

SUPREME OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

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FRANK DARABONT, FERENC, INC.,	:
DARKWOODS PRODUCTIONS, INC., and	:
CREATIVE ARTISTS AGENCY, LLC,	:
	: Index No.: 654328/2013
	:
Plaintiffs,	: Part 3 (Cohen, J.)
	:
-against-	: Motion Sequence No. 030
	:
AMC NETWORKS ENTERTAINMENT	:
LLC, AMC FILM HOLDINGS LLC, AMC	:
NETWORKS INC., STU SEGALL	:
PRODUCTIONS, INC., and DOES 1	:
THROUGH 10,	:
	:
Defendants.	:
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**DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO  
VACATE THE TRIAL DATE AND CONTINUE THE TRIAL IN LIGHT OF THE  
SUBSTANTIAL HEALTH RISKS POSED BY THE COVID-19 PANDEMIC**

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## PRELIMINARY STATEMENT

As we look hopefully toward the future and an end of the global pandemic, the reopening of the courts for jury trials is an important and laudable milestone. Outside counsel and in-house counsel for AMC also look forward to a time this year when we can return to our offices, which have been closed for over one year. But what every agency and organization has learned over the past year is that lifting restrictions should happen carefully and incrementally—or infections spike and more people die. As Chief Judge DiFiore said recently, the proper approach for the courts is to “move forward responsibly and deliberately, carefully monitoring the COVID-19 metrics and the public health guidance.” Ex. A (March 1, 2021 Statement of DeFiore, C.J.).<sup>1</sup> She emphasized the need to proceed “incrementally” and “gradually,” and to “tak[e] into account the conditions in each courthouse and region of the state.” *Id.* And she stressed the need for individual judges to use “discretion . . . to schedule a *limited* number of in-court matters where the judge determines that doing so would further *important* considerations of access to justice or court operations.” *Id.* (emphases added). She directed the courts to consider the particular needs of the cases before them, the circumstances of their communities, and the evolving landscape, in determining whether and when to hold in-person proceedings. *See id.*

Reopening the courts with a sprawling and complex five-week trial, with the majority of the lawyers and witnesses from California, is neither deliberate nor incremental. On Defendants’ side alone, the core trial team of lawyers and staff from AMC, Gibson Dunn, and co-counsel includes at least 22 people. Plaintiffs’ trial team is expected to be large as well. And although not everyone will need to be in the courtroom at every moment, during the trial and in the weeks leading up to it, the team will need to meet together constantly off-site and with witnesses.

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<sup>1</sup> Citations to “Ex. \_\_\_” refer to exhibits to the Affirmation of Brian C. Ascher, dated March 15, 2021.

The latest CDC guidelines recommend against indoor gatherings with members of other households. Yet a trial of this size and scope beginning next month would force jurors, witnesses, and counsel to emerge from their year-long hibernation to sit in a room with dozens of strangers for weeks on end.

The CDC guidelines also recommend against unnecessary travel, even by those who have been vaccinated. Yet, the majority of the witnesses and counsel central to this trial (many of whom have *not* been vaccinated) will have to travel for hours from California on planes and using public transportation. They will then have to live in hotels for weeks on end, with strangers from across the country and globe who may inadvertently bring with them other deadly variants of the virus. Some members of Defendants' core trial team have serious medical and health conditions that would make this exposure especially risky. These partners and associates, who have been members of AMC's defense team for years, likely will be told *not* to travel for the trial, creating an obvious and intractable conflict between counsel's obligations as colleagues to keep one another safe and our obligations to the client to zealously represent them at trial.

These concerns are heightened *dramatically* and empirically in this case given the length of the trial and the size of the counsel teams that will be necessary. This is not a three-day criminal trial prosecuted by local counsel; it is a sprawling, complex case involving dozens of individuals from all over the country who will be forced to live in hotels and occupy public indoor spaces with other strangers, increasing the risk of contracting the virus. *See, e.g.*, Ex. B. The Court raised these and other similar concerns during our conference just one month ago, and the Court was correct. *See, e.g.*, Ex. C (Feb. 10 H'rg Tr.) at 4:4-14 (Court: "my guess is, just being candid, that once they start jury trials, again, I am anticipating here that a five-week jury trial is not going to

be on everybody's list of favorite things to start with because it creates a number of issues"); *id.* at 5:6-14; 9:1-7.

To be clear, Defendants are *not* arguing that the Court's re-opening process should be halted. To the contrary, consistent with Chief Judge DiFiore's guidance, this Court can and should move forward "responsibly and deliberately," "incrementally" and "gradually," and schedule a limited number of shorter and less risky in-court matters where "doing so would further important considerations of access to justice or court operations" and take into account the corresponding health risks of particular cases.

