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**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**FOR THE COUNTY OF LOS ANGELES, CENTRAL DISTRICT**

|  |  |  |
| --- | --- | --- |
| T.J. SIMERS,  Plaintiff,  vs.  LOS ANGELES TIMES COMMUNICATIONS, LLC, et al.,  Defendants. |  | Case No.: BC 524 471  **The Honorable** **Armen Tamzarian**  **PLAINTIFF** **T.J. SIMERS’ TRIAL BRIEF IN SUPPORT OF COMPLETING TRIAL REMOTELY AND IN OPPSOTION TO ANY REQUEST FOR MISTRIAL BECAUSE OF JUROR UNAVAILABILITY; DECLARATION OF ZACHARY LYNCH; EXHIBITS**  Trial: January 5, 2022  Time: 10:00 a.m.  Dept.: 52  Action Filed: October 15, 2013 |

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Plaintiff, T.J. Simmons, submit the instant trial brief to the Honorable Armen Tamzarian, in Department 52, regarding the completion of trial remotely, in the alternative to a mistrial.

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Description automatically generatedDated: January 13, 2022 SHEGERIAN & ASSOCIATES, INC.

By:

Zachary Lynch, Esq.

Attorneys for Plaintiff,

T.J. SIMERS

MEMORANDUM OF POINTS AND AUTHORITIES

1. SUMMARY OF PLAINTIFF’S ARGUMENTS

Plaintiff T.J. Simers (“Simers”), Defendant Los Angeles Times (“Defendant”), and the Court are in the unique, precarious position of considering next steps following a Juror and an attorney-staff member testing positive for Covid-19. Simers wholly appreciates that the Court is likely gathering its own information and that the situation is ever-evolving. Through this trial brief, Simers intends to contribute to that ongoing conversation. At the outset, Simers’ primary consideration is concern for the jury’s and greater public’s health, as well as compliance with any Los Angeles County Superior Court (“LASC”) rules.

***First***, Simers reasonably anticipates that multiple jurors will be unable or unwilling to proceed following a potential exposure. Under a recent Los Angeles Superior Court public notice, “persons who have had contact with persons diagnosed with Coronavirus/COVID-19 [shall not enter any courthouse under the jurisdiction of the Superior Court of California, County of Los Angeles].” (Declaration of Zachary Lynch (“Lynch Decl.”), Exh. 1, Attention: Coronavirus/COVID-19 Announcement (although there is not an effective date on this notice, Simers believes it was effective sometime around December 30, 2021, at least based upon popular source articles, attached as Exh. 2).) There is ambiguity to the term “contact,” but it is generally understood that contact—at least “close contact”—is being within “[six] feet of an infected person for a cumulative total of 15 minutes or more over a 24-hour period.” (Lynch Decl., Exh. 3, CDC Guidance on Quarantine and Isolation, p. 3 (updated January 9, 2022, highlights added).) Simers is speculating but believes up to four jurors may have been in “close contact” with the now-discharged juror who tested positive. Also, other individuals involved in the case were potentially within close contact of the trial technician that also tested positive, including Defendant’s co-lead trial counsel.

***Second,*** the Court has authority and discretion to conduct proceedings, including trials, remotely. Under Code of Civil Procedure section 367.75(d), “upon [the Court’s] own motion or the motion of any party, the court may conduct a trial . . ., in whole or in part, through the use of remote technology, absent a showing by the opposing party as to why a remote appearance should not be allowed.” Here, all that remains is about one-half day of evidence, closing arguments, and jury deliberations. Simers, witnesses, and all counsel have invested substantial resources in this trial. Simers is over seventy years old, and this is the third trial. If trial is not changed to a remote format, there is an additional risk of losing further jurors because of time qualifications. This is grave prejudice to Simers. By and through this trial brief, Simers hereby moves to have this trial conducted remotely under California Civil Procedure 367.75.[[1]](#footnote-1)

***Third***, logistically, Simers is willing to facilitate setting up jurors for remote appearances and providing individual, isolated areas for each juror to access. Specifically, Simers proposes: (i) using third party equipment to access the proceeding; (ii) providing each juror an individual room within a hotel or office at a mutually agreeable location, which would ensure all jurors have reliable internet access and a safe, isolated environment; (iii) and having independent technical support on standby to assist with any access or support issues. Of course, the jury would not be aware of whether either party, if any, provided these accommodations. Additionally, these accommodations will provide safe, secure, and consistent access to the proceeding, without violating LASC’s Attention: Coronavirus/COVID-19 Announcement for those jurors who were in close contact with the now-discharged juror who tested positive for COVID-19. Simers has already begun preliminary discussions with third-party providers on these resources, which should be available in short order. Additionally, this would avoid any violation of LASC’s Attention: Coronavirus/COVID-19 Announcement, which only applies to LASC courthouses.

***Fourth*,** Courts throughout California have successfully held remote jury trials. For example, Riverside Superior Court has a detailed manual on Protocol for Remote Jury Trials, which includes guidance on best practice for closing arguments, verdict forms, deliberations, reading of the verdict, and relation to post-trial motions and judgment. As stated in Riverside Superior Court’s Protocol for Remote Jury Trials:

. . . Riverside Superior Court is not the first court to implement remote jury trials, and a large superior court like Alameda County has been using them since the summer of 2020 to great success. So have courts in other States. With no definite end to the pandemic in sight, remote trials are currently a must, and we will do everything we can to make them fair and just for all involved.

It is important to note that each superior court judge as a constitutional officer retains the power and discretion to conduct civil trials as he or she sees fit. Nevertheless, the overarching goal for the Riverside Superior Court for the foreseeable future is to conduct civil jury trials remotely in furtherance of the critically-important goal of promoting the health and safety of all Californians.

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(Lynch Decl. Exh. 4, p. 15 (citing Cal. Emerg. Rules, rule no. 3).) Otherwise stated, other California Superior Courts have adapted to the public health risks by utilizing remote technology.

As introduced above and further discussed below, respectfully, the Court should hold the remainder of trial remotely, as opposed to finding a mistrial because of juror unavailability.

1. ARGUMENT
   1. Simers Reasonably Anticipates Trial Will Be Unable to Continue Under LASC Rules Because of Jurors’ Close Contact with a Now-Discharged COVID-19 Positive Juror.

Sometime on or around December 31, 2021, LASC issued a public notice titled, Attention: Coronavirus/COVID-19 Announcement, which states: “**Effective immediately,** the following persons shall not enter any courthouse under the jurisdiction of the Superior Court of California, County of Los Angeles: . . . Persons who have been diagnosed with Coronavirus/COVID-19, or persons who have had contact with persons diagnosed with Coronavirus/COVID-19.” (Lynch Decl., Exh.1 (no emphasis added).)

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Here, up to four jurors may have been in close contact with the now-discharged juror who was COVID-19 positive. Under LASC’s notice, these individuals are likely unable to enter the courthouse. Without a shift to remote format, the jury will need to adjourn for an extended period of time, which would likely cause further juror unavailability in of itself. Additionally, Defendant’s co-lead trial counsel may have been in close contact with a COVID-19 positive trial technician, which may necessitate that he makes remote appearances should trial continue.

* 1. The Court Has Authority to Conduct the Remainder of the Trial Remotely.

As of January 1, 2022, the Court explicitly has authority to hold trial remotely under Civil Procedure Code section 367.75. As written:

(1) Except as otherwise provided by law and subject to the limitations of subdivision (b), upon its own motion or the motion of any party, the court may conduct a trial or evidentiary hearing, in whole or in part, through the use of remote technology, absent a showing by the opposing party as to why a remote appearance or testimony should not be allowed.

