

C. Good Cause Also Exists In Light Of The Risk Of Mistrial And Prejudice To Defendants.

On top of the undeniable health risks, moving forward with the trial on Monday would risk a substantial waste of resources by the Court, the jurors, and the parties. And it would also prejudice Defendants' presentation of its case. When trials have proceeded and then participants have developed symptoms consistent with COVID-19 during trial, courts have felt compelled to grant a mistrial given the public health risks and prejudice to the party whose counsel is sick. A federal court in Texas, for example, had to pause a trial because a lawyer and juror tested positive for COVID-19. Angela Morris, *BREAKING: Lawyer, Juror Test Positive for*

COVID-19, Prompting Judge To Pause Federal Trial, LAW.COM, <https://bit.ly/3zzdZDf> (Nov. 12, 2020) (district court “paused the jury trial upon learning of the first coronavirus diagnosis”). And this summer, a North Carolina judge declared a mistrial when three jurors tested positive for COVID-19. *See* Michael Gordan, *After 3 Jurors Test Positive for COVID, Judge Calls Mistrial in Mecklenburg Court Case*, THE CHARLOTTE OBSERVER (Aug. 3, 2021), <https://bit.ly/334qKtr>; *see also* Molly Crane-Newman, *NYC Sex Abuse Case Ends in Mistrial After Defense Lawyer Shows Up With Coronavirus Symptoms*, NEW YORK DAILY NEWS (Mar. 15, 2020), <https://bit.ly/3f1GJvc> (court declares mistrial after defense counsel exhibits symptoms of COVID-19); Lance Benzel, *COLORADO GAZETTE*, <https://bit.ly/34jwboS> (Nov. 29, 2020) (court declares mistrial after six prior continuances because defense team exhibited symptoms of COVID-19).

The risk of a mistrial is even greater here. In those cases, there were no known cases among counsel or the jury prior to the start of trial. The opposite is true here: there are known positive cases and exposures. As one court explained when it continued all jury trials earlier this week in light of the Omicron variant: “We must keep in mind that jury service compels people of all walks of life, with all health conditions and vaccination status to attend court.” *Judge: Pause Jury Trials During COVID Spike*, Cobb County Government, <https://bit.ly/32VPCnm> (Jan. 3, 2022). Moreover, even setting aside that there are known exposures from trial counsel, even

in the ordinary trial, “the likelihood of successfully getting through a lengthy jury trial when our community spread is at this record level is slim.” *Id.* That is patently so in a trial where there are multiple confirmed cases among the trial team, with the entire trial team having been exposed. The risk of further exposure and/or a mistrial are simply too great. *See, e.g., In re Testosterone Replacement Therapy Prods. Liab. Litig.*, No. 14-c-1748 (E.D. Ill. June 12, 2017) (Trial Tr. Vol. 6 at 1200, 1217) (granting a mistrial at Mr. Buchanan’s request in light of colleague’s health condition). And those risks are not worth the difference between trying this eleventh bellwether trial now versus at a later time when defense counsel have better assessed the extent of the outbreak and can safely and vigorously defend their clients.

* * *

Defendants do not make this request lightly. They have diligently prepared for trial. And they are doing their best to manage the outbreak on their team. But the developments of the past couple of days are unprecedented. Even if the “mere existence of the coronavirus does not warrant continuing a proceeding,” there can be no doubt that “these specific circumstances do.” *Quinn v. City of Tuskegee, Ala.* 464 F. Supp. 3d 1262, 1264 (M.D. Ala. 2020) (continuing civil trial on the first day of trial in light of “surge in coronavirus cases” and other considerations). Defendants respectfully request that the Court grant a continuance of the *Sloan/Wayman* trial until the parties are healthy and may safely participate in the trial. At a minimum,

the Court should grant a one-week continuance so that defense counsel will have clarity on the extent of the outbreak, as even a single week could be the difference in knowing whether the three positive cases were brought to the trial site or contracted here.

CONCLUSION

For the foregoing reasons, the Court should continue the *Sloan/Wayman* trial.

Date: January 7, 2022

Respectfully submitted:

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(F)

Pursuant to Local Rule 7.1(F), counsel for Defendants certify that this memorandum contains 2,626 words.

Dated: January 7, 2022

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY this 7th day of January 2022, a true and correct copy of the foregoing was electronically filed via the Court's CM/ECF system, which will automatically serve notice of this filing via e-mail to all registered counsel of record.

Dated: January 7, 2022

Respectfully submitted,

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