To assist the Court, Defendants submit an affidavit from Dr. Stephen Ostroff, the highly-respected former deputy director of the National Center of Infectious Diseases at the Centers for Disease Control and Prevention. Dr. Ostroff explains scientifically that the circumstances of this case pose extreme risks to the lawyers, jurors, their families, and the community. These risks are not hypothetical. In courtrooms around the country, jurors and lawyers have contracted COVID, and deaths have been reported by court staff in California and Texas. New York State Courts have had positive cases even before any civil trials resumed. These infections risk the health and lives of those involved in the litigation, and also pose severe trial management problems. In November alone, "[j]udges in New York City, Indiana, Colorado and Missouri declared mistrials recently because people connected to the trials either tested positive for the virus or had symptoms." Ex. D. And contrary to the statements made by Plaintiffs' counsel before this Court, vaccination remains several months away for many of Defendants' and their counsel's employees and family members.

There is no urgency in this particular case at this particular time that warrants imposing the significant and specific risks at play here of proceeding to a five-week trial during the pandemic. Courts around the country are prioritizing *criminal* trials, where the Constitution and federal law

mandate swift prosecutions and concerns over life and liberty are at stake. These consolidated *civil* cases are eight (Index No. 654328/2013) and three years old (Index No. 650251/2018), and they concern only money owed among large companies and individuals who are already very wealthy. Any future damages award is incurring prejudgment interest. And there is no credible suggestion that evidence will become stale (everyone has been deposed several times, and many testified at the *Kirkman* trial). Nor is there a credible argument that the trial will be impacted in any way by hitting pause and waiting until conditions are safer.

Unlike the typical trial, which has a handful of counsel and a few witnesses, and can be concluded in several days, this trial will expose jurors, witnesses, and counsel to dozens of strangers from across the country for well over one month. There are many shorter and less complex trials in Supreme Court's pipeline that should proceed—cases that will require smaller, local trial teams, involve less in-person court time, will have fewer witnesses requiring substantial pretrial preparation sessions, and will not necessitate the majority of the lawyers and witnesses to live in hotels for extended periods of time. The judiciary should focus its reopening at this time on these smaller, local, criminal trials—not sprawling and complex multi-week civil trials with lawyers and witnesses from across the country.

Simply put, this is about the worst “test case” imaginable for a trial in this courthouse at this time. There are *enormous* risks from proceeding with this trial before vaccinations are completed, and there is *no* countervailing urgency. This Court should not force the parties and their counsel—let alone the jurors—to choose between zealously trying this case and risking their own health or that of their loved ones and the public at large.

This jury trial should be adjourned until the risks decrease and at the very least until the witnesses, trial counsel, and jurors have a realistic chance of securing immunization and allowing

the lag time necessary for the vaccines to become effective (a process that takes up to six weeks after the first immunization in a two-dose vaccine). Alternatively, Defendants are ready and willing to try this case now as a virtual bench trial—an option this Court has twice suggested the parties consider in light of the current health crisis. *See* Ex. C (Feb. 10 Hr’g Tr.) at 7:15; 03/10/2021 Hr’g (transcript forthcoming). But if Plaintiffs insist on proceeding with a jury trial, then they should be required to wait until it is safe to do so.

### ARGUMENT

#### **I. A Jury Trial in this Case in the Coming Weeks Will Inevitably Result in Increased COVID-19 Exposure and Risk Infection, Serious Illness, or Even Death.**

Defendants understand and appreciate the need for the New York State courts to begin offering in-person services. AMC and its counsel agree, as Chief Judge DiFiore explained recently, that “[f]ace to face interaction is an indispensable component of our justice system.” Ex. A (March 1, 2021 Statement of DeFiore, C.J.). Defendants look forward to reopening their own offices, welcoming back their employees, and resuming in-person operations. And Defendants are grateful for the judiciary’s laudable efforts to create a safe environment and to “responsibly,” “deliberately,” “gradually,” and “carefully return to in-person operations.” *Id.*

But the Chief Judge also made clear that the courts must be “flexible and adaptable, taking into account the conditions in each courthouse and region of the state.” *Id.* It is important that judges exercise their individual “discretion . . . to schedule a *limited* number of in-court matters where the judge determines that doing so would further *important* considerations of access to justice or court operations.” *Id.* (emphases added).<sup>2</sup>

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<sup>2</sup> As the *New York Times* recently explained regarding the risk of infections in courthouses, “the challenge of preventing the virus’s spread is magnified by [the City’s] dense population. In normal times, clerks, court officers and lawyers squeeze into courtroom galleries and line the crowded hallways, waiting for cases to be called.” Ex. E. That challenge resulted in New York State courts in the City holding just nine criminal trials last year and *no* civil trials. *Id.*

Those important considerations no doubt include an emphasis on in-person proceedings when “deciding the guilt or innocence of individuals accused of crimes.” *Id.* But “for the foreseeable future, the *default* approach for us will continue to be virtual appearances in order to limit the number of people in our courthouses.” *Id.* (emphasis added). In fact, just a few days ago, Justice Garguilo postponed a complex civil trial that had been scheduled to commence on March 29, 2021, given the comparable safety risks of conducting a lengthy jury trial in current conditions. Ex. F. Justice Garguilo set a conference for May 3, 2021, asking the parties to return to “reflect[] on a realistic and responsible date to commence the preliminary voir dire process”—suggesting that even by June it may not be time to commence complex civil cases. *Id.*

This complex case involves too many lawyers and witnesses from too many parts of the country (primarily California) and will last for too long for it to be litigated in-person at this time. There are no countervailing interests in life or liberty that warrant imposing the extreme and potentially fatal risks on the lawyers, witnesses, and the community. The Court should adjourn the trial until it can be held safely.

**A. This Complex, High-Stakes Case, Litigated by Counsel from Across the Country, Poses Unique Risks of Spreading the Virus.**

Holding a complex, five-week civil trial at this stage in the pandemic poses outsized risks to the lawyers, witnesses, jurors, and the community.

The outside counsel teams on both sides are large, and many of them live on the other side of the country. Snyder Aff. ¶ 4. The same is true of both sides’ witnesses, the majority of whom will come from California. *Id.* at ¶ 9. Requiring witnesses and counsel to travel cross-country for trial would directly violate the CDC guidance that “[t]ravel increases your chance of getting *and spreading* COVID-19.” Ex. G; *see also id.* (the “CDC recommends that you do not travel at this time”). Forcing attorneys and witnesses to sit on long plane flights followed by public

transportation poses enormous risks for infection, which will then be brought to the on-site litigation teams, witnesses, jurors, and court staff. Ex. H.<sup>3</sup> Once they arrive in New York City, the lawyers and witnesses will then have to live in hotels for more than five weeks, exposing them to out-of-town strangers who may well be importing new virus variants into the City.

The trial in this case will last substantially longer than in the average case. Ex. I. From voir dire to jury deliberations, the trial will last at least five weeks. And there will be weeks of necessary in-person preparation for dozens of witnesses and counsel before the trial even begins. *See* Snyder Aff. ¶ 5; Gallagher Aff. ¶ 4. Multiple witnesses have said that they refuse to travel (*id.* at ¶ 9; *cf.* Ex. C (Feb. 10 H'rg Tr.) at 11:20-12:1), and although Defendants realize these witnesses may testify by video, such testimony is far less effective before a jury and therefore unfairly prejudices Defendants (Snyder Aff. ¶ 9).

In a trial setting, there is no way to avoid in-person interactions in an indoor space that pose severe risks of infection. Ostroff Aff. ¶¶ 10, 12, 13(a), (c)-(d). Given the complexity and breadth of the issues in this case—and its monetary value—trial counsel will need to communicate rapidly during examinations, associates and paralegals will need to hand documents to attorneys with little notice, clients will need to confer with their counsel in real-time, and the teams will need trial techs and other vital support staff on-site to coordinate audio-video presentations and other logistics. Ex. J. Outside of the courtroom, trial teams and their witnesses will be required to comingle in “war rooms” before and after court hours—and for weeks leading up to the trial. Ex. K. And outside the courtroom, dozens of lawyers and witnesses will be living in hotels across Manhattan for weeks on end, exposing everyone to potential infection spread in hotels by countless strangers

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<sup>3</sup> The Court graciously offered that witnesses could testify remotely, but that does not account for the attorneys, who cannot *litigate* remotely. And there are multiple witnesses whose in-person testimony is essential to the case, and who therefore would need to make the trip even if they had not yet been vaccinated.

traveling from around the world who also may be bringing with them new and deadly variants of the virus. Ostroff Aff. ¶¶ 11, 13(b)-(c). Given the importance of this case to the parties, counsel will have no choice: They will have a duty to defend this case as they would any other, which necessarily requires close coordination and introduces extreme health risks.<sup>4</sup>

As Dr. Ostroff explains, “[i]t is inevitable” that holding a trial under these specific circumstances will expose multiple individuals both inside and outside the courthouse to COVID-19. Ostroff Aff. ¶ 12. That inevitable exposure will likely result in infection and could result in serious infection and disease. *Id.* at ¶¶ 9, 12, 13(d). Dr. Ostroff confirms that this is the true danger of COVID-19. It is impossible to know in advance whether infection will result in symptoms, how long any symptoms may last, and whether the disease will result in serious illness or death. *See id.* at ¶¶ 12, 13(d)(iii). The disease affects each of us differently, and not even youth and a lack of comorbidities can ensure safety. *See Ex. SS.*

The risks to *jurors* from this long and complex of a case is also unreasonable. After one year of lockdown and isolation, jurors will be forced to sit in a crowded room with strangers for at least five weeks, which studies have suggested increases the risk of transmission of COVID-19 by up to *seventeen times*. Ostroff Aff. ¶ 10. Jurors will ride on public transit and expose themselves to dozens, if not hundreds, of individuals every day. *Id.* at ¶ 13(b). And they will then go home each night, for five weeks or more, knowing that they are putting their family and loved ones at risk.

Apart from the severe health and safety risks from pressing forward with this trial at this time, experience in other courts around the country shows that the risk of infection and disease and

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<sup>4</sup> Similarly, given the media attention this case has garnered, and the public’s right of access (*Westchester Rockland Newspapers, Inc. v. Leggett*, 48 N.Y.2d 430 (1979)), Defendants expect that multiple members of the press will seek to attend the trial in person and may well have a First Amendment right to do so (*Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980)).

a resulting mistrial in these circumstances is significant. In one civil case in the Eastern Division of Texas, where precautions were taken such as plexiglass around the witness box, a juror reported testing positive for COVID-19 after one week of trial. Ultimately, a mistrial was declared, but fifteen participants in the trial ended up with COVID-19, including six court staff, another juror, members of both the defense and the plaintiff's teams, and audiovisual personnel on both sides. Ex. L. Mistrials have been declared by judges in New York, Indiana, Colorado and Missouri—specifically because trial participants either tested positive for the virus or had symptoms. Ex. D. In a case with as many trial participants as this one, the likelihood of a mistrial is particularly acute.

In short, the *likely* result of pressing forward with a trial next month would be to impose undue, significant and grave health and safety risks on dozens of individuals—only to declare a mistrial after some portion of those involved in the trial become infected and unable to continue. See Ostroff Aff. ¶ 9.

**B. No Countervailing Concerns Warrant the Inevitable Risks of Infection.**

The empirical and inevitable risks described above for the attorneys, witnesses, and jurors are particularly unreasonable because what is at stake in this case is not the life and liberty of a criminal defendant, but rather whether Defendants owe Plaintiffs more money. It would be callous in the extreme to put the health and safety of dozens of individuals and families at risk over a monetary dispute between large corporations and wealthy individuals—particularly where the money, if awarded, is accruing interest at a rate of 9% per year as we speak.

There is an understandable desire to return to in-person *criminal* trials as soon as reasonably possible. Delay in criminal trials places life and liberty at stake, and, particularly in the cases of acquittal, failure to complete a criminal case expeditiously results in the irreparable harm of “prolonged imprisonment.” See *People v. Johnson*, 38 N.Y.2d 271, 275-76 (1975) (“The speedy trial guarantee . . . protects the accused, if held in jail to await trial, against prolonged

imprisonment . . .”). That is why the right to a speedy criminal trial is enshrined in the Sixth Amendment to the United States Constitution, and why New York criminal procedure law provides strict time limits on criminal cases (CPL § 30.30). *See People v. Blakley*, 34 N.Y.2d 311, 317 (1974). As Chief Judge DiFiore noted, “[f]ace to face interaction is an indispensable component of our justice system, *especially when it comes to deciding the guilt or innocence of individuals accused of crimes.*” Ex. Ex. A (March 1, 2021 Statement of DeFiore, C.J.) (emphasis added).

But those concerns are absent in a complex civil dispute like this one. Plaintiffs have received millions of dollars from Defendants, and all this case concerns—at the end of the day—is whether they are owed millions more. When other courts have considered resuming jury trials during the pandemic they have started with criminal trials—often with a single, detained defendant—before gradually expanding to larger criminal trials, and civil trials. *See, e.g.*, Exs. M, N, O, P.

Plaintiffs have pointed to Judge Rakoff holding an in-person criminal trial in *United States v. Petit*, No. 19-cr-850 (S.D.N.Y.). But even that isolated example of a criminal trial, implicating the life and liberty of an individual, illustrates the risks Defendants have emphasized. A juror sitting in that case became infected with COVID-19 shortly after the trial commenced. The infected juror fortunately did not have to be hospitalized and, fortunately, there have been no reports yet that any others on the jury or their families or loved ones became infected. But we do not know whether the infected juror infected others. In any event, even if the infected juror did not spread the virus to others, there is no reason to think the jury would be so lucky in *this* case. It is not just likely but “*inevitable* that . . . participants [in this trial] will be exposed to the virus.” Ostroff Aff. ¶ 12 (emphasis added); *see also id.* ¶ 9 (“very likely” that “problems related to the

virus . . . surface during the trial that could endanger trial participants”). And given the length of the trial and the number of participants, “the likelihood of a superspreading event or multiple chains of transmission” is increased. *Id.* ¶ 12. That Judge Rakoff held an in-person trial in a shorter, less complex *criminal* case, and luckily seems to have avoided spreading the virus among trial participants and others, has no bearing on whether trial is safe and appropriate under the circumstances in this complex, civil case.

**C. Precautions Cannot Ensure the Safety of the Witnesses, Counsel, or Jurors.**

Defendants appreciate the efforts the Court has taken to try to protect trial participants, but as Dr. Ostroff notes, those precautions cannot ensure safety in this case, given the number of participants, the length of the trial, and the cross-country travel of the trial participants. Ostroff Aff. ¶¶ 9-13(d). This particular trial simply cannot be managed in a safe way at this time in the pandemic. *See, e.g.*, Ex. C (Feb. 10 H’rg Tr.) at 4:4-14, 5:6-14, 9:1-7; Ostroff Aff. ¶¶ 14-15.

Testing and temperature checks are minimally effective, particularly where the disease manifests differently in some people as opposed to others. Ostroff Aff. ¶ 13(d)(iii). For example, as we all know by now, an individual with a normal temperature may well be diseased, *id.*, and may spread the virus to someone who is unwittingly more susceptible to suffering serious symptoms. Ex. Q. And here, because this trial involves so many participants over such a long period of time, the risks that testing and temperature screening will miss infection are even more significant. *See* Ostroff Aff. ¶¶ 13(d)(ii)-(iii).

The courtroom, supporting facilities, and trial team “war rooms” cannot be organized in a way that maintains sufficient physical distance among trial participants (indeed, our offices are not even open). Both parties will be represented by large trial teams due to the hundreds of millions of dollars at stake. Extra alternate jurors will also be needed. And given the number of necessary

trial attendees, proper social distancing and adequate ventilation will be very difficult. *Id.* at ¶¶ 13(c), (d)(iv)-(v).

As the courthouses begin to reopen, the bench and the bar are working to mitigate risks and to hold trials in a way that is safe and effective. This Court's efforts, led by Chief Judge DiFiore, are laudable. But this is a *terrible* test case. The Court should begin with the shorter, criminal trials involving local counsel and witnesses. And after those trials have proven safe, the Court can gradually and incrementally expand to more complex, civil cases. The Court should *not* dive head-first into a pool without knowing how deep the water is. *See, e.g.*, Ex. C (Feb. 10 H'rg. Tr.) at 4:4-14, 5:6-14, 9:1-7.

Plaintiffs profess to be unconcerned with the risks they and their counsel will be exposed to at trial. This is unfortunate gamesmanship. Indeed, in January, Plaintiffs expressed the same sincere concerns that Defendants raise in this motion. *See id.* at 11:20-12:1 (Plaintiffs' counsel: "I think we have 21 witnesses from California. . . . Many of them are in their 60s and, you know, I'm sure . . . they're going to be very thrilled to be the first ones to come testify in a trial. And . . . so the complexity is that there are a lot of out-of-town witnesses and many nonparties who will need to" travel to testify).

But even if Plaintiffs' new views were authentic, they should not be permitted to impose those views on Defendants' counsel and witnesses, or on the jury pool or the public at large. AMC and its counsel remain highly concerned and deeply troubled by the difficult choices that charging forward with a trial next month would require them to make. AMC's in-house counsel are integral to the trial team, and each individual would have to decide between putting their lives and their families' lives at risk by participating in-person in the defense of this nine-figure case (as they feel they must) and violating their obligations to their employer and its shareholders by staying home.

AMC's outside counsel would have to choose between the health and safety of the attorneys and staff, and their ethical obligations to zealously defend their clients. As stated in the attached affirmations of AMC General Counsel Jamie Gallagher and Gibson Dunn's Orin Snyder, this puts AMC and Gibson Dunn in an impossible position. The result will be severe prejudice to Defendants, given that for certain critical members of our teams with compromised immune systems, Defendants and their counsel have no choice but to prioritize health and safety over defending this lawsuit. Snyder Aff. ¶¶ 6-10; Gallagher Aff. ¶ 7; *Cf.* Ostroff Aff. ¶ 13(d). Simply put, proceeding with this trial next month will pit the safety and health of our lawyers and their families against our professional obligations to our clients.

**D. The Risks to the Attorneys, Witnesses, and Jurors Remain Real, Could Be Aggravated by Variants, and Will Not Be Solved by Vaccinations at this Time.**

Although infection rates are dropping, there is no question that the risks described above remain real. *See* Ostroff Aff. ¶¶ 4-5, 13(a). Just a couple weeks ago, the director of the Centers for Disease Control and Prevention warned expressly that “[n]ow is *not* the time to relax the critical safeguards that we know could stop the spread of COVID-19 in our communities” and that “with variants spreading, we stand to *completely lose* the hard-earned ground we have gained.” Ex. R (emphasis added); *see also* Ostroff Aff. ¶ 13(a) (“There is a high probability that the recent declines in COVID-19 incidence in the United States will swiftly be reversed by increasing circulation of these variants.”). And just last week, in commemorating the one-year anniversary of the pandemic that has killed over 550,000 people, President Joe Biden warned that “this is not the time to let up.” Ex. S. He continued: “[b]ecause if we don’t stay vigilant and the conditions change, then we may have to reinstate restrictions to get back on track.” *Id.*

Courts have not escaped the tragedy of infections and death from the virus. Last year, 23 courthouse employees in Albany, Georgia tested positive for COVID-19 after one infected juror

sat on a murder trial jury. *See* Ex. T. In January of this year, three court staff in Los Angeles contracted COVID-19 and died as a result. *See* Exs. U, V. And, as noted above, a civil trial in Texas federal court resulted in widespread infection, sickening 15 people and resulting in a mistrial. Ex. L. Jurors and counsel tested positive, and following the outbreak one juror refused to return at all and several others declined to return for several weeks. And this is just what has been publicly reported. *Id.* We do not know what happened to the family and loved ones of the trial participants who became infected or died. Nor do we know who else in the broader community became infected as a result of the courtroom exposure and outbreak.

These grave health and safety risks remain, and could even increase, given the news of more contagious variants entering New York City. And there is no possible chance that all trial participants will be vaccinated and immunized in time for an April trial date.

**1. New, More Contagious Variants Invading New York City Make In-Person Activities Particularly Dangerous in the Coming Weeks.**

An April trial date means that numerous unvaccinated participants will be thrown into a high-risk and prolonged engagement at a particularly dangerous point in the pandemic. Plaintiffs' suggestion that infection rates have decreased to a safe level is empirically false; in fact, the average daily cases in New York City today is higher than it was when New York State courts suspended operations in December. *See* Ex. W (documenting seven-day average daily cases at 3,614 cases on March 13, 2021, as compared to 2,328 cases on December 1, 2020); *see also* Ostroff Aff. ¶¶ 5-6.

To aggravate matters, new variants of the virus are rapidly emerging throughout the city and state, and the frequency of infections are expected to rise as a result. Ostroff Aff. ¶ 13(a). Just last Wednesday, multiple news outlets reported that over *half* of the city's current coronavirus cases are caused by two new and more dangerous variants. Exs. X, Y, Z; Ostroff Aff. ¶ 13(a). The

city has confirmed that one of these variants, originating from Washington Heights, spreads faster than the original virus, and is circulating at three times the level of the highly contagious UK variant. Ex. AA. And studies have already shown that vaccines may not be as effective against another variant spreading through New York City containing a so-called E484K mutation. Exs. AA, BB; *accord* Ex. CC; *see also* Ostroff Aff. ¶ 13(a).

As these variants are spreading throughout the city, the decrease in the city's infection rate has slowed, plateauing at still a very high level, and is predicted to increase in the coming weeks. Ostroff Aff. ¶¶ 5-6, 8, 13(a); Exs. DD, EE. That is why experts have urged the public “not to let up on health measures” until more people have been vaccinated. Ex. Y. In fact, according to one of the nation's top disease experts, the rapid rise in variants throughout the United States is reflective of the country being in the “eye of the hurricane” of the pandemic (Ex. FF), meaning that while infection rates have declined, the country may face a whiplash effect as the infection rates of new variants continues to dramatically rise. *See* Exs. CC, GG, HH; *see also* Ex. EE (“Cases have fallen more slowly in New York City than nationwide, and highly contagious variants are causing concern.”).

The reality of the public health risk in New York's State courts in particular is evidenced by the sheer number of New York State court employees who have been tested positive for COVID-19 since the beginning of March—over 71. Ex. II. With a civil trial of this magnitude, with the large number of participants from out-of-state who will not be vaccinated by the time trial is scheduled to commence, who will have to live in hotels across the city, and with the ominous threat of new variants in this city, pressing forward with a trial in this particular case next month would be unsafe and irresponsible. *See* Ostroff Aff. ¶ 3, 14-15.

## 2. The Majority of Trial Participants (and Likely Jurors) Will *Not* Be Vaccinated by the Time Trial Starts.

Numerous trial participants *will not be vaccinated* by the end of April, and are not scheduled to receive vaccinations until later this spring or early summer. The Court cannot proceed with a trial next month on the assumption that trial participants will be vaccinated.

Vaccinations in New York are currently available only to residents over the age of 60, or who work in specific industry sectors, or who have specific medical conditions. Ex. JJ. Many trial participants based in New York do not meet these criteria. Snyder Aff. ¶ 4. Similarly, vaccinations in California, from which 16 of Defendants' trial participants would be traveling (*see id.* at ¶ 9), are currently available only to health care workers, long-term care residents, persons 65 and older, employees of certain industry sectors, and those with health conditions designated as "high risk." Ex. KK. And while the federal government has predicted that there will be enough doses to vaccinate all U.S. adults by the end of May, it "will take longer" to "administer[] the shots." Exs. LL; *see also* Ex. MM. As such, a substantial number of trial participants from Defendants' side alone will not be vaccinated and protected by the time this trial is scheduled and will have no way to get vaccinated, contrary to Plaintiffs' counsel's statements at the March 10 conference. *See* Ostroff Aff. ¶ 13(d)(i).

Even if trial participants are able to receive vaccinations at the end of April, the single-dose Johnson & Johnson vaccine takes at least two weeks to begin conferring protection from the virus to the vaccine recipient (Ex. NN); and the two-dose Pfizer and Moderna vaccines likewise take at least two weeks to confer immunity, following delivery of the *second* dose to the recipient (Ex. OO). All told, it can be roughly six weeks from the first shot of a given vaccine to reach full immunity and protection. Thus, even to the extent any trial participants were to receive vaccines

in the weeks leading up to the April 21 jury selection date (and the majority will have not), those participants still will not be protected from the virus. Ostroff Aff. ¶ 13(d)(i).

A five-week civil jury trial over profits from a television series cannot reasonably justify exposing this many unvaccinated or not-yet-immune individuals to the grave risks of infection.

## **II. The Court Could Not Empanel a Constitutionally Representative Jury for This Five-Week Trial During the Middle of a Pandemic.**

“The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community.” *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 220 (1946); *Timmel v. Phillips*, 799 F.2d 1083, 1086 n.5 (5th Cir. 1986) (“The tradition of trial by an impartial jury drawn from a cross-section of the community applies to both civil and criminal proceedings.”). This is codified in New York’s Judiciary Law, which states that all litigants have the right to juries “selected at random from a fair cross-section of the community.” Jud. Law § 500. The pandemic has created new challenges to empaneling a representative jury: while it may be possible to do so safely for a short trial, it simply cannot be done here where dozens of counsel and witnesses will have to participate over the five-week trial.

During the course of the pandemic, courts across the country have found it difficult to empanel representative juries, given how few prospective jurors are willing to respond to a summons. *See, e.g., United States v. Foley*, 2020 WL 6591471, at \*1 (D. Conn. Nov. 11, 2020) (adjourning jury selection after only “nine” potential jurors appeared out of “twenty” summoned venirepersons); *United States v. Pair*, 2021 WL 279239, at \*6 (E.D. Va. Jan. 27, 2021) (explaining the problems inherent in trying “to ensure that jurors are ‘comfortable with the idea of sitting in an enclosed courtroom, with a group of strangers, for the entire day’” during trial (quoting E.D. Va. General Order 2020-19)); *United States v. Taylor*, 2020 WL 7264070, at \*7 (D.D.C. Dec. 10,

2020) (acknowledging “that any pandemic jury may not represent a fair cross-section of the community, given the potential for diminished representation from various sub-groups, including those vulnerable to or living with others vulnerable to severe complications from COVID-19, as well as caregivers whose children are not in school”). “[C]ourts in Hartford, Connecticut, San Diego and Norfolk, Virginia, have had to delay jury selection for trials because too few people responded to jury duty summonses. The non-response rates are much higher now than they were before the pandemic, court officials say.” Ex. D. For example, “[i]n San Diego, a criminal case had to be postponed . . . because too few people showed up for jury duty. Officials twice summoned 900 people, but only about 40 people showed up each time.” *Id.* And “[i]n Norfolk, Virginia, efforts to resume jury trials during the pandemic stalled recently because roughly nine out of 10 possible jurors weren’t showing up in court.” *Id.*

While it may be possible to safely empanel a jury for a short trial with few participants, that challenge will be magnified exponentially here, where many (if not most) potential jurors will be intimidated by a demand that they appear in person for *five weeks*, with dozens of counsel, witnesses, and staff. These factors “dramatically increase[]” the risks of COVID transmission to jurors (and others) in comparison with a smaller and shorter trial—a fact jurors will assuredly understand. Ostroff Aff. ¶ 11; *see also* Ex. PP. When jurors learn about the likely length of this trial and the number of participants, they will take whatever steps available to them to be excused from service.

This is not mere supposition—a study completed just last week confirms that prospective jurors are likely to avoid serving on this five-week trial. Between March 11-March 13, 2021, the Defendants commissioned an anonymous study of 403 prospective jurors in New York County (the “Defense’s Study”) to evaluate New Yorker’s concerns about COVID-19 and their

willingness to serve on a jury for a lengthy trial. Manrique Aff. Ex. 1 (DRC Study). More than one third of respondents (35.7%) indicated that they would attempt to avoid serving on a 5-6 week-long jury trial by answering *voir dire* questions in a way that would assure they would not be seated on the jury. *Id.* at 1. And more than half of the prospective jurors (51.1%) suggested that they would not be able to discharge their duties as jurors, because they would have a hard time paying attention during a 5-6 week-long jury trial for a fear of contracting COVID-19. *Id.* Similarly, 44.7% responded that they would feel pressure to reach a verdict quickly to avoid exposure to COVID-19 if selected to serve on a 5-6 week long jury trial. *Id.*

Moreover, while some prospective jurors may not avoid service, these individuals—i.e., the jurors who do *not* avoid serving on a 5-6 week trial—will *not* represent a cross-section of the community. Defendants' survey revealed that Black (76.5%), Asian (67.9%), and Hispanic / Latinx (63.3%) respondents were much more likely than White respondents (57.1%) to doubt that they could serve safely on a jury. *Id.* at 2. There is a similar split along income lines: 78.7% of respondents with an income of under \$25,000 and 70.5% of respondents with household incomes between \$25,000 - \$49,000 doubted that the trial would be safe, while 53.5% of respondents with incomes ranging between \$100,000 - \$149,000 and 50.8% of individuals with incomes greater than \$150,000 responded the same. *Id.*<sup>5</sup>

In criminal trials, the difficulties inherent in empanelling a representative jury are often outweighed by the liberty interests that may be adversely impacted if trial is postponed. But those countervailing interests are not present in this civil dispute over money between wealthy parties. Ex. QQ at 62 (National Center for State Courts recommends that courts should address juror

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<sup>5</sup> This is consistent with a June 2020 national survey that showed a clear demographic split in juror hesitancy, with women—particularly women in Black and Hispanic / Latinx communities—more hesitant to appear for jury duty than White males. *See* Ex. RR.

shortages “by postponing civil and other jury trials where there is not a speedy trial issue” and focusing on providing juries for criminal trials). Given the enormous difficulties inherent in empaneling a jury for, and conducting, this lengthy, five-week trial, and the lack of compelling reasons to hold the trial immediately, the Court should postpone the trial to allow for broader vaccine distribution and the resulting increase in community willingness to serve as a juror.

**CONCLUSION**

The Court should adjourn the trial until a later date when it can be held safely.

Deadline

Dated: March 15, 2021  
New York, New York

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Deadline

**ATTORNEY CERTIFICATION PURSUANT TO COMMERCIAL DIVISION RULE 17**

I, Orin Snyder, an attorney duly admitted to practice law before the courts of the State of New York, hereby certify that this Memorandum of Law in Support Of Defendants' Motion To Vacate The Trial Date And Continue The Trial In Light Of The Substantial Health Risks Posed By The COVID-19 Pandemic complies with the word count limit set forth in Rule 17 of the Commercial Division of the Supreme Court (22 NYCRR 202.70(g)) because it contains 6,722 words, excluding the parts of the memorandum exempted by Rule 17. In preparing this certification, I have relied on the word count of the word-processing system used to prepare this memorandum of law.

Dated: March 15, 2021  
New York, New York

GIBSON, DUNN & CRUTCHER LLP

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