Code Civ. Pro. 367.75(d). By statute, no stipulation or waiver is required. Rather, upon request of the moving party, the burden of proof shifts to the non-moving party to show “why the remote appearance or testimony should not be allowed.” However, in the Court’s discretion, it may require in-person appearances when: (i) the court does not have requisite technology; (ii) it materially assists in determination, effective management, or resolution; (iii) the court reporter cannot transcribe. Code Civ. Pro. 367.75(b) (also discussing translation, which is not at issue here).

Here, no reasonable argument could be made why a remote trial “should not be allowed.” To date, this trial has been ongoing for five and one-half days. All that remains is one-half day of evidence, closing arguments, and deliberations. Once trial continues, a verdict could reasonably be expected the evening of closing or the following day. If a remote format is not adopted and, in the alternative, trial is temporarily suspended, then jurors will no longer be time qualified. Additionally, jurors stand to their emotional connection to the evidence in the case, which enormously prejudices Simers. Simers, witnesses, and all counsel have invested substantial resources into this trial, whether monetary or emotional. Simers is over seventy years old. This is the third trial on this matter, and the second trial following an appeal. The alternative to a remote format is a nearly assured mistrial. Given these circumstances, a risk of mistrial certainly outweighs any reason “why the remote appearance should not be allowed,” particularly when substantial portions of the trial have already been conducted semi-remotely.

Simers has already facilitated and presented remote appearances by witnesses. Aside from some a few, minor repetitive questions and one witness briefly needing to re-join the proceeding, this remote testimony has gone smoothly.[[2]](#footnote-2) To the extent that Defendant’s counsel needs to cross-examine remotely, it will only apply to about two-witnesses, being less than one-half day of evidence. Regarding jury deliberations, they are wholly possible by remote means. As further discussed below, Simers can ensure jurors will have: a quiet, safe area to attend the proceeding remotely; reliable internet; and sufficient technological resources.

* 1. Logistically, Simers Can Arrange Off-Site, Safe, and Isolated Environments for Jurors to Complete the Trial.

Simers has already begun organizing logistics for conducting the remainder of the trial remotely. Specifically, Simers could anonymously provide:

* Individual, nearby hotel rooms or offices at a mutually agreeable location. This will provide a quiet and isolated area for each juror to attend the trial. Additionally, this will provide stable internet for those who lack internet at home or have poor internet connection.
* Individual laptops, so those without their own technological equipment may still participate.

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* If possible, independent technical support, who can troubleshoot any technological issues that may arise.

Additionally, Simers aims to thoroughly test these systems to ensure any preliminary issues are resolved prior to resuming trial. In short, this should obviate any delays or miscommunication attributable to the equipment itself or internet access. Additionally, there would be no issues under LASC’s public notice, as applied to individuals in contact with the now-discharged COVID-19 positive juror.

* 1. Other California Superior Courts Are Successfully Holding Civil Jury Trials Remotely.

As illustrative in Riverside Superior Court’s Protocol for Remote Jury Trials, remote trials are wholly possible and necessary given the present public health issues, which provides:

. . . Riverside Superior Court is not the first court to implement remote jury trials, and a large superior court like Alameda County has been using them since the summer of 2020 to great success. So have courts in other States. With no definite end to the pandemic in sight, remote trials are currently a must, and we will do everything we can to make them fair and just for all involved.

It is important to note that each superior court judge as a constitutional officer retains the power and discretion to conduct civil trials as he or she sees fit. Nevertheless, the overarching goal for the Riverside Superior Court for the foreseeable future is to conduct civil jury trials remotely in furtherance of the critically-important goal of promoting the health and safety of all Californians.

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(Lynch Decl. Exh. 3, p. 15 (citing Cal. Emerg. Rules, rule no. 3).) Regarding post-trial motions, “The remote civil jury trials process should not affect post-trial motions or the rendering of judgment.” (*Id.*) Simers’ counsel is familiar with the Honorable Kira Klatchko in Riverside Superior Court Department PS1, whose department phone number is (760) 904-6726, if the Court is inclined to inquire about that court’s experience with remote civil jury trials.

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1. CONCLUSION

For the aforementioned reasons, if the Court is considering a mistrial in the present matter, then—respectfully—the Court should permit completion of the trial by remote means.[[3]](#footnote-3)

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Description automatically generatedDated: January 13, 2022 SHEGERIAN & ASSOCIATES, INC.

By:

Zachary Lynch, Esq.

Attorneys for Plaintiff,

T.J. SIMERS

DECLARATION OF ZACHARY LYNCH

I, Zachary Lynch, declare as follows:

1. I am an attorney at law, duly authorized to practice law before all of the courts of the State of California. I am the attorney of record for plaintiff, T.J. Simers, in this case. I am familiar with the files, pleadings, and facts in this case and could and would competently testify to the following facts on the basis of my own personal knowledge.
2. Attached as **Exhibit 1** is a true and correct copy of Los Angeles Superior Court’s public notice, titled, “Attention: Coronavirus/COVID-19 Announcement.” As of the evening of January 12, 2022, this document was still posted at [142020315174950CoronavirusPosterv3.pdf (lacourt.org)](https://www.lacourt.org/newsmedia/uploads/142020315174950CoronavirusPosterv3.pdf). Attached as **Exhibit 2** is a popular source article published on December 30, 2021 discussing Los Angeles Superior Court Presiding Judge Eric C. Taylor’s encouraging remote appearances in response to a winter surge of COVID-19 cases.
3. Attached as **Exhibit 3** is a true and correct copy of the Centers for Disease Control and Prevention’s “Quarantine and Isolation” webpage, which was downloaded as an exhibit on January 12, 2022.
4. Attached as **Exhibit 4** is a true and correct copy of Riverside Superior Court’s “Protocol for Remote Jury Trials.”

I declare, under penalty of perjury under the laws of the State of California, that the foregoing is true and correct.

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Zachary Lynch, Esq.

**SIMERS v. LOS ANGELES TIMES COMMUNICATIONS, et al.** **LASC Case No. BC 524 471**

**PROOF OF SERVICE**

**STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

I am an employee in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 145 S Spring Street, Suite 400, Los Angeles, California 90012.

On January 13, 2022, I served the foregoing document, described as **“PLAINTIFF T.J. SIMERS’ TRIAL BRIEF IN SUPPORT OF COMPLETING TRIAL REMOTELY AND IN OPPSOTION TO ANY REQUEST FOR MISTRIAL BECAUSE OF JUROR UNAVAILABILITY; DECLARATION OF ZACHARY LYNCH; EXHIBITS.”** on all interested parties in this action by placing a true copy thereof in a sealed envelope, addressed as follows:

**Linda Miller Savitt, Esq.**

**Elsa Banuelos, Esq.**

**John J. Manier, Esq.**

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**(STATE)** I declare, under penalty of perjury under the laws of the State of California, that the above is true and correct.

**(BY ELECTRONIC MAIL)** I sent such document via facsimile mail to the number(s) noted above.

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Description automatically generatedExecuted on January 13, 2022, at Los Angeles, California.

Raul Aguilar

1. If necessary, Simers will also bring this motion by *ex parte* application. However, Simers wanted to apprise and engage the Court and Defendant on this emergent issue as soon as possible, particularly considering trial is near-complete and the jurors have limited time qualifications. [↑](#footnote-ref-1)
2. Of note, to the extent that Defendant asserts that it had any issues examining Heather Halpern relating to documents, it should have used the screen share function without publishing to the content to the jury. [↑](#footnote-ref-2)
3. If the Court is unwilling to conduct the remainder of the trial remotely and is inclined to grant a mistrial because of insufficient jurors, Simers respectfully requests that the Court temporarily excuse the jury and order them back on the soonest-available date as permitted by public health considerations and LASC’s rules. [↑](#footnote-ref-3)