



PROGRAM MATERIALS

Program #30187

August 4, 2020

Practical and Ethical Issues for Taking Remote Depositions

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Practical Issues for Taking Remote Depositions

August 4, 2020

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OUTLINE

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 - a. In Person
 - b. Phone
 - c. Video
 - d. Conference
2. Relevant Rules
3. Emergency Orders
4. Notice of Deposition
5. Participants
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 - b. Witness
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 - d. Court reporter
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 - a. Administration of oath
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7. Effective examinations
8. Using exhibits remotely

Fed Rule Civ. Proc. 26. Duty to Disclose; General Provisions Governing Discovery

(c) PROTECTIVE ORDERS.

- (1) *In General.* A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending—or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:
 - (A) forbidding the disclosure or discovery;
 - (B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery;
 - (C) prescribing a discovery method other than the one selected by the party seeking discovery;
 - (D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;
 - (E) designating the persons who may be present while the discovery is conducted;
 - (F) requiring that a deposition be sealed and opened only on court order;
 - (G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and
 - (H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.
- (2) *Ordering Discovery.* If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery.
- (3) *Awarding Expenses.* [Rule 37\(a\)\(5\)](#) applies to the award of expenses.

Fed. R. Civ. Proc. 30. Deposition By Oral Examination

(b) NOTICE OF THE DEPOSITION; OTHER Formal REQUIREMENTS.

(4) *By Remote Means.* The parties may stipulate—or the court may on motion order—that a deposition be taken by telephone or other remote means. For the purpose of this rule and Rules [28\(a\)](#), 37(a)(2), and 37(b)(1), the deposition takes place where the deponent answers the questions.

(5) *Officer's Duties.*

(A) *Before the Deposition.* Unless the parties stipulate otherwise, a deposition must be conducted before an officer appointed or designated under [Rule 28](#). The officer must begin the deposition with an on-the-record statement that includes:

- (i) the officer's name and business address;
- (ii) the date, time, and place of the deposition;
- (iii) the deponent's name;
- (iv) the officer's administration of the oath or affirmation to the deponent; and
- (v) the identity of all persons present.

(c) EXAMINATION AND CROSS-EXAMINATION; RECORD OF THE EXAMINATION; OBJECTIONS; WRITTEN QUESTIONS.

(1) *Examination and Cross-Examination.* The examination and cross-examination of a deponent proceed as they would at trial under the [Federal Rules of Evidence](#), except Rules [103](#) and [615](#). After putting the deponent under oath or affirmation, the officer must record the testimony by the method designated under Rule 30(b)(3)(A). The testimony must be recorded by the officer personally or by a person acting in the presence and under the direction of the officer.

Federal Rule Evidence 615. Excluding Witnesses

- At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding:
 - (a)** a party who is a natural person;
 - (b)** an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney;
 - (c)** a person whose presence a party shows to be essential to presenting the party's claim or defense; or
 - (d)** a person authorized by statute to be present.

Florida Statutes Title VII. Evidence § 90.616.

Exclusion of witnesses

- (1) At the request of a party the court shall order, or upon its own motion the court may order, witnesses excluded from a proceeding so that they cannot hear the testimony of other witnesses except as provided in subsection (2).
- (2) A witness may not be excluded if the witness is:
 - (a) A party or guardian of a minor child victim, or a lawful representative who is a natural person.
 - (b) In a civil case, an officer or employee of a party that is not a natural person. The party's attorney shall designate the officer or employee who shall be the party's representative.
 - (c) A person whose presence is shown by the party's attorney to be essential to the presentation of the party's cause.
 - (d) In a criminal case, the victim of the crime, the victim's next of kin, the parent e of such person, unless, upon motion, the court determines such person's presence to be prejudicial.

Florida Supreme Court Administrative Order AOSC20-23
IN RE: COMPREHENSIVE COVID-19 EMERGENCY
MEASURES FOR THE FLORIDA STATE COURTS

I. GUIDING PRINCIPLES

- A. The presiding judge in all cases must consider the constitutional rights of crime victims and criminal defendants and the public's constitutional right of access to the courts.
- B. To maintain judicial workflow to the maximum extent feasible, chief judges are directed to take all necessary steps to facilitate conducting proceedings with the use of technology.
- C. Nothing in this order is intended to limit a chief judge's authority to conduct court business or to approve additional court proceedings or events (except for grand jury proceedings, jury selection proceedings, and criminal and civil jury trials, all of which are suspended) that are required in the interest of justice, if doing so is consistent with protecting the health of the participants and the public health.
- D. Judges and court personnel who can effectively conduct court and judicial branch business from a remote location shall do so. Participants who have the capability of participating by electronic means in remote court proceedings shall do so.

Florida Supreme Court Administrative Order AOSC20-23

IN RE: COMPREHENSIVE COVID-19 EMERGENCY

MEASURES FOR THE FLORIDA STATE COURTS

II. USE OF TECHNOLOGY

- A. All rules of procedure, court orders, and opinions applicable to court proceedings that limit or prohibit the use of communication equipment for conducting proceedings by remote electronic means shall remain suspended.
- B. The chief judge of each district court of appeal and each judicial circuit remains authorized to establish procedures for the use, to the maximum extent feasible, of communication equipment for the conducting of proceedings by remote electronic means, as are necessary in their respective district or circuit due to the public health emergency.
- C. Administering of Oaths
 - (1) Notaries and other persons qualified to administer an oath in the State of Florida may swear a witness remotely by audio-video communication technology from a location within the State of Florida, provided they can positively identify the witness.
 - (2) If a witness is not located within the State of Florida, a witness may consent to being put on oath via audio-video communication technology by a person qualified to administer an oath in the State of Florida.
 - (3) All rules of procedure, court orders, and opinions applicable to remote testimony, depositions, and other legal testimony, including the attestation of family law forms, that can be read to limit or prohibit the use of audio-video communications equipment to administer oaths remotely or to witness the attestation of family law forms, shall remain suspended.
 - (4) Notaries and other persons qualified to administer an oath in the State of Florida may swear in new attorneys to The Florida Bar remotely by audio-video communication technology from a location within the State of Florida, provided they can positively identify the new attorney.
 - (5) For purposes of the provisions regarding the administering of oaths, the term “positively identify” means that the notary or other qualified person can both see and hear the witness or new attorney via audio-video communications equipment for purposes of readily identifying the witness or new attorney.

IN THE CIRCUIT COURT FOR _____

----- X

JOE SMITH,

:

Plaintiff,

:

Case No. 202-123456

v.

:

ABC CORP., et al.,

:

Defendants

:

----- X

NOTICE OF VIDEOTAPED DEPOSITION OF WITNESS

Plaintiff, by his undersigned counsel, pursuant to Rule _____, will take the deposition of Witness on September 1, 2020, at the law offices of _____ or if the circumstances of the COVID – 19 virus continue to so require, the deposition will be conducted through a secure web-based deposition option, such as that afforded by Veritext or any other court reporting service or video conferencing (VTC) services offered by Veritext (“Web Deposition”) or any other court reporting service.

The deposition will be taken before an official court reporter and videographer or any other Notary Public or officer authorized to administer oaths by the laws of the State of _____, and a person who is neither a relative, employee, attorney, nor counsel, and who is not financially interested in the action. The court reporter may also be remote via one of the options above for the purposes of reporting the proceeding and may or may not be in the presence of the deponent. The deponent is requested to present identification to the person administering the oath.

The deposition shall be recorded stenographically and by audio and audio-video recording. The deposition upon oral examination is being taken for purposes of discovery, for use at trial, or for such other purposes as are permitted under the applicable statutes and rules.

Rule 3.4: Fairness to Opposing Party & Counsel

Advocate

A lawyer shall not:

- (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
- (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

* * *

- (d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

Rule 4.4: Respect for Rights of Third Persons

Transactions With Persons Other Than Clients

- (a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

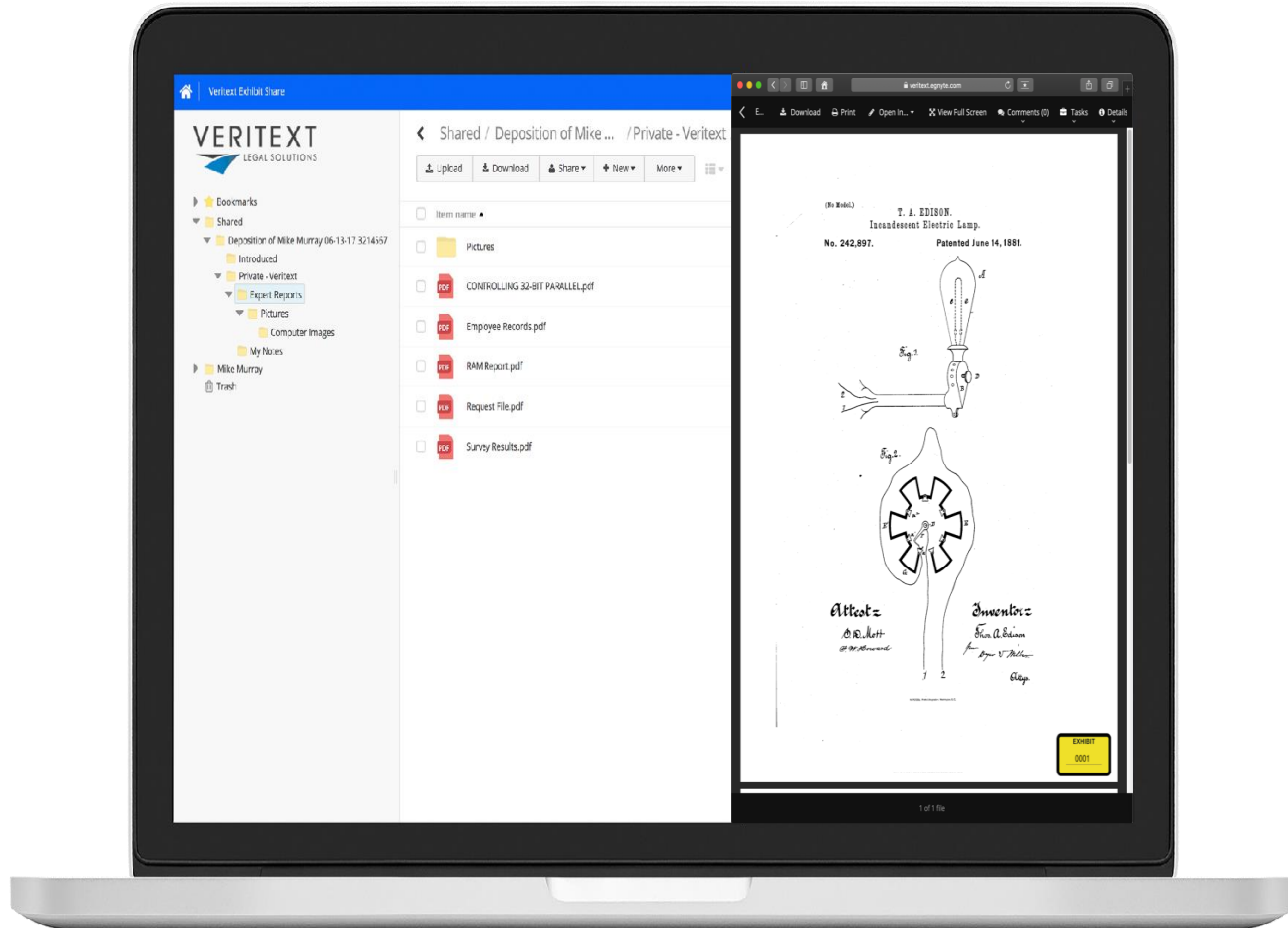
Rule 8.4: Misconduct

Maintaining The Integrity Of The Profession

It is professional misconduct for a lawyer to:

* * *

- (d) engage in conduct that is prejudicial to the administration of justice;



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 Exhibit Share

 ABC vs DEF Case

 Depositions

 Deposition of Jim Smith 1-1-20

 !! Marked Exhibits

 Jones Firm - Private

 Previously Marked

 Trash

< ... / Exhibit Share / ABC vs DEF Case / Depositions / Deposition of Jim S... ☆

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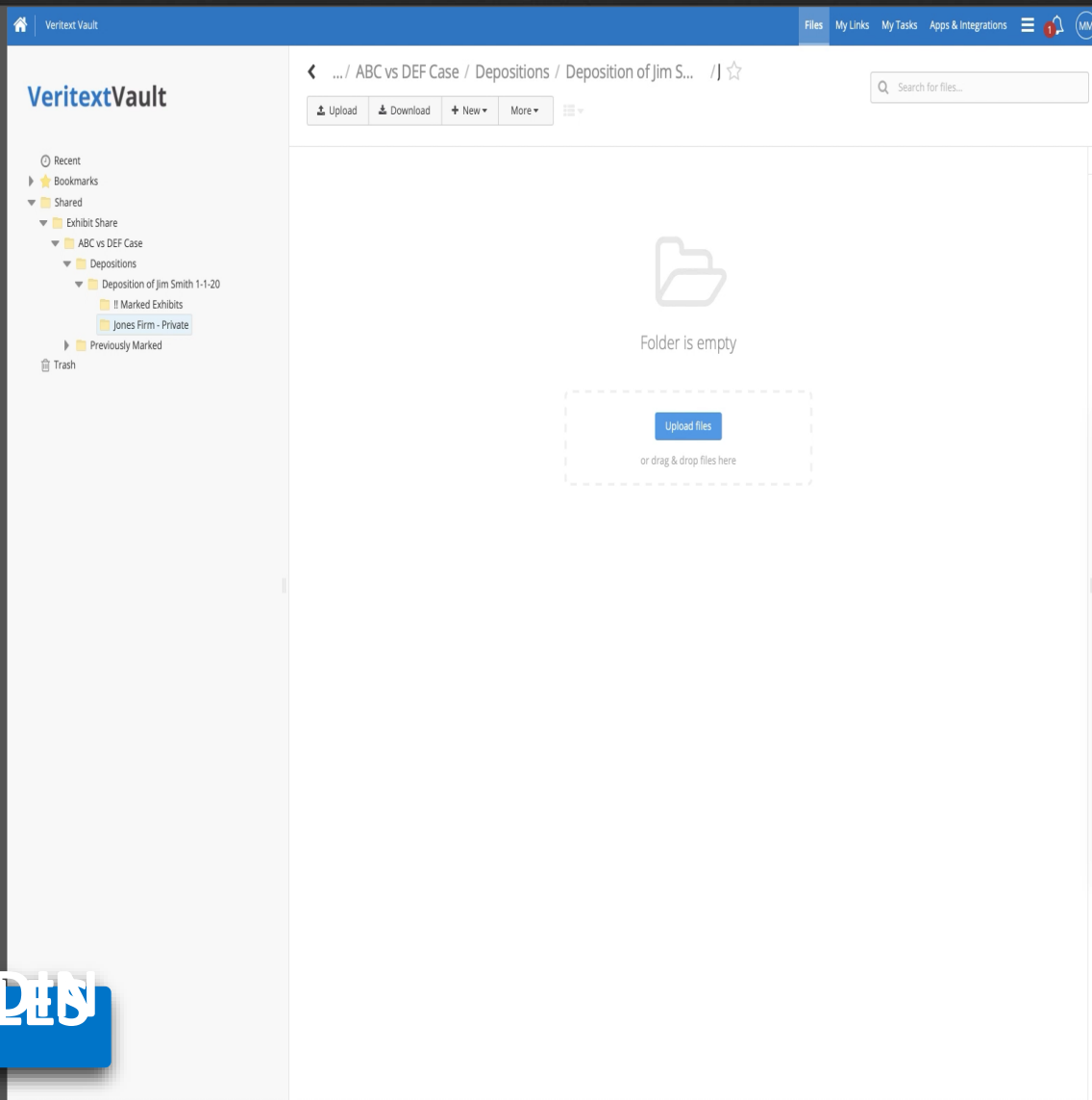


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☐ !! Marked Exhibits	Nov 26, 2019 10:46AM	-	-
☐ Jones Firm - Private	Nov 26, 2019 10:46AM	-	-

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Exhibit Share

ABC vs DEF Case

Depositions

Deposition of Jim Smith 1-1-20

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Item name	Date modified	Updated by	Size
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US459516.pdf	Mar 18, 2015 2:40PM	Mike Murray	250 KB
TRE662344.pdf	Mar 26, 2012 2:34PM	Mike Murray	74 KB
Smith Contract.pdf	May 28, 2015 12:54PM	Mike Murray	425 KB
Original Plans - Revision 3.pdf	May 28, 2015 12:55PM	Mike Murray	425 KB
Original Plans.pdf	Mar 26, 2012 2:36PM	Mike Murray	425 KB
Letter to Jones.pdf	Mar 26, 2012 2:42PM	Mike Murray	80 KB

Exhibit Share

Docs for Deposition

Letter to Jones.pdf

Original Plans - Revision 3.pdf

Original Plans.pdf

Smith Contract.pdf

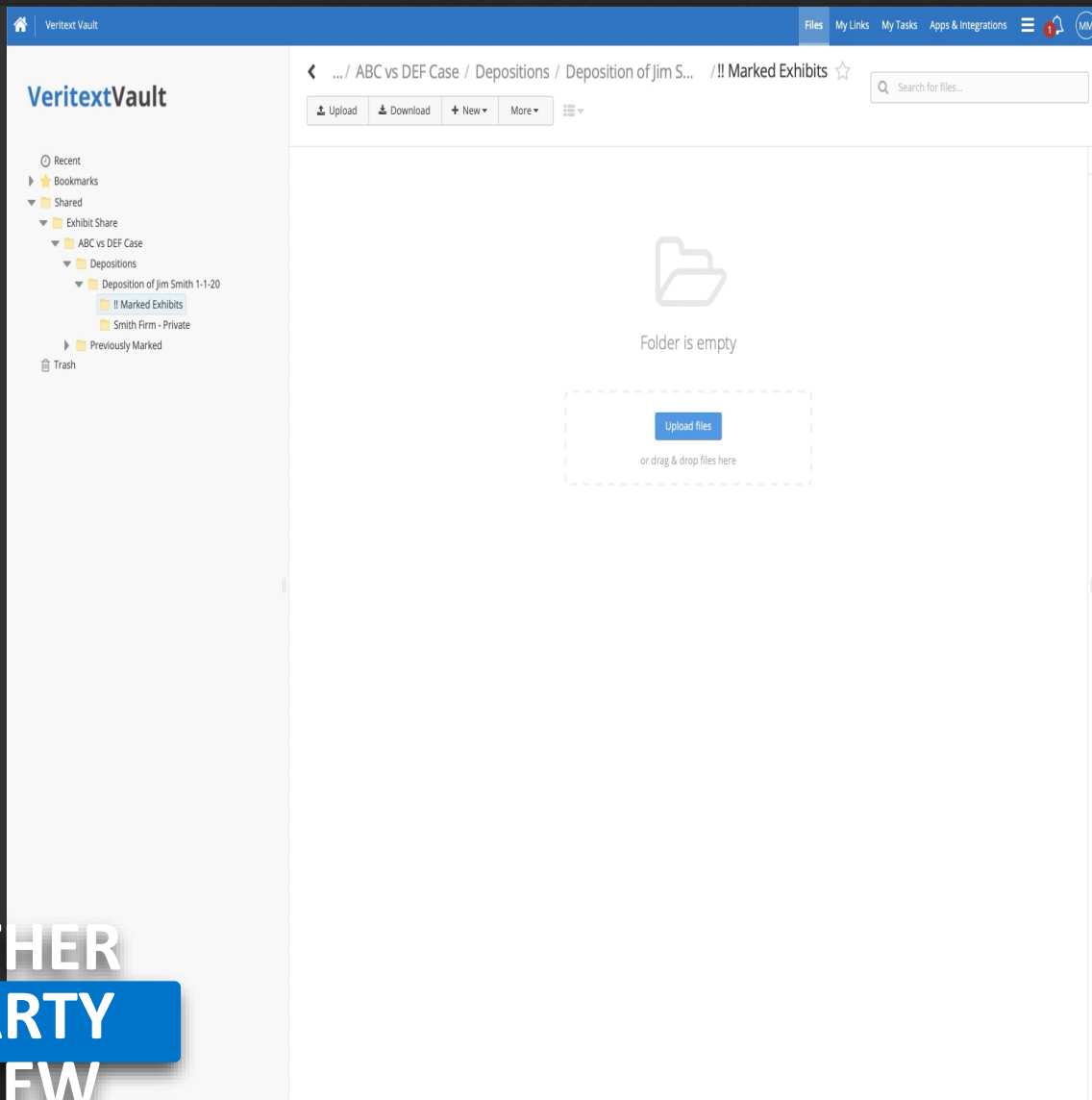
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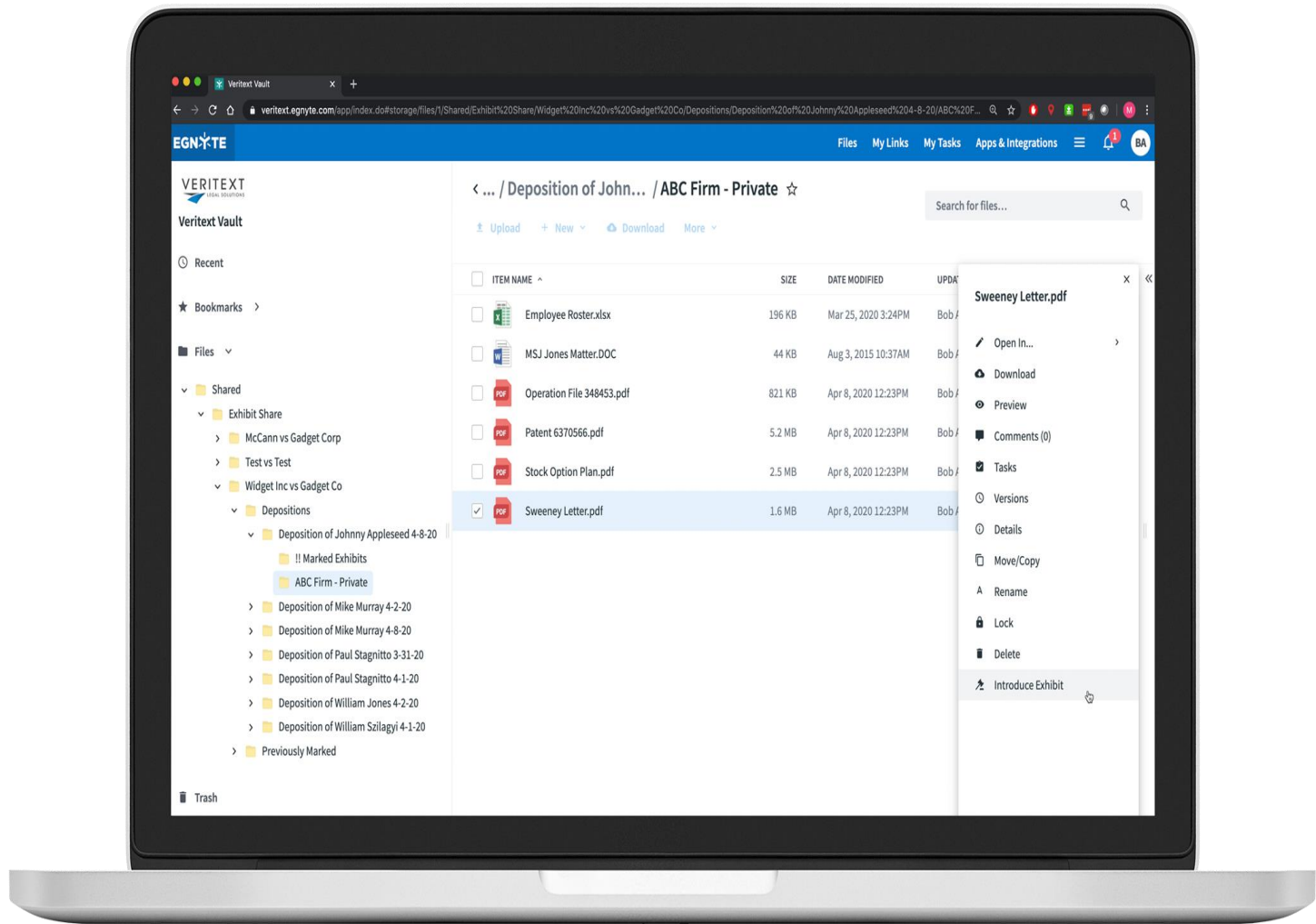
OTHER
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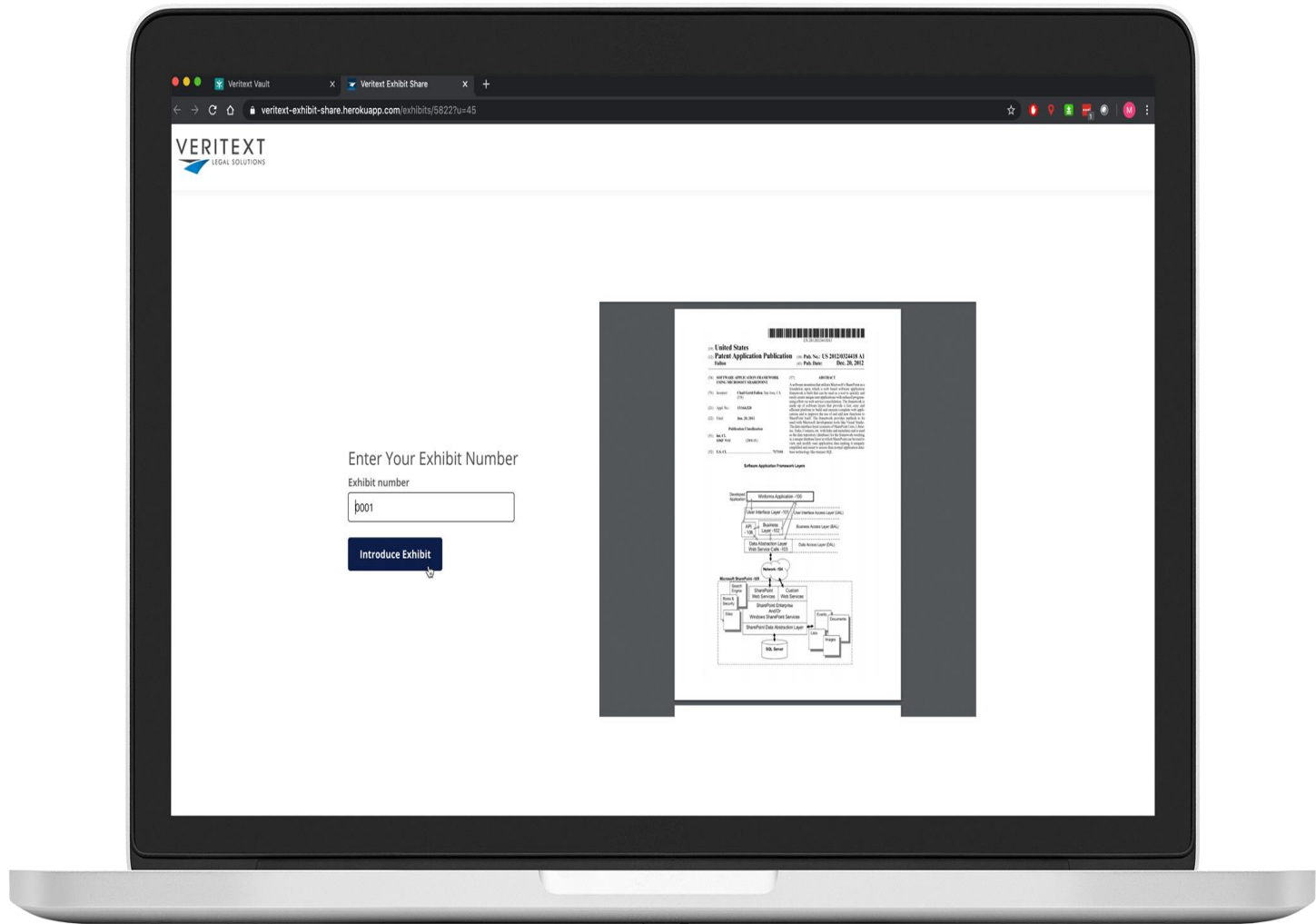


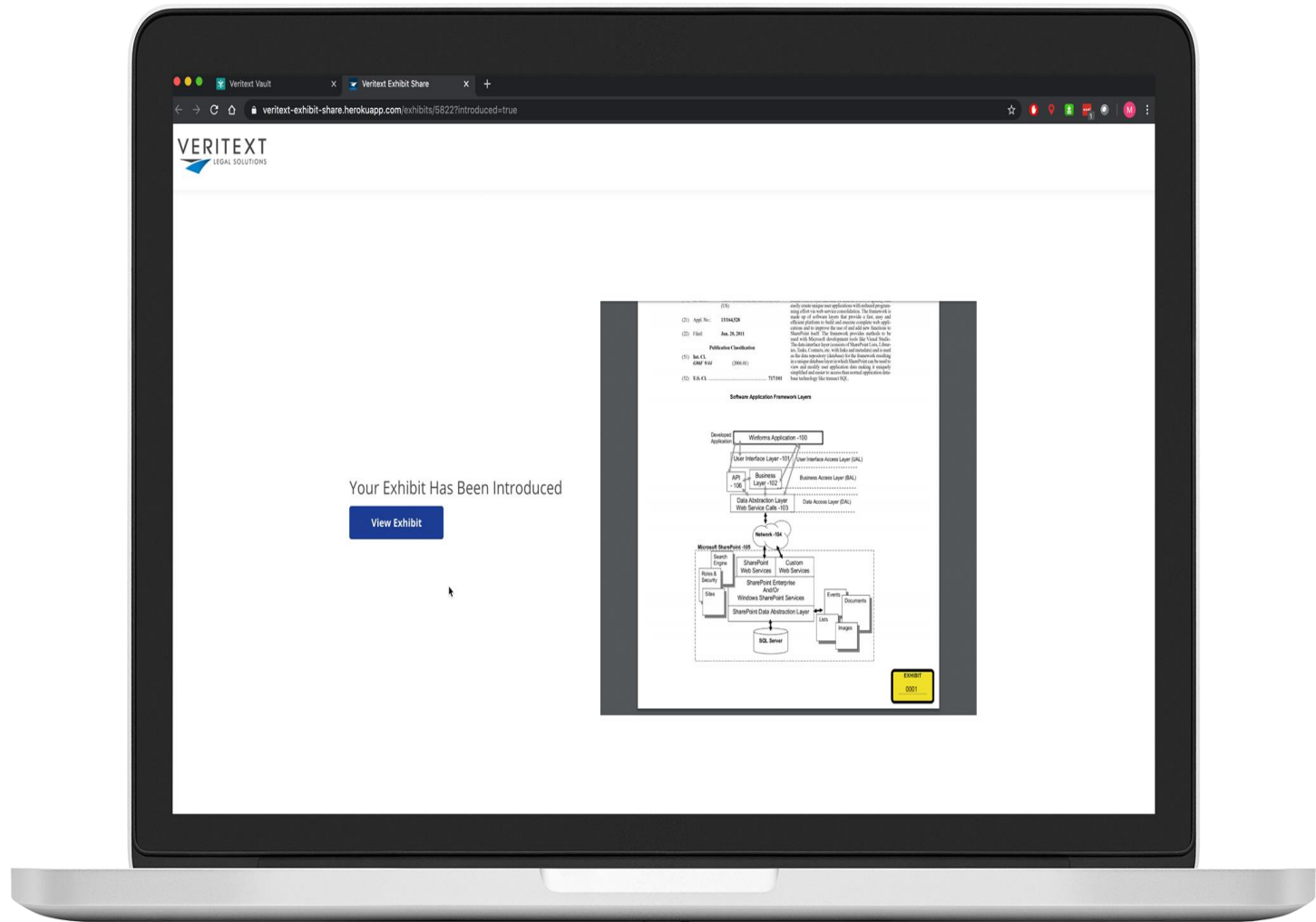
INTRODUCING EXHIBITS

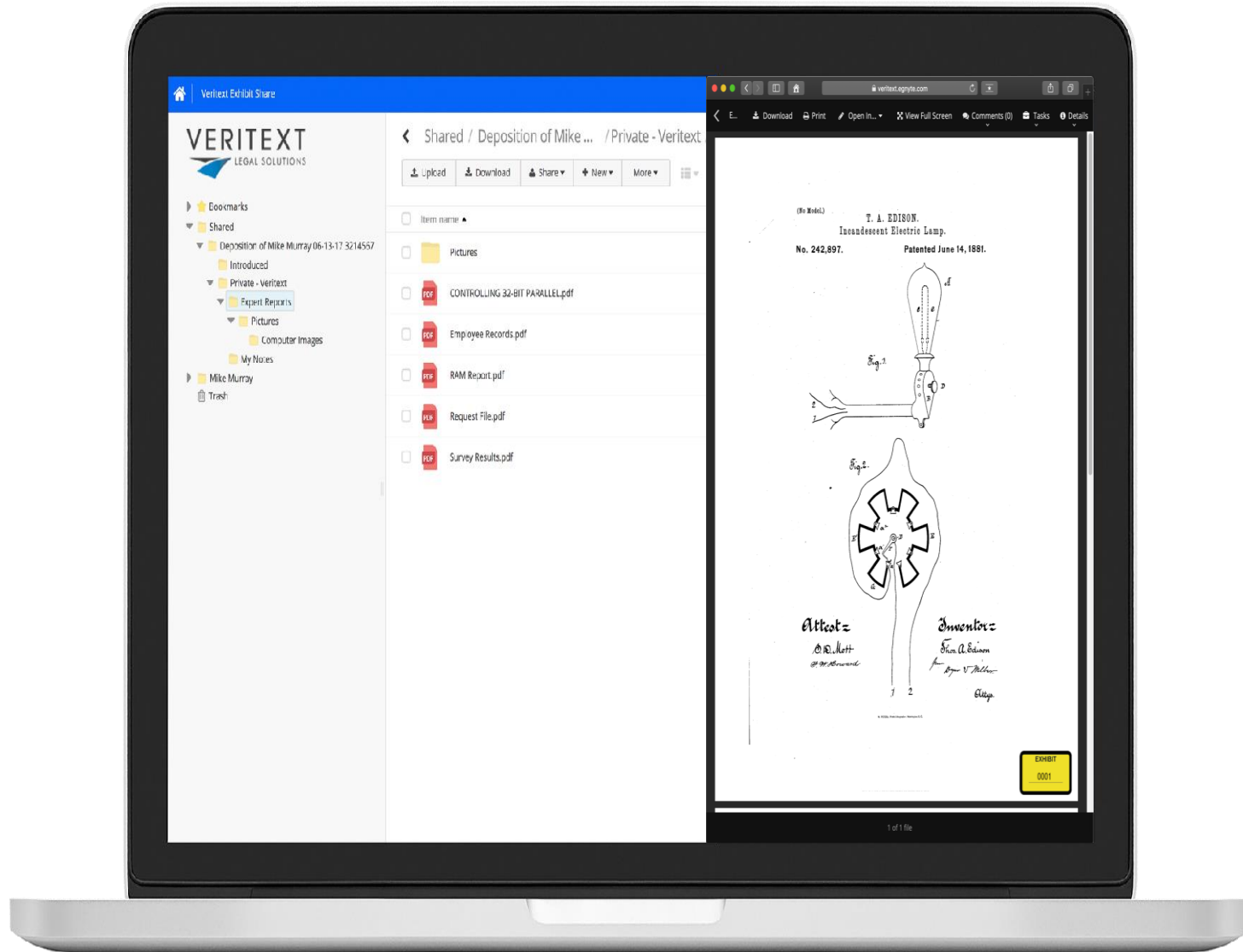
The screenshot displays the VeritextVault web application interface. The top navigation bar includes 'Veritext Vault', 'Files', 'My Links', 'My Tasks', and 'Apps & Integrations'. The left sidebar shows a hierarchical tree structure with categories like 'Recent', 'Bookmarks', 'Shared', 'Exhibit Share', 'ABC vs DEF Case', 'Depositions', 'Deposition of Jim Smith 1-1-20', '!! Marked Exhibits', 'Jones Firm - Private', 'Docs for Deposition', 'Previously Marked', and 'Trash'. The main content area shows a breadcrumb path: '< ... / Depositions / Deposition of Jim S... / Jones...'. Below this is a search bar and a toolbar with 'Upload', 'Download', '+ New', and 'More' buttons. A table lists the files in the current directory:

☐	Item name ^	Date modified	Updated by	Size		
☐	Docs for Deposition	Nov 26, 2019 10:54AM	-	-		
☐	Letter to Jones.pdf	Nov 26, 2019 10:56AM	Mike Murray	206 KB		
☐	Original Plans - Revision 3.pdf	May 28, 2015 12:55PM	Mike Murray	425 KB		
☐	Original Plans.pdf	Mar 26, 2012 2:36PM	Mike Murray	425 KB		
☐	Smith Contract.pdf	May 28, 2015 12:54PM	Mike Murray	425 KB		
☐	TRE98234.pdf	Mar 1, 2013 8:38AM	Mike Murray	1.7 MB		
☐	TRE662344.pdf	Mar 26, 2012 2:34PM	Mike Murray	74 KB		
☐	US459516.pdf	Mar 18, 2015 2:40PM	Mike Murray	250 KB		











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APPENDIX

Fed. Rule Civ. Proc. Rule 30.

Depositions by Oral Examination

(a) When a Deposition May Be Taken.

(1) Without Leave. A party may, by oral questions, depose any person, including a party, without leave of court except as provided in Rule 30(a)(2). The deponent's attendance may be compelled by subpoena under Rule 45.

(2) With Leave. A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(1) and (2):

(A) if the parties have not stipulated to the deposition and:

(i) the deposition would result in more than 10 depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by the third-party defendants;

(ii) the deponent has already been deposed in the case; or

(iii) the party seeks to take the deposition before the time specified in Rule 26(d), unless the party certifies in the notice, with supporting facts, that the deponent is expected to leave the United States and be unavailable for examination in this country after that time; or

(B) if the deponent is confined in prison.

Fed. Rule Civ. Proc. Rule 30.

Depositions by Oral Examination (cont'd)

(b) Notice of the Deposition; Other Formal Requirements.

- (1) Notice in General.** A party who wants to depose a person by oral questions must give reasonable written notice to every other party. The notice must state the time and place of the deposition and, if known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs.
- (2) Producing Documents.** If a subpoena duces tecum is to be served on the deponent, the materials designated for production, as set out in the subpoena, must be listed in the notice or in an attachment. The notice to a party deponent may be accompanied by a request under Rule 34 to produce documents and tangible things at the deposition.
- (3) Method of Recording.**
 - (A) Method Stated in the Notice.** The party who notices the deposition must state in the notice the method for recording the testimony. Unless the court orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means. The noticing party bears the recording costs. Any party may arrange to transcribe a deposition.
 - (B) Additional Method.** With prior notice to the deponent and other parties, any party may designate another method for recording the testimony in addition to that specified in the original notice. That party bears the expense of the additional record or transcript unless the court orders otherwise.

Fed. Rule Civ. Proc. Rule 30.

Depositions by Oral Examination (cont'd)

- (4) By Remote Means. The parties may stipulate—or the court may on motion order—that a deposition be taken by telephone or other remote means. For the purpose of this rule and Rules 28(a), 37(a)(2), and 37(b)(1), the deposition takes place where the deponent answers the questions.
- (5) Officer's Duties.
- (A) Before the Deposition. Unless the parties stipulate otherwise, a deposition must be conducted before an officer appointed or designated under Rule 28. The officer must begin the deposition with an on-the-record statement that includes:
 - (i) the officer's name and business address;
 - (ii) the date, time, and place of the deposition;
 - (iii) the deponent's name;
 - (iv) the officer's administration of the oath or affirmation to the deponent; and
 - (v) the identity of all persons present.
 - (B) Conducting the Deposition; Avoiding Distortion. If the deposition is recorded nonstenographically, the officer must repeat the items in Rule 30(b)(5)(A)(i)–(iii) at the beginning of each unit of the recording medium. The deponent's and attorneys' appearance or demeanor must not be distorted through recording techniques.
 - (C) After the Deposition. At the end of a deposition, the officer must state on the record that the deposition is complete and must set out any stipulations made by the attorneys about custody of the transcript or recording and of the exhibits, or about any other pertinent matters.

Fed. Rule Civ. Proc. Rule 30.

Depositions by Oral Examination (cont'd)

(6) Notice or Subpoena Directed to an Organization. In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

(c) Examination and Cross-Examination; Record of the Examination; Objections; Written Questions.

(1) Examination and Cross-Examination. The examination and cross-examination of a deponent proceed as they would at trial under the Federal Rules of Evidence, except Rules 103 and 615. After putting the deponent under oath or affirmation, the officer must record the testimony by the method designated under Rule 30(b)(3)(A). The testimony must be recorded by the officer personally or by a person acting in the presence and under the direction of the officer.

(2) Objections. An objection at the time of the examination—whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition—must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection. An objection must be stated concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3).

(3) Participating Through Written Questions. Instead of participating in the oral examination, a party may serve written questions in a sealed envelope on the party noticing the deposition, who must deliver them to the officer. The officer must ask the deponent those questions and record the answers verbatim.

Fed. Rule Civ. Proc. Rule 30.

Depositions by Oral Examination (cont'd)

(d) Duration; Sanction; Motion to Terminate or Limit.

- (1) Duration. Unless otherwise stipulated or ordered by the court, a deposition is limited to 1 day of 7 hours. The court must allow additional time consistent with Rule 26(b)(1) and (2) if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination.
- (2) Sanction. The court may impose an appropriate sanction—including the reasonable expenses and attorney's fees incurred by any party—on a person who impedes, delays, or frustrates the fair examination of the deponent.
- (3) Motion to Terminate or Limit.
 - (A) Grounds. At any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. The motion may be filed in the court where the action is pending or the deposition is being taken. If the objecting deponent or party so demands, the deposition must be suspended for the time necessary to obtain an order.
 - (B) Order. The court may order that the deposition be terminated or may limit its scope and manner as provided in Rule 26(c). If terminated, the deposition may be resumed only by order of the court where the action is pending.
 - (C) Award of Expenses. Rule 37(a)(5) applies to the award of expenses.

(e) Review by the Witness; Changes.

- (1) Review; Statement of Changes. On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:
 - (A) to review the transcript or recording; and
 - (B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

Fed. Rule Civ. Proc. Rule 30.

Depositions by Oral Examination (cont'd)

- (2) Changes Indicated in the Officer's Certificate. The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.
- (f) Certification and Delivery; Exhibits; Copies of the Transcript or Recording; Filing.
 - (1) Certification and Delivery. The officer must certify in writing that the witness was duly sworn and that the deposition accurately records the witness's testimony. The certificate must accompany the record of the deposition. Unless the court orders otherwise, the officer must seal the deposition in an envelope or package bearing the title of the action and marked "Deposition of [witness's name]" and must promptly send it to the attorney who arranged for the transcript or recording. The attorney must store it under conditions that will protect it against loss, destruction, tampering, or deterioration.
 - (2) Documents and Tangible Things.
 - (A) Originals and Copies. Documents and tangible things produced for inspection during a deposition must, on a party's request, be marked for identification and attached to the deposition. Any party may inspect and copy them. But if the person who produced them wants to keep the originals, the person may:
 - (i) offer copies to be marked, attached to the deposition, and then used as originals—after giving all parties a fair opportunity to verify the copies by comparing them with the originals; or
 - (ii) give all parties a fair opportunity to inspect and copy the originals after they are marked—in which event the originals may be used as if attached to the deposition.

Fed. Rule Civ. Proc. Rule 30.

Depositions by Oral Examination (cont'd)

(B) Order Regarding the Originals. Any party may move for an order that the originals be attached to the deposition pending final disposition of the case.

(3) Copies of the Transcript or Recording. Unless otherwise stipulated or ordered by the court, the officer must retain the stenographic notes of a deposition taken stenographically or a copy of the recording of a deposition taken by another method. When paid reasonable charges, the officer must furnish a copy of the transcript or recording to any party or the deponent.

(4) Notice of Filing. A party who files the deposition must promptly notify all other parties of the filing.

(g) Failure to Attend a Deposition or Serve a Subpoena; Expenses. A party who, expecting a deposition to be taken, attends in person or by an attorney may recover reasonable expenses for attending, including attorney's fees, if the noticing party failed to:

(1) attend and proceed with the deposition; or

(2) serve a subpoena on a nonparty deponent, who consequently did not attend.

[Link to article](#)

TAKING EFFECTIVE REMOTE DEPOSITIONS



With litigation practices entering the world of remote technologies due to the coronavirus pandemic, counsel should understand the tools and techniques available remotely to conduct effective depositions.

THE PLATFORMS

Most court reporting companies offer effective remote capabilities, often through Zoom or Webex. It is equally important to select a vendor that can provide related software through which exhibits may be uploaded, managed, and shared. One such program is Exhibit Share, through which exhibits are preloaded and then, during the deposition, marked and shared with the other participants. But only when the examining attorney decides to share them.

Each participant in the deposition receives access to Exhibit Share. The extent of that access, however, is granted and restricted based upon each person's role at the deposition.

Each side has its own "Private" folder. This is where the intended exhibits are pre-marked, uploaded, and stored. Because the folder remains private, the witness and opposing counsel cannot see in advance what materials only later will be used.

When counsel is ready for the exhibit, it is introduced by selecting it from the "Private" folder, typing an exhibit number, and publishing it as a "Marked Exhibit." At that moment, the document appears in the "Marked Exhibits" folder, which is accessible to everyone who has been credentialed and has logged in to Exhibit Share. Everyone — including the witness and opposing counsel — can then view the exhibit and even download it. They may review the document at their own pace and focus on whatever parts they wish.

While everyone then has their own access to the exhibit, another step is useful: once the exhibit has been marked (waiting until then is important, as described further below), someone working with the examining attorney may share his or her screen, using the "screen share" tool. This makes the exhibit visible as part of the video conference, so that everyone simultaneously is viewing the same section of the document. The examining attorney can then further focus attention by magnifying sections, marking the exhibit, or using a pointing tool.

ADDITIONAL EFFECTIVE PRACTICES

In advance of the day of the deposition, the court reporter should be asked to provide the necessary credentials and login information to all participants, including the witness, all counsel and parties/corporate representatives, and run a test with the witness.

For a video deposition that will be played at trial, the witness should be instructed ahead of time to be positioned in front of a suitable background. If it is in fact not suitable when the witness appears, time should be taken to find a suitable position and background. Of course, the witness should be requested in advance to appear in a quiet location and ensure the potential for disruptions are minimized.

Counsel should note on the record that the deposition is being conducted under Florida Supreme Court Administrative Order AOSC20-23 (“the Order”) (so long as the Order remains in effect) facilitating and promoting remote proceedings. While the Order authorizes persons qualified to administer oaths in Florida to swear a witness remotely by audio-video communication technology from a location in Florida, the person administering the oath must be able to identify the witness. Therefore, the witness should be requested to present identification.

If the notary or witness is located outside Florida, the consent of the witness to be put under oath via audio-video communication should be obtained, along with the stipulation of counsel to that process.

Counsel should identify for the witness the roles of everyone appearing, including particularly the court reporter and videographer (if the deposition is being recorded for use at trial). The witness should be reminded that, despite the remote setting, the oath has the same effect as any that he or she would take in court or when appearing in person.

The common problem of counsel and witness talking over each other can be compounded in a remote context. The witness should therefore be cautioned to wait until a question is complete, and counsel should do the same when the witness is responding. When defending a deposition with a client in a remote location, the client must be instructed to pause sufficiently to afford time for objection, if necessary.

A particular concern in a remote deposition is the coaching of a witness by someone in the room with the witness. The witness should be asked to state under oath whether there are other persons present and to identify any such person(s). (The exclusion of non-parties and non-essential persons should be sought pursuant to Florida Statute 90.616 – Exclusion of Witnesses.) If the person so identified is also a participant in the video conference, that person should be required to appear on video, rather than by employing a blank screen, so that otherwise improper conduct can be monitored. Indeed, it is arguably appropriate to require anyone seeking to participate, wherever they are, to appear on camera. If coaching of the witness is a real concern, counsel may wish to demand in advance of the deposition that the witness appear alone and, in the absence of such an agreement, seek an order from the court.

To maintain the confidentiality of exhibits until they are used, it is important that the person displaying the exhibit refrain from sharing his or her screen until only the already marked exhibit is on the screen. Otherwise materials in the “Private” folder might be prematurely disclosed. Further, understand that it

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Continued...

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is everything on the screen that will be shared. So all other programs, such as Outlook, Word, and anything else, should be closed.

Similarly, great care must be taken during breaks to switch to the “mute” function so that any privileged or work product communications — or otherwise embarrassing dialogue — are not disclosed.

The world has certainly changed, and lawyers are adapting like all others. Fortunately, the skilled use of tools such as these promotes the effective questioning of witnesses, even remotely, and without compromising the techniques that make depositions most effective.

Aron U. Raskas is a shareholder in the business litigation practice at Gunster in Miami. He focuses on business disputes and the defense of professional liability matters. Contact him at araskas@gunster.com.

**UNIFORM AUDIO-VISUAL DEPOSITION
[ACT] [RULE]***

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS EIGHTY-SEVENTH YEAR
IN NEW YORK, NEW YORK
JULY 28 - AUGUST 4, 1978

WITH PREFATORY NOTE AND COMMENTS

Approved by the American Bar Association at its Meeting in
Atlanta, Georgia, February 13, 1979

*The Conference changed the designation of the Audio-Visual Deposition [Act] [Rule] from uniform to model as approved by the Executive Committee on February 6, 1988.

UNIFORM AUDIO-VISUAL DEPOSITION [ACT] [RULE]

Section 1. [Authorization of Audio-Visual Deposition].

(a) Any deposition may be recorded by audio-visual means without a stenographic record. Any party may make at his own expense a simultaneous stenographic or audio record of the deposition. Upon his request and at his own expense, any party is entitled to an audio or audio-visual copy of the audio-visual recording.

(b) The audio-visual recording is an official record of the deposition. A transcript prepared by an official court reporter is also an official record of the deposition.

[(c) On motion the court, for good cause, may order the party taking, or who took, a deposition by audio-visual recording to furnish, at his expense, a transcript of the deposition.]

Section 2. [Use].

An audio-visual deposition may be used for any purpose and under any circumstances in which a stenographic deposition may be used.

Section 3. [Notice].

The notice for taking an audio-visual deposition and the subpoena for attendance at that deposition must state that the deposition will be recorded by audio-visual means.

Section 4. [Procedure].

The following procedure must be observed in recording an audio-visual deposition:

(1) (Opening of Deposition.) The deposition must begin with an oral or written statement on camera which includes:

- (i) The operator's name and business address;
- (ii) The name and business address of the operator's employer;
- (iii) The date, time, and place of the deposition;

- (iv) The caption of the case;
- (v) The name of the witness;
- (vi) The party on whose behalf the deposition is being taken; and
- (vii) Any stipulations by the parties.

(2) (Counsel.) Counsel shall identify themselves on camera.

(3) (Oath.) The oath must be administered to the witness on camera.

(4) (Multiple Units.) If the length of a deposition requires the use of more than one recording unit, the end of each unit and the beginning of each succeeding unit must be announced on camera.

(5) (Closing of Deposition.) At the conclusion of a deposition, a statement must be made on camera that the deposition is concluded. A statement may be made on camera setting forth any stipulations made by counsel concerning the custody of the audio-visual recording and exhibits or other pertinent matters.

(6) (Index.) Depositions must be indexed by a time generator or other method specified pursuant to Section 6.

(7) (Objections.) An objection must be made as in the case of stenographic depositions.

(8) (Editing.) If the court issues an editing order, the original audio-visual recording must not be altered.

(9) (Filing.) Unless otherwise stipulated by the parties, the original audio-visual recording of a deposition, any copy edited pursuant to an order of the court, and exhibits must be filed forthwith with the clerk of the court.

Section 5. [Costs].

The reasonable expense of recording, editing, and using an audio-visual deposition may

be taxed as costs.

Section 6. [Standards].

[The [Supreme Court, Court Administrator, Clerk] may promulgate rules establishing standards for audio-visual equipment and guidelines for taking and using audio-visual depositions.] Incompatible audio-visual recordings must be conformed to the standards at the expense of the proponent. Both recordings are originals.

Section 7. [Uniformity of Application and Construction].

This [Act] [Rule] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] [Rule] among states enacting it.

Section 8. [Short Title].

This [Act] [Rule] may be cited as the “Uniform Audio-Visual Deposition [Act] [Rule]”.

Section 9. [Time of Taking Effect].

This [Act] [Rule] shall take effect . . .

[Section 10. [Repeal].

The following acts and parts of acts are repealed:]

2020 WL 2630732

Only the Westlaw citation is currently available.
United States District Court, W.D. Washington,
at Seattle.

Marjorie OGILVIE, Plaintiff,
v.
THRIFTY PAYLESS INC., et al., Defendants.

CASE NO. C18-0718JLR

|
Signed 05/12/2020

Attorneys and Law Firms

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ORDER DENYING STIPULATED MOTION TO ADJUST THE CASE SCHEDULE AND CONTINUE CERTAIN CASE DEADLINES

[JAMES L. ROBERT](#), United States District Judge

*1 Before the court is the parties' stipulated motion to continue the deadlines for (1) the disclosure of expert witness testimony from May 13, 2020, to September 20, 2020, (2) the discovery cutoff from July 13, 2020, to August 30, 2020, and (3) the dispositive motions deadline and the deadline for motions challenging expert witness testimony from August 11, 2020, to September 30, 2020. (*See* 5/5/20 Stip. (Dkt. # 44).) The court denies the parties' stipulated motion for the following reasons.

This is not the first time that the parties have asked for an extension to case deadlines. Defendant Thrifty PayLess, Inc., removed this action to federal district court on May 17, 2018. (Not. of Rem. (Dkt. # 1).) On July 17, 2018, the

court issued a scheduling order and set this matter for trial on October 15, 2019. (*See* Sched. Order (Dkt. # 17) at 1.) On March 26, 2019, the parties filed a stipulated motion for an extension of time to complete discovery. (3/26/19 Stip. (Dkt. # 29).) The parties asked for an approximate 90-day extension of the expert disclosure and discovery cutoff deadlines. (*See id.*) The court denied the parties' request but granted an approximate 2-week extension of the relevant deadlines. (*See* 3/27/19 Order (Dkt. # 30).) On June 14, 2019, the parties again filed a stipulated motion seeking to continue the trial date to July 14-16, 2020. (6/14/19 Stip. (Dkt. # 34).) The court denied the motion for lack of good cause but informed counsel that they could stipulate to have the trial date moved to the end of the court's trial calendar, which at that time was in mid-to-late fall 2020. (6/25/19 Order (Dkt. # 35).) On June 28, 2019, the parties filed another stipulated motion asking the court to continue their trial date to the end of the court's trial calendar. (6/28/19 Stip. (Dkt. # 36).) The court granted the motion and reset the trial date for November 9, 2020. (6/28/19 Order (Dkt. # 38).) The court issued an amended case schedule based on the parties' new November 9, 2020, trial date. (Am. Sched. (Dkt. # 40).) The parties now seek an approximate 90-day extension of the deadlines in the amended case schedule for the disclosure of expert witness testimony, the discovery cutoff, and the filing of dispositive motions and motions related to expert witness testimony. (*See* 5/5/20 Stip.)

As the court has previously informed the parties, the court issues scheduling orders setting trial dates and related dates to provide a reasonable schedule for the resolution of disputes. (*See* 3/27/19 Order at 2.) First, the court generally sets the discovery cut-off 30 days prior to the deadline for filing dispositive motions to ensure that the court has before it a complete record when it considers a motion that could potentially dispose of the case. (*See id.*) Second, the schedule generally provides 90 days between the deadline for filing dispositive motions and the trial date. (*See id.*) This 90-day period takes into account: (a) an approximate 30-day lag between the date a party files a motion and the date that motion becomes ripe for the court's consideration, *see* Local Rules W.D. Wash. LCR 7(d)(3); and (b) an additional 30 days during which the court endeavors to rule on the motion, *id.* at LCR 7(b)(5). (*See* 3/27/19 Order at 2.) Anything short of a 90-day period leaves inadequate time for the parties to consider the court's ruling and plan for trial or an alternate resolution. (*See id.*) Although the court has previously explained these principles to the parties, they persist in seeking to reset case deadlines in this matter in contravention of these principles. (*See* 5/5/20 Stip.)

*2 Pursuant to [Federal Rule of Civil Procedure 16\(b\)\(4\)](#), “[a] schedule may only be modified for good cause and with the judge’s consent.” [Fed. R. Civ. P. 16\(b\)\(4\)](#). “Good cause” for purposes of [Rule 16](#) focuses on the diligence of the party seeking to modify the pretrial scheduling order. *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607-08 (9th Cir. 1992). Parties must “diligently attempt to adhere to that schedule throughout the subsequent course of the litigation.” *Jackson v. Laureate, Inc.*, 186 F.R.D. 605, 607 (E.D. Cal. 1999). In part, the “good cause” standard requires the parties to demonstrate that “noncompliance with a [Rule 16](#) deadline occurred or will occur, notwithstanding [the parties’] diligent efforts to comply, because of the development of matters which could not have been reasonably foreseen or anticipated at the time of the [Rule 16](#) scheduling conference....” *Id.* at 608. Further, the court’s scheduling order states that the dates are “firm” and that “[t]he court will alter these dates only upon good cause shown.” (Sched. Order at 2.) The order clarifies that “failure to complete discovery within the time allowed is not recognized as good cause.” (*Id.*)

The court concludes that the parties have not established good cause for an extension of the case deadlines. The parties assert that Defendant Assa Abloy Entrance Systems US Inc.’s expert cannot complete a report without the deposition of [Federal Rule of Civil Procedure 30\(b\)\(6\)](#) witnesses, a meeting with client representatives, and observing the subject door at the Rite Aid location. (5/5/20 Stip. ¶ 1.) The parties also state that “[g]iven the restrictions in place due to the impacts of COVID-19 the past several months, the parties have not yet completed all depositions in this matter.” (*Id.* ¶ 3.) Although the parties assert that the pandemic impacts their ability to take depositions or hold meetings in person, they do not discuss why they cannot conduct such depositions and meetings by telephone or other remote means. (*See generally id.*) Although the court understands that the

parties may have a preference for taking depositions or meeting in person, given the present circumstances, the court urges the parties to consider available alternatives. *See Fed. R. Civ. P. 30(b)(4)* (“The parties may stipulate—or the court may on motion order—that a deposition be taken by telephone or other remote means.”). This pandemic may well be with us for many months to come. We will all need to adjust to keep litigation moving forward. Unless the parties have explored alternative means to complete discovery, the court does not consider the mere existence of the pandemic as “good cause” for a delay in the case schedule. Further, at least part of the delay appears to have nothing to do with the impacts caused by the pandemic, but merely the inability of the parties to agree on scheduling. (*See* 5/5/20 Stip. ¶ 2 (“The parties were unable to find a mutually acceptable date for the depositions in late 2019/early 2020.”).) Accordingly, the court does not find that the parties have established “good cause” for an extension of the relevant case deadlines and DENIES the parties’ stipulated motion (Dkt. # 44).

Although the court cannot grant the parties’ stipulated motion, the court is willing to drop this case to the end of its trial calendar once again and to issue a new case schedule for the deadlines at issue in the parties’ stipulated motion and all other unexpired deadlines based on that new trial date. If the parties would like to move their trial date to the end of the court’s trial calendar, they may file a stipulation to so notify the court. The parties should be aware that the court is presently setting trials in approximately the summer of 2021.

All Citations

Slip Copy, 2020 WL 2630732

2020 WL 3250723

Only the Westlaw citation is currently available.
United States District Court, N.D. Illinois, Eastern
Division.

LEARNING RESOURCES, INC., Plaintiff,
v.

PLAYGO TOYS ENTERPRISES LTD., Sam's West,
Inc., Sam's East, Inc., Jet.Com, and Walmart Inc.,
Defendants.

No. 19-CV-00660

|
Signed 06/16/2020

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Sam's East, Inc., Jet.Com, Inc., Walmart Inc.

MEMORANDUM OPINION AND ORDER

Jeffrey Cummings, United States Magistrate Judge

*1 Plaintiff Learning Resources, Inc. filed this copyright infringement action alleging that the Walmart defendants (Walmart Inc., Sam's West, Inc., Sam's East, Inc., and Jet.Com) and Playgo Toys Enterprises Ltd. violated the Copyright Act of 1976, 17 U.S.C. § 101 *et seq.*, by selling play food items intentionally copied from Learning Resources. Learning Resources has noticed the in-person deposition of Ms. Shelley Latham in Fayetteville, Arkansas, for June 30, 2020. Ms. Latham is a Senior Merchant for Toys for the Walmart defendants and was – according to Learning Resources – “the ‘buyer’ of (and executive responsible for) the infringing products in this case.” (Dckt. #101 at 1). The Walmart defendants do not believe that Ms. Latham’s deposition should be conducted

in-person because of concerns related to the on-going COVID-19 pandemic. Although Playgo agrees that the deposition need not be conducted in-person, Learning Resources insists that it must be. Consequently, the Walmart defendants have filed a motion pursuant to [Federal Rules of Civil Procedure 26\(c\)](#) and [30\(b\)\(4\)](#) for the entry of an order requiring that Ms. Latham’s deposition be conducted by remote videoconference. The Walmart defendants’ motion is granted for the reasons stated below.

I. STANDARD

[Federal Rule of Civil Procedure 26\(c\)](#) provides that this Court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. [Fed.R.Civ.P. 26\(c\)](#). This Court is vested with “broad discretion to decide when a protective order is appropriate and what degree of protection is required.” [Schockey v. Huhtamaki](#), 280 F.R.D. 598, 600 (D. Kan. 2012). [Federal Rule of Civil Procedure 30\(b\)\(4\)](#) authorizes this Court in its discretion to order that a deposition “be taken by telephone or other remote means.” [Fed.R.Civ.P. 30\(b\)\(4\)](#); [Usov v. Lazar](#), No. 13 CIV 818, 2015 WL 5052497, at *1 (S.D.N.Y. Aug. 25, 2015); [Graham v. Ocwen Loan Servicing, LLC](#), No. 16-80011-CIV, 2016 WL 7443288, at *1 (S.D. Fla. July 1, 2016) (“[C]ourts enjoy wide discretion to control and place appropriate limits on discovery, which includes authorizing depositions to be taken by remote means”). When exercising its discretion, this Court “must ‘balance claims of prejudice and those of hardship and conduct a careful weighing of the relevant facts.’ ” [Usov](#), 2015 WL 5052497, at *1, quoting [RP Family, Inc. v. Commonwealth Land Title Ins. Co.](#), No. 10 Civ. 1149, 2011 WL 6020154, at *3 (E.D.N.Y. Nov. 30, 2011).

II. DISCUSSION

The Walmart defendants seek to have Ms. Latham’s deposition conducted by remote videoconference based on safety concerns created by the COVID-19 pandemic. In particular, the Walmart defendants’ lead counsel (Mr. William McGrath) is in a high-risk category if exposed to COVID-19 due to the fact that he is over 65 years-old. (Dckt. #100-1 at 2). Mr. McGrath’s wife and his son-in-law (who lives nearby) are likewise in high risk

categories. (*Id.*). The Walmart defendants believe that an unnecessary and unacceptable risk to the health of Mr. McGrath and others will be created if he is forced to fly from Chicago to Arkansas to attend a deposition in a confined room with other counsel (who will travel from New York City and Austin), Ms. Latham, and a court reporter. (*Id.*).

*2 For its part, Learning Resources asserts that “in-person depositions are the norm in American jurisprudence, and a party is well within its rights to cross-examine an adverse witness face-to-face.” (Dckt. #101 at 3). Furthermore, while Learning Resources is “sensitive to health and safety concerns raised by Defendants’ counsel”, it asserts that the “conditions on the ground in Arkansas are much different than in Chicago.... because [t]he governor has lifted most aspects of the shut-down orders.... [and] [l]ife in Arkansas is rapidly returning to business a[s] usual.” (*Id.* at 2, 3). Finally, Learning Resources insists that its proposed compromise of having Mr. McGrath attend the deposition by video while a Walmart attorney based in Arkansas attends in person would “address any fairness concerns” raised by the Walmart defendants. (*Id.* at 2).

1. COVID-19 related health concerns provide “good cause” for a remote videoconference deposition under the circumstances of this case

As other courts have recognized, “[t]he President of the United States has declared a national emergency due to the spread of the COVID-19 virus, and the Centers for Disease Control have noted that the best way to prevent illness is to minimize person-to-person contact.” *Sinceno v. Riverside Church in City of New York*, No. 18-CV-2156 (LJL), 2020 WL 1302053, at *1 (S.D.N.Y. Mar. 18, 2020). To protect Court personnel, the bar, and the public against the severe risks posed by COVID-19, federal courts around the country – including the Western District of Arkansas where Fayetteville is located – have authorized video teleconferencing for a number critical criminal proceedings that had previously been conducted in person and imposed a moratorium on various other court proceedings. *See, e.g.*, Western District of Arkansas, Admin. Order 2020-3 Use of Video Teleconferencing and Telephone Conferencing During Course of the Covid-19 Pandemic (dated 3/31/20); Western District of Arkansas, Admin. Order 2020-5 Court Operations During the COVID-19 Pandemic (dated 5/21/20). These restrictions, as Learning Resources acknowledges, remain in effect through the present day. (*Id.*; Dckt. #101 at 3 n.3).

The general concern over the risks posed by COVID-19 are heightened in this case for three reasons. First, the Walmart defendants’ lead counsel, Mr. McGrath, and members of his family are in a high risk category if exposed to COVID-19. Second, counsel for the parties will be traveling to Arkansas from three areas that have either been COVID-19 “hot spots” (namely, New York City and Chicago) or where COVID-19 hospitalization rates are currently on the rise (Austin). *See* “Austin enters Stage 4 COVID-19 risk-based level after a spike in hospitalizations,” KVUE ABC (June 14, 2020) available at: <https://www.kvue.com/article/news/health/coronavirus/austin-texas-covid19-risk-level-4-hospitalizations-coronavirus/269-8eacb5c4-d441-47d5-a902-3aba79b93317>. Finally, notwithstanding the fact that the governor of Arkansas has lifted most aspects of the shut-down orders,¹ “Northwest Arkansas (where Fayetteville is located) is experiencing a surge in community spread of the [COVID-19] virus ... and has witnessed a significant increase in the number of hospitalized individuals with COVID-19.” *See* “Washington Regional official: COVID-19 spike in NWA is a “serious public health emergency,” ABC 4029 News (June 11, 2020) available at: <https://www.4029tv.com/article/washington-regional-official-covid-19-spike-in-nwa-is-a-serious-public-health-emergency/32831055>.

*3 For these reasons, the Court finds that the health concerns created by the COVID-19 pandemic create “good cause” for the entry of an order requiring that Ms. Latham’s deposition take place by remote videoconference under the circumstances in this case.² *See, e.g., In re RFC & ResCap Liquidating Tr. Action*, No. 013CV3451SRNHB, 2020 WL 1280931, at *3 (D. Minn. Mar. 13, 2020) (“[u]nder the circumstances, COVID-19’s unexpected nature, rapid spread, and potential risk establish good cause for remote testimony”); *Joffe Order* (“Plaintiff’s proposal requires counsel or witnesses to travel across state lines from disparate places of origin, congregate for several hours in a confined space, and then disperse back to their homes.... The burden on witnesses, in the form of potential exposure and infection for them and their families, needs no further elaboration. Indeed, for essentially those same reasons, the Court has not resumed in-person proceedings.”); *SAP, LLC v. EZCARE Clinic, Inc.*, No. CV 19-11229, 2020 WL 1923146, at *2 (E.D. La. Apr. 31, 2020) (“This court will not require parties to appear in person with one another in the midst of the present pandemic.”).

2. The frustration of Learning Resources' intent to question Ms. Latham in person does not create prejudice sufficient to overcome the risks created by COVID-19 under the circumstances here

Ms. Latham is seemingly an important witness given her role as the Walmart defendants' "buyer" of the allegedly infringing products in this case. It is certainly understandable that Learning Resources would like to question her face-to-face and this Court recognizes that "a party's ability to observe a deponent in person does have value." *Usov*, 2015 WL 5052497, at *2. Nonetheless, "remote depositions are a presumptively valid means of discovery" even without the in-person interaction (*Id.* (internal quotation marks omitted)), and many courts have held that remote videoconference depositions offer the deposing party a sufficient opportunity to evaluate a deponent's nonverbal responses, demeanor, and overall credibility. *See, e.g., Id.*, at *2; *Sec. & Exch. Comm'n v. Aly*, 320 F.R.D. 116, 119 (S.D.N.Y. 2017); *Tangtiwatanapaibul v. Tom & Toon Inc.*, No. 117CV00816LGSKHP, 2017 WL 10456190 at *3 (S.D.N.Y. Nov. 22, 2017); *Graham*, 2016 WL 7443288 at *2; *Shockey*, 280 F.R.D. at 602; *Gee v. Suntrust Mortgage, Inc.*, No. 10-CV-01509 RS NC, 2011 WL 5597124 at *3 (N.D. Cal. Nov. 15, 2011).

Moreover, the cases cited by Learning Resources are inapposite and do not support the proposition that remote videoconference deposition would be inappropriate in this case. Two of the cases³ concern whether the deponent should be deposed either in-person or through a telephone deposition – which is a clearly less desirable method than taking a deposition through a remote videoconference. *See, e.g., Shockey*, 280 F.R.D. at 602 (the "disadvantages of telephonic depositions ... do not apply at all, or to the same degree, when the depositions are to be taken via videoconference"); *United States v. One Gulfstream G-V Jet Aircraft*, 304 F.R.D. 10, 17 n.4 (D.D.C. 2014) ("[T]elephonic depositions are disfavored because it is impossible to see the witness's demeanor, watch what documents the witness is reviewing, or monitor who else the witness is talking with"). In the third case, the Seventh Circuit recognized that it was generally more desirable to present testimony at trial in-person rather than through videoconferencing but nonetheless affirmed the district court's decision to force a plaintiff inmate to testify at trial by videoconferencing rather than in-person as he had sought to do. *Perotti v. Quinones*, 790 F.3d 712, 721-25, 729 (7th Cir. 2015).

defendants hire additional counsel to represent Ms. Latham at her in-person deposition is unreasonable

*4 Learning Resources asserts that the risk to Mr. McGrath can be averted if the Walmart defendants retain additional counsel in Arkansas to represent Ms. Latham in-person while Mr. McGrath attends the deposition by video. (Dckt. #101 at 2-3). Learning Resources' counsel asserts that Walmart has retained the same local law firm to represent three of its witnesses whom he has deposed within the last fifteen months and it can follow the same procedure in this case. (*Id.*). While the Walmart defendants do not challenge this representation, they do argue that requiring them to "engage additional local counsel unfamiliar with the case to be physically present while Mr. McGrath appears remotely would unnecessarily deprive Walmart of the effective assistance of its current counsel." (Dckt. #100, at 2). The Court agrees. The fact that Walmart voluntarily chose to retain local counsel to represent its witnesses of unspecified importance in other unspecified cases does not automatically mean that it would be fair to order it to retain local counsel in this case. Moreover, as stated above, Ms. Latham appears to be an important witness and an attorney should be thoroughly conversant with the issues in this case to properly represent her during her deposition. It is unreasonable to expect the Walmart defendants to hire new counsel – even counsel who have previously represented Walmart in other litigation – and incur the expense and effort to get them fully up to speed in the next couple of weeks when the option of conducting Ms. Latham's deposition by videoconference is available.

In sum: while the Court is sympathetic to Learning Resources' preference for an in-person deposition, that preference is outweighed by the risks posed by the COVID-19 pandemic and the hardship that the Walmart defendants will likely experience if their lead counsel is unable to be physically present during Ms. Latham's in-person deposition. Consequently, in its discretion, the Court orders that Ms. Latham's deposition take place via remote videoconference. The Court further orders that the Walmart defendants bear any additional costs that are created by use of the videoconferencing format. *See, e.g., Graham*, 2016 WL 7443288, at *2 (imposing videoconferencing costs on the party who successfully moved to have the deposition conducted by videoconference); *Tangtiwatanapaibul*, 2017 WL 10456190 at *4 (same).

3. Learning Resources' proposal that the Walmart

CONCLUSION

For these reasons, the Walmart defendants' motion to require deposition by remote means [Dckt. #100] is granted.

All Citations

Slip Copy, 2020 WL 3250723

Footnotes

- 1 As the Southern District of New York recently observed, "[t]he fact that certain jurisdictions are beginning to relax their restrictions, a process based in part on political or economic considerations, does not mean that community spread has ceased or that individuals need not be concerned about potential exposure." *Joffe v. King & Spalding, LLP*, No. 17 Civ. 3392 (VEC) (SDA), Order (6/4/20) (Dckt. #239 at 6) [hereinafter "*Joffe Order*"].
- 2 The Court's holding in this case is not tantamount to a finding that concerns raised regarding COVID-19 will *always* suffice to support the entry of an order requiring a remote videoconference deposition. Cf. *Manley v. Bellendir*, No. 18-CV-1220-EFM-TJJ, 2020 WL 2766508, at *3 & n.10 (D. Kan. May 28, 2020) (finding that a remote videoconference deposition was not warranted where defendant asserted that "due to Plaintiff's past substance abuse, his in-person deposition [wa]s necessary to keep Plaintiff focused and efficiently conduct the deposition," "Defendant's need and ability to safely depose Plaintiff in person with the precautions outlined by Defendant outweigh[ed] Plaintiff's general concerns regarding COVID-19," and plaintiff's counsel failed to substantiate her suggestion that she was in a high risk group for contracting the virus).
- 3 *Mattar v. Cmty. Mem'l Hosp.*, No. 1:04 CV95, 2005 WL 6586402 at *1-2 (N.D. Ind. Feb. 18, 2005); *In re: The TJX Companies, Inc., Fair & Accurate Credit Transactions Act (FACTA) Litig.*, No. 07-MD-1853-KHV, 2008 WL 717890, at *2 (D. Kan. Mar. 17, 2008); see also *Clayton v. Velociti, Inc.*, No. 08-2298-CM/GLR, 2009 WL 1033738, at *5 (D. Kan. Apr. 17, 2009) (citing *TJX* for the proposition that "nothing in the Federal Rules of Civil Procedure requires the Court to order that depositions be taken telephonically").

2020 WL 3469166

Only the Westlaw citation is currently available.
United States District Court, N.D. Illinois, Eastern
Division.

IN RE BROILER CHICKEN ANTITRUST
LITIGATION This Document Relates To: All
Actions

Case No. 1:16-cv-08637

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Signed 06/25/2020

MEMORANDUM OPINION AND ORDER

Jeffrey T. Gilbert, United States Magistrate Judge

***1** Class Plaintiffs’ Motion for Entry of an Order Regarding Remote Depositions of Certain Categories of Witnesses [ECF No. 3610] (“Class Plaintiffs’ Motion”) is granted in large part for the reasons explained in this Memorandum Opinion and Order.

I.

Class Plaintiffs want to start taking depositions in this case via audiovisual or other remote means pursuant to [Federal Rule of Civil Procedure 30\(b\)\(4\)](#). They say the Court should allow this to happen to keep this case moving through pretrial discovery, class certification and summary judgment motion practice, and trial in a manner consistent with [Federal Rule of Civil Procedure 1](#) amidst the COVID-19 pandemic now sweeping this country and the world, which can make many in-person depositions impractical at this time. *See* [FED. R. CIV. P. 1](#) (“These rules...should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.”).

Direct Action Plaintiffs (“DAPs”) seem to agree depositions will need to be taken by remote means in this case though they say it will take time to put into place a protocol for taking those depositions that is acceptable to all parties and the Court. Defendants say now is not the appropriate time to move forward with remote depositions, but even they appear to grudgingly concede there soon may come a time when remote deposition practice is necessary to move this case forward on a reasonable timetable.¹

The Court agrees with Class Plaintiffs and DAPs that depositions will need to be taken by remote means if this case is going to move forward as it must, and it disagrees with Defendants that this decision should wait. Some depositions of class representative plaintiffs in this case already have been or are being taken remotely by video albeit by agreement and with some encouragement from the Court. *See* May 19, 2020 Order [ECF No. 3622], at 1; May 18, 2020 Hearing Tr. [ECF No. 3624], at 14-17. Class Plaintiffs say counsel for various parties also have participated remotely by telephone in virtually every deposition taken in this case even before the onset of the pandemic.²

***2** The Court also agrees that it needs to enter a protocol for taking remote depositions in a case like this with three putative classes, over 100 opt-out DAPs, more than 20 Defendants, dozens of lawyers, and the United States Department of Justice, as intervenor, watching everything that is going on because of a parallel grand jury investigation, and at least one pending felony indictment. *See United States v. Jason Jeffrey Penn, et al.*, Criminal Action No.: 20-cr-00152-PAB (D.Col. June 2, 2020). Toward that end, Class Plaintiffs have submitted a proposed remote deposition protocol that DAPs and Defendants have commented upon in their respective submissions on Class Plaintiffs’ Motion. [ECF Nos. 3610-1, 3628, 3628-1, 3629, 3630].

A.

Defendants object to being required to prepare or present any of their witnesses for either in-person or remote depositions under current circumstances. They raise a host of objections. They say the COVID-19 pandemic makes it unsafe and impractical to travel to or meet with a witness in person, whether to prepare or depose that individual. That is particularly true, they say, of witnesses employed

by poultry producers, an industry that has been designated as essential to the national defense and has been hard hit by the COVID-19 pandemic. Defendants also argue this is not the time to be taking Defendants' essential employees away from the critical jobs they are doing to ensure continued operation of companies on the front lines of feeding people who eat meat or chicken. Class Plaintiffs, however, offer repeatedly to accommodate witnesses who say it is impossible for them to sit for a deposition now, and they suggest, correctly, that the Court can resolve any disputes in this regard that the parties cannot resolve themselves. Class Plaintiffs' Motion [ECF No. 3610], at 5; Class Plaintiffs' Reply Brief [ECF No. 3639], at 15.

Defendants also say some of their witnesses have serious health issues that limit their ability to prepare for or give a deposition. But if witnesses have serious health issues, then that would seem to support Class Plaintiffs' desire to memorialize the testimony of those witnesses as soon as possible. Moreover, a video deposition and remote preparation for these witnesses may be much safer and allow for more flexibility than in-person sessions in any event. If necessary, for example, accommodations can be made so that a witness with health issues can testify over more than one session if that is necessary without anyone needing to travel on multiple days.

Other witnesses say they have Internet connectivity or capacity issues. Some say they share the Internet in their homes with other family members and that service is spotty when everyone is online. The Court understands these are real issues today. Some of these issues, though, potentially can be remedied either by the court reporter, the witness, or his (all the [Rule 30\(b\)\(1\)](#) witnesses appear to be men) current or former employer by upgrading the Internet service, which could provide a benefit that will last well after the deposition is taken. Class Plaintiffs also say a remote deposition protocol in this case should include a provision from another recent case that says no party will be forced to "proceed with a deposition where the deponent cannot hear or understand the other participants or where the participants cannot hear or understand the deponent." Class Plaintiffs' Reply [ECF No. 3639], at 9.

Defendants give no indication that any efforts have been made to investigate if the Internet connectivity or capacity issues some of their witnesses identify can be fixed or mitigated sufficiently to allow these witnesses to be prepared or deposed by remote means. For example, as to the witnesses who say their Internet service is slow when other family members are online at the same time, Defendants do not say whether a witness's family members can refrain from using the Internet when the witness is being prepared or deposed, and whether that

would allow the remote deposition to go forward more smoothly. Further, as a last resort, all of these witnesses presumably have telephones, and remote depositions can be taken by telephone as well as by video.

***3** Other defense witnesses are a bit older, live in rural locations, and say they are neither familiar with nor comfortable using the technology required for remote video deposition preparation or testimony. All of these witnesses were high-level executives in large companies. One was president and chief executive officer of a company that bills itself as the sixth largest chicken producer in the world, "serving markets from Arizona to Asia, Tampa to Tokyo." *See* <https://mountaire.com/about/> (last visited on June 25, 2020). It is difficult to believe these individuals cannot learn how to use the technology required for a video deposition or preparation session particularly with the help of sophisticated counsel and a quality court reporting firm. That these witnesses are not presently comfortable or familiar with the technology does not mean they cannot learn the basics that would allow them to be prepared or deposed remotely even if they never become fully comfortable with the technology themselves.

Still other witnesses say they do not have time for a deposition right now either because of the demands of their jobs or, in one instance, the declarant's law practice. Again, the Court notes that Class Plaintiffs have offered to work with Defendants and the witnesses in these instances. Class Plaintiffs' Motion [ECF No. 3610], at 5; Class Plaintiffs' Reply Brief [ECF No. 3639], at 15. Furthermore, it is a rare witness who really wants to make time to be deposed or prepare for a deposition at any time. Yet people make the time, get it over with as soon as possible, and then get on with their lives. In the case of the busy lawyer, the Court only notes that good lawyers, who often also are busy lawyers, always need to juggle clients and cases as part of their law practices, so the Court is confident that this lawyer will be able to satisfy his professional obligations to the Defendant he represents in this case and other clients, including by participating in a deposition in this case if it is necessary for him to do so.

Defendants also point out that many witnesses and their lawyers are working from home during the COVID-19 pandemic and, as a result, "the burden is magnified when witnesses and their lawyers are juggling preparation and caring for children, helping with school, dealing with pets, answering a doorbell, fixing meals, and the like." Defendants' Opposition [ECF No. 3630], at 8. This undoubtedly is true. Even as stay-at-home orders have been relaxed or suspended, many lawyers still are working from home and may have children who currently

are not in school during the summer or who may be attending school only part-time and e-learning from home the other portion of the week when school resumes in the Fall. But, again, accommodation is the answer here rather than a complete cessation of discovery activity until the COVID-19 pandemic abates.

Defendants also argue that preparing or defending a witness for a deposition by remote means will be exceedingly difficult in this case because it will require review of a large number of documents and cover events that took place over many years. Preparing a witness for such a deposition would be difficult and time consuming even in person, but Defendants say it is even more difficult and will take much longer if it needs to be done remotely. Similarly, the prospect of defending a witness in a case like this by remote means presents many challenges given the number of lawyers that have attended the 87 depositions that Class Plaintiffs have taken so far in this case, the likely length of each deposition based on how long other depositions have lasted, the large number of exhibits typically marked in those depositions, and the technological issues that are likely to arise in remote depositions. Defendants' lawyers understandably would much prefer to be in the same room with a witness who is being deposed both for the witness's comfort and so that the lawyer can adequately protect the witness by lodging objections or giving instructions not to answer a question when appropriate. Defendants say they will suffer serious prejudice if their lawyers are unable to communicate in person with a witness during deposition preparation and/or to defend a witness in person while he or she is testifying.

***4** Defendants argue strenuously that while courts have allowed depositions to occur remotely on motion, they have not previously *required* a party to prepare a deposition witness by video or other remote means as they say they would be forced to do here if the Court grants Class Plaintiffs' Motion. In the Court's view, this is heavy on semantics. Courts do not speak to how a lawyer must prepare a witness when they allow a witness to be deposed by remote means. They say the deposition can proceed remotely under [Rule 30\(b\)\(4\)](#) and leave it up to the lawyer and the party or the witness to decide how the witness will be prepared for the deposition. Class Plaintiffs are not asking the Court to require Defendants' lawyers to prepare their witnesses for deposition by video or telephone if they do not want to do so.

The Court, though, understands Defendants are saying that one consequence of the Court granting Class Plaintiffs' Motion may be that they will end up preparing all or some of their witnesses remotely because of safety concerns over lawyers or witnesses traveling or meeting

in person, and that will prejudice them. Defendants and their counsel, however, can choose how they want to prepare witnesses for depositions and whether or not they want to be with the witness in person when the witness gives a deposition by remote means. While it may be more difficult for a lawyer to prepare a witness for a deposition without sitting in the same room with her or him, it is not impossible to do so. Similarly, while it may be more difficult to defend a witness who is testifying remotely without being in the same room with the witness, there undoubtedly are ways to reduce the risks and challenges in that situation as well.³

The Court's informed guess is that a witness can be well-prepared to give a deposition, even a deposition that may involve a large number of documents and a relevant time period of many years, without being in the same room with her or his counsel. If the witness and counsel have the same universe of documents in front of them, either in hard or electronic copy, those documents are identifiable by a Bates number or other unique identifier, and they utilize a video system that allows them to see each other and even to see a document together on their computer screens at the same time, the preparation session(s) should proceed without too much trouble even if the process takes a bit longer than in person. The parties in these cases have produced millions of documents electronically, their lawyers likely are accustomed to seeing documents on screens rather than in hard copy, and even in-person depositions occur with electronic documents being shown to witnesses on a screen rather than on paper. *See* Defendants' Opposition [ECF No. 3630], at 12 n.18 and Exhibit 14 [ECF No. 3630-24].

Defendants are correct that remote video technology is not perfect by any means. A host of technological problems can and do arise during a remote video deposition that may interrupt or delay the deposition. There are many opportunities for glitches (e.g., a frozen screen with the dreaded message "your internet connection is unstable") that can frustrate even the most technologically savvy lawyer taking or defending a remote deposition. Defendants point to one deposition taken in this case in which the court reporting firm's electronic platform for displaying exhibits did not always work well and required several breaks in the flow of the deposition to accommodate and fix the issues that arose. Defendants' Opposition [ECF No. 3630], at 12 n. 18. As Defendants acknowledge, this was an *in-person* deposition. Defendants may want the Court to infer that if technological problems can arise during an in-person deposition, the prospect for disruption is even greater in a remote video deposition and the consequences could be much worse. *Id.* The Court, however, takes a different lesson from this deposition vignette. Technological

problems can arise during in-person as well as remote depositions, but that is not a reason to prevent remote depositions from occurring. It can be difficult and frustrating in both contexts to accommodate technological problems, but the depositions still proceed.

***5** The Court is not blind to nor is it ignoring the very real challenges involved in conducting remote video depositions in a case like this with so many parties and lawyers. But unless the Court is going to stay all depositions that cannot proceed by agreement (whether in-person or remotely) until there is a cure or a vaccine for COVID-19, or something approaching so-called herd immunity, which it is unwilling to do on a blanket basis, the parties and their counsel are going to have to have to adapt, make some choices, be creative, and compromise in this and every other case in which they are involved during this time without modern precedent.

Finally, in response to Defendants' objections, Class Plaintiffs say Defendants are over-dramatizing the problems they will face in preparing and defending at least the 18 depositions that are the subject of Class Plaintiffs' Motion. For example, Class Plaintiffs point out they are limited to 14 hours of deposition time for [Rule 30\(b\)\(6\)](#) depositions per Defendant so they have to be judicious with their use of time for the eight [Rule 30\(b\)\(6\)](#) depositions on their list of 18 depositions. See February 28, 2019 Order [ECF No. 1979], at 1. Class Plaintiffs want to cover just three topics in the [Rule 30\(b\)\(6\)](#) depositions they now want to take dealing with pricing, supply, and production. Plaintiffs' Amended Notice of [Rule 30\(b\)\(6\)](#) Deposition [ECF No. 3610-5], Topics 18, 21, 22. The Court agrees those are meaty topics (no pun intended), but there still are just three of them, albeit with sub-parts. Class Plaintiffs represent each deposition will take less than a day. Finally, although Class Plaintiffs do not say this, perhaps some of the information Class Plaintiffs now want to obtain with a [Rule 30\(b\)\(6\)](#) deposition can be provided by one or more Defendants by other means which could serve to reduce witness preparation and deposition time. The Court encourages the parties to engage in this sort of discussion aimed at reducing the number or the length of depositions that need to be taken in this case.

B.

Courts are beginning to recognize that a "new normal" has taken hold throughout the country in the wake of the

COVID-19 pandemic that may necessitate the taking of remote depositions unless litigation is going to come to an indefinite halt until there is a cure or a vaccine for COVID-19.⁴ The more recent court decisions build on pre-pandemic case law that liberally allowed for and encouraged remote depositions as the technology for taking depositions in that way has improved significantly over time.⁵

***6** Although there are cases, some of which Defendants cite, in which courts have not permitted depositions to be taken by remote means, many were decided one or almost two decades ago, before video depositions and remote meetings became as commonplace as they are today in the practice of law, and in almost every other aspect of business and social life and interaction, and under different circumstances than now are facing litigants, lawyers, and courts.⁶ In the more recent cases cited by Defendants, when courts have denied a party leave to take a remote deposition, it has been based on the particular facts and circumstances present in those cases, some of which are different from this case. See, e.g., *Quarrie v. Wells*, 2020 U.S. Dist. LEXIS 63710, at *2-3 (D. N.M. Apr. 10, 2020) (denying a *pro se* plaintiff's motion for leave to conduct depositions by telephone because of, among other things, the plaintiff's lack of experience in taking depositions and the complex nature of the anticipated testimony); *Egan v. Royal Kona Resort*, 2018 WL 1528779 (D. Hawaii Mar. 28, 2018) (holding that a slip-and-fall plaintiff must travel to Hawaii, where she was injured and filed suit, at the defendant's expense for her deposition rather than be deposed by video at her residence in New Hampshire, when, among other things, the plaintiff previously had agreed to travel to Hawaii for her deposition).⁷

Cases in this area are heavily fact dependent. In one recent case, for example, the court accepted a plaintiff's representations that she would experience significant hardship by being required to sit for a remote deposition because she did not have access to the Internet, had scant knowledge of technology, and lived alone with no one to help her set up the virtual technology that the court reporter would send her. The court ordered the deposition to take place in person within one week. Yet, if that deposition could not be taken in person within a week's time, then the court ordered that it proceed by remote means. See *Thomas v. BJ's Wholesale Club, Inc.*, Superior Court of New Jersey, Law Division, Middlesex County, Docket No. MID-L-5518-19 (June 5, 2020) (holding that "[p]laintiff's deposition must occur virtually via zoom or other teleconference system by that date"). In another recent case, the court required two witnesses to testify remotely by video at trial because the witnesses feared exposure to the virus that causes COVID-19 if they

had to testify in person after a lawyer from one of the law firms involved in the trial tested positive for the virus. *See In re RFC and ResCap Liquidating Trust Action*, 2020 WL 1280931, at *3 (D. Minn. Mar. 10, 2020) (finding that “COVID-19’s unexpected nature, rapid spread, and potential risk establish good cause for remote [trial] testimony”).

*7 Courts have long held that leave to take remote depositions pursuant to Rule 30(b)(4) should be granted liberally. *See, e.g., Guillen v. Bank of Am. Corp.*, 2011 WL 3939690, at *1 (N.D. Cal. Aug. 31, 2011) (citing *Brown v. Carr*, 253 F.R.D. 410, 412 (S.D. Tex. 2006)) (“Leave to take depositions by telephone is granted liberally.”); *Jahr v. IU Int’l Corp.*, 109 F.R.D. 429, 431 (M.D.N.C. 1986) (“[L]eave to take telephonic depositions should be liberally granted in appropriate cases.”); *accord Hoeft v. Richardson*, 2009 WL 3242067, at *3 (W.D. Wis. Oct. 2, 2009) (quoting *Brown*, 253 F.R.D. at 412). All that is required to authorize a remote deposition is a legitimate reason put forward by the party proposing to take a deposition by remote means. *Kaseberg v. Conaco, LLC*, 2016 WL 8729927, at *5 (S.D. Cal. Aug. 19, 2016) (quoting *Jahr*, 109 F.R.D. at 431). A desire to save money taking out of state depositions can suffice to show good cause to take a deposition by remote means. *Guillen*, 2011 WL 3939690, at *1; *accord Kaseberg*, 2016 WL 8729927, at *6. Once the proponent of taking a deposition by remote means makes a sufficient threshold showing, the burden then shifts to the opposing party to show how it would be prejudiced if the deposition were taken in that way. *Guillen*, 2011 WL 3939690, at *1 (citing *Brown*, 253 F.R.D. at 412; *Cressler v. Neuenschwander*, 170 F.R.D. 20, 21 (D. Kan. 1996)).

Defendants argue that Class Plaintiffs have not established good cause to take each of the 18 depositions they propose to take before they file their class certification motions. Class Plaintiffs, however, say they are seeking to take each of these 18 depositions “not only for class certification but in order to meet the other deadlines necessary to keep this case on track.” Class Plaintiffs’ Reply [ECF No. 3639], at 14. Moreover, although some courts speak colloquially about whether there is “good cause” to take remote depositions allowed by Rule 30(b)(4), the Rule does not literally require the existence of good cause. Rather, it appears to leave it to the court’s broad discretion over discovery to determine whether there is a legitimate reason to take a deposition by telephone or other remote means under all the facts and circumstances of a given case. *See Roberts v. Homelite Div. of Textron, Inc.*, 109 F.R.D. 664, 666 (N.D. Ind. 1983) (“Neither the rule itself nor the notes of the Advisory Committee list the criteria which the trial court should use in exercising its discretion under Rule

30(b)(4)...the better reasoned view gives the trial court the same discretion which it enjoys in resolving all other discovery disputes.”). The decision whether to allow a remote deposition essentially involves a careful weighing of the reasons put forth by the proponent of the remote deposition and the claims of prejudice and hardship advanced by the party opposing the deposition. *Learning Resources*, 2020 WL 3250723, at *3-4; *Usov v. Lazar*, 2015 WL 5052497, at *2 (S.D. N.Y. Aug. 22, 2015).

Further, one of the primary reasons that Class Plaintiffs say remote depositions are justified in this case—the existence of the global COVID-19 pandemic that renders in-person depositions impractical or unsafe in many instances—transcends the particular circumstances of each of the 18 individual witnesses that Class Plaintiffs wish to depose remotely as of now. So, too, does Class Plaintiffs’ argument that their ability to take depositions in this case has been stalled for over a year because the Court granted the United States Department of Justice’s application to stay certain discovery while it conducted its grand jury investigation, and depositions should not be delayed further because of the COVID-19 pandemic. *See* [ECF Nos. 2271, 2302, 3153, 3356]. There are other reasons depositions have been delayed in this case besides the stay, as Defendants correctly point out, but there is no denying that the stay had a negative impact on the case moving forward for a period of time through no fault of Class Plaintiffs. The close-approaching date for Class Plaintiffs to file their class certification motions and a looming fact discovery close date early next year are yet additional legitimate reasons for Class Plaintiffs to begin to take remote depositions. A large number of depositions still need to be taken in this case (100 according to Class Plaintiffs and DAPs), and the parties (with the Court’s assistance, if necessary) need to get about the business of scheduling and taking those depositions.

*8 Accordingly, under the case law and all the circumstances of this case, the Court does not see why Class Plaintiffs must show there is a legitimate reason constituting good cause to take each one of the 18 depositions they want to take as part of their initial burden under Rule 30(b)(4). The thrust of Class Plaintiffs’ argument is that these depositions will need to be taken at some point so they should start down that path now. The Court agrees. Further, the Court is not generally in the business of second-guessing a party’s desire to take a deposition it says it needs to take unless the opposing party can show a good reason why that deposition should not be taken. Finally, the Court has limited the total number of depositions Class Plaintiffs can take of each Defendant family in this case so Class Plaintiffs already need to be mindful of who they want to depose and for what reason. *See* August 28, 2018 Order [ECF No. 1155].

C.

Defendants' suggestion that the Court should delay this decision until the Fall is neither practical nor, in the Court's judgment, wise. It is not obvious the situation will be materially different in September when Defendants say the Court and the parties first should begin to consider remote depositions in this case. Defendants understandably cite no authority for their hope that things may be better by September. In fact, one court labeled the "hope the physical distancing and stay-at-home orders required by the current pandemic will be lessened to allow for in-person depositions in the near future" as "pure speculation." *United States ex rel. Chen*, 2020 WL 2631444, at *1.

Recent statements by public health officials about the staying power of COVID-19 also belie Defendants' speculation that things may be so different in the Fall as to render remote depositions in this or any other case unnecessary, or at least less likely. For example, Dr. Anthony Fauci, Director of the National Institute of Allergy and Infectious Diseases, said in an interview with NBC Sports on June 5, 2020, that there was "virtually no chance" that the novel coronavirus, which causes the disease COVID-19, will be eradicated any time soon. <https://www.businessinsider.com/fauci-theres-virtually-no-chance-covid-19-will-be-eradicated-2020-5>. To the contrary, Dr. Fauci, said he believes a second wave of coronavirus infections is "inevitable" and that "the worst-case scenario...involves a second, larger wave of infections this fall and winter." <https://www.businessinsider.com/second-wave-of-coronavirus-infections-may-peak-in-fall-2020-5>. In an interview with the *The New York Times*, Dr. Fauci said: "When is it going to end? We're still at the beginning of really understanding." Grady, Denise, "Fauci Warns That the Coronavirus Pandemic Is Far From Over." *The New York Times*, June 10, 2020, Section A, page 7. In addition, COVID-19 cases continue to rise in some states where restrictions have been eased. Calfas, Jennifer, "States See Big Increases in Virus Cases." *The Wall Street Journal*, June 23, 2020, Section A, page 6. ("The nation's death toll surpassed 120,000 as more than 20 states saw the pace of new coronavirus cases rise faster this week than in the week before.").

D.

For all these reasons, the Court agrees with Class Plaintiffs, and with other courts that recently have so held, that there are legitimate reasons for Class Plaintiffs to take at least the 18 depositions they now want to take by remote means because of the COVID-19 pandemic so as to protect the safety and health of witnesses, counsel, court reporters, videographers, and other persons, and to move this case through the pretrial process at an acceptable pace during a time when in-person depositions may present risks to the health and safety of people participating in them. See *Learning Resources*, 2020 WL 3250723, at *3; *Wilkens*, 2020 WL 2496001, at *1; *Grano*, 2020 WL 1975057, at *2; *United States ex rel. Chen*, 2020 WL 2631444, at *1; *Sinceno*, 2020 WL 1302053, at *1; *Joffe*, 17 Civ. 3392 (VEC)(SDA), at *6; *Ogilvie*, 2020 WL 2630732, at *2-3. To be clear, this is not a blanket ruling that the COVID-19 pandemic alone justifies the taking of remote depositions in all cases and under all circumstances. In this case, however, the COVID-19 pandemic, in conjunction with the other circumstances discussed above, are legitimate reasons for Class Plaintiffs to want to move forward with remote depositions now.

*9 Courts also recognize a basic "underlying principle" that "[t]he right to proceed in court should not be denied except under the most extreme circumstances." *Commodity Futures Trading Comm'n v. Chilcott Portfolio Mgmt., Inc.*, 713 F.2d 1477, 1484 (10th Cir. 1983) (citing *Klein v. Adams & Peck*, 436 F.2d 337, 339 (2d Cir.1971)). That principle also militates in favor of conducting remote depositions in this case during the COVID-19 pandemic to move the case closer to resolution by dispositive motion, settlement, or trial than would be the case if the litigation treads water until the pandemic abates.⁸

Once Class Plaintiffs meet their burden to show why remote depositions should be allowed in this case, as they have done, then the burden is on Defendants to show why a deposition should not be taken in that way. *Guillen*, 2011 WL 3939690, at *1 (citing *Brown*, 253 F.R.D. at 412; *Cressler*, 170 F.R.D. at 21). See also *Learning Resources*, 2020 WL 3250723, at *3-4; *Usov*, 2015 WL 5052497, at *2. Defendants have not met their burden to show they will suffer undue prejudice if the Court allows Class Plaintiffs to take the 18 remote depositions they now propose to take in this case. The arguments Defendants have put forth are not sufficient to overcome the legitimate reasons that Class Plaintiffs have advanced to depose by remote means the 18 witnesses they have identified pursuant to Rule 30(b)(4), whether as Rule 30(b)(1) or Rule 30(b)(6) depositions. The Court's ruling

is based on all the facts and circumstances of this case and on the parties' arguments on Class Plaintiffs' Motion, and it is the result of a balancing of the parties' respective interests detailed above as required by Rule 30(b)(4).

Nothing in the Court's ruling today prevents Defendants from attempting to show there are instances in which there is a legitimate concern that a particular in-person deposition cannot be taken safely or effectively, or for some other reason, and that the deposition also cannot be taken remotely without undue prejudice to the witness or a Defendant. The Court can address those situations as they arise and in the context of particular facts and circumstances relating to that witness or deposition, most likely in the context of a motion for a protective order under Rule 26(c)(1), if the parties cannot work things out themselves.

Courts sometimes have considered whether remote depositions should be allowed in the context of dueling motions filed pursuant to both Rule 30(b)(4) and Rule 26(c)(1). See *Shibata v. Swingle*, 2018 WL 4522050 (N.D.N.Y. Feb. 26, 2018); *Wilkerson v. Stalder*, 2015 WL 2236417 (M.D. La. May 12, 2015). Although Defendants have not filed a formal Rule 26(c)(1) motion here, many of their arguments are of the type that would be included in such a motion, but they also are arguments that courts can and do consider in ruling on a Rule 30(b)(4) motion given the balancing of interests required to resolve such a motion. In the Court's view, the objections Defendants have made here, though significant and serious, are insufficient, without more, to prevent remote depositions from going forward in this case when there otherwise are legitimate reasons for those depositions to proceed and possible ways to remedy the potential obstacles that at least have been raised to date.

II.

***10** Two questions remain: When will Class Plaintiffs begin to take the remote depositions they are allowed to take, and what protocol will govern the taking of remote depositions in this case?

A.

The Court is focused in the first instance on putting Class Plaintiffs in a position to file their motions for class certification as soon as possible. See May 18, 2020 Hearing Tr. [ECF No. 3624], at 42 ("I will tell you that I'm focused right now on class certification because that's the next step in this case, and I would like that process to move forward as quickly as we can...."). Class certification motions now are due on September 3, 2020, consistent with General Order No. 20-2012, as amended, entered in this and all other cases pending in this District which extended all court-set deadlines for a total of 77 days in light of the COVID-19 pandemic. See *In re Coronavirus COVID-19 Public Emergency*, Amended General Order 20-0012 entered on March 17, 2020, Second Amended General Order 20-0012 entered on March 30, 2020, Third Amended General Order 20-0012 entered on April 24, 2020, and Fourth Amended General Order 20-0012 entered on May 26, 2020 ("ILND COVID-19 Orders"). The filing of Class Plaintiffs' motions for class certification triggers a five-month period of briefing, disclosure of experts concerning class certification issues, and the briefing of any related *Daubert* motions. See Scheduling Order No. 13 [ECF No. 3420].

Beyond class certification, fact discovery currently is set to close on March 4, 2021. See Scheduling Order No. 13 [ECF No. 3420] and the ILND COVID-19 Orders referenced above. It may or may not be possible to meet that date under current circumstances. If depositions beyond the 18 depositions that are the subject of Class Plaintiffs' Motion will be taken by remote means in this case, as Class Plaintiffs apparently intend, it very well may take the parties more time to conduct those depositions and that could require an extension of the fact discovery close date. The parties and the Court recognize the need for the parties to start meeting and conferring about a global schedule and regarding how and when all of those depositions can and will be taken.

It is not clear now, however, when even the 18 depositions Class Plaintiffs say they want to take first will be taken. It also is not clear which of these depositions must be taken before Class Plaintiffs file their class certification motions and which, if any, do not. The parties have been conferring with Special Master Maura R. Grossman in an effort to expedite and streamline the production of structured data that the Court ordered Defendants to produce before Class Plaintiffs file their motions for class certification. It is unclear whether Class Plaintiffs need any of that structured data for the depositions they seek to take by remote means. Some of the proposed Rule 30(b)(6) topics seem to encompass information that should be contained in the forthcoming productions of structured data; others do not. Defendants

seem to assume that the depositions Class Plaintiffs want to take will not occur until the structured data is produced. Defendants' Opposition [ECF No. 3630], at 5. Class Plaintiffs do not really address the issue directly. So, production of this structured data may impact when the depositions will occur.

***11** The parties also are conferring about the proposed topics that Class Plaintiffs say they wish to cover in the eight [Rule 30\(b\)\(6\)](#) depositions they propose to take remotely. Defendants' Opposition [ECF No. 3630], at 3 n.5. If they cannot reach agreement, then the Court will need to resolve any disputes before those depositions can proceed. The Court also wants to enter a protocol for taking remote depositions that addresses as many potential issues as possible before those depositions begin.

The DAPs also note they have not yet reached agreement with Class Plaintiffs about how to allocate time among all Plaintiffs for questioning Defendants' deposition witnesses. Those discussions also have to reach a conclusion, and the Court will need to weigh in on any dispute that the parties cannot resolve themselves.

So, the timing of the depositions Class Plaintiffs want to take, both before and after Class Plaintiffs file their motions for class certification, is something that the Court and the parties still need to address.

B.

The Court and the parties also need to address how remote depositions will proceed. Class Plaintiffs included a proposed protocol for remote depositions with their Motion. DAPs propose modifications to that protocol. Defendants raise issues with the protocols proposed by both groups of Plaintiffs.

The Court agrees that Class Plaintiffs' proposed protocol is a reasonable starting place, but some of DAPs' and Defendants' suggestions have obvious merit. The Court is confident the parties will be able to reach agreement on a remote deposition protocol with or even without the Court's help. In an effort to move the process along, the Court has the following reactions to Defendants' and DAPs' objections and proposed modifications to Class Plaintiffs' deposition protocol.

The Court agrees with Defendants that whether a person

is an "essential employee" for reasons that have to do with the a company's role in responding to the COVID-19 pandemic is a factor that should be taken into account when deciding whether that person should sit for an in-person or remote deposition, but it disagrees that there should be a blanket exemption for depositions of all "essential employees" until it knows more about how that term is defined and how it will be applied.

The Court agrees with Defendants that a remote deposition protocol should be consistent, to the extent possible, with the existing deposition protocol in this case [ECF No. 995], and that it does not appear that Class Plaintiffs' proposed four-day notice requirement of telephone attendance at a remote deposition is any more necessary than for an in-person deposition.

The Court agrees with Defendants that a videotape of a deposition that potentially will be used for trial does not need to show both the witness and his or her lawyer.

The Court agrees with Defendants that if the questioning attorney wants to use electronic exhibits at the depositions, then that attorney should deliver those exhibits in hard copy (or in whatever form the deponent and her or his attorney wants) to the deponent and/or the deponent's attorney before the deposition, and those exhibits should not be opened by the recipient(s) until the deposition starts. The deponent can be asked under oath at the beginning of the deposition whether she or he looked at the exhibits before the deposition began, and the envelope or container in which the exhibits were delivered even can be opened for the first time on screen, if necessary.

***12** The Court agrees with Defendants that Plaintiffs should not be allowed unilaterally to determine the remote video deposition platform. The parties should agree on the remote video deposition platform to be used. If they cannot do so, then the Court will decide.

The Court agrees with Defendants that remote depositions may have to occur over portions of a typical deposition day or over multiple days to accommodate a host of concerns including the fact that witnesses and lawyers may be attending the deposition from home with responsibilities for children or others, and that remote depositions may take longer than in-person depositions for technological and other reasons.

The Court does not know if it is possible for a video platform to always show the witness, the witness's attorney, and the questioning attorney on the video screen at all times, as some DAPs suggest, but it agrees that would be preferable.

The Court agrees with some DAPs that the parties and the Court should consider whether to extend the length of time for a remote deposition beyond the time provided by the Federal Rules and should consider how to take into account time lost for technological glitches, but it is not convinced the suggestion to add an automatic 30 minutes to every remote deposition is the best way to do that.

The Court agrees with some DAPs that there should be no unrecorded or at least unnoted conversations between the witness and his or her attorney during a remote deposition while the witness is on the record, but it is unsure how to phrase or police that rule.

The Court agrees with some DAPs that, to save time, an objection on behalf of one aligned party could be deemed an objection on behalf of all (a convention that also can apply to an in-person deposition) but would like to hear from all parties about that.

The Court also agrees with certain DAPs that there needs to be an allocation of time between Class Plaintiffs and DAPs for questioning of Defendants' witnesses.

A telephonic hearing is set for July 20, 2020, at 10:30 a.m. for the purpose of addressing the matters set forth in Section II of this Memorandum Opinion and Order, and any other issues the parties may wish to raise relating to the taking of remote depositions. By July 15, 2020, the parties shall file an agreed remote deposition protocol and note any remaining disagreements about the terms of such a protocol in that filing. By the same date, Class Plaintiffs also shall submit a timetable for taking the 18 depositions they say they want to take after consultation about that timetable with Defendants and DAPs. Class Plaintiffs should note any disagreements among the parties about their proposed deposition schedule in that submission. If these dates chosen unilaterally by the Court do not work for the parties, liaison counsel should send an email to the Court's courtroom deputy proposing different dates.

For all these reasons, Class Plaintiffs' Motion for Entry of an Order Regarding Remote Depositions of Certain Categories of Witnesses [ECF No. 3610] is granted in large part.

It is so ordered.

All Citations

Slip Copy, 2020 WL 3469166

III.

Footnotes

- ¹ If Defendants do not unequivocally commit to the possibility that at least some witnesses will need to be deposed by remote means in this case, then they come pretty close to doing so. *See* Defendants' Opposition [ECF No. 3630], at 14 ("Defendants recognize that this situation is highly fluid and believe the question of remote depositions should be re-examined in September. If, at that time, in-person depositions remain unsafe or inadvisable, the parties and the Court should re-visit the advisability and fairness of remote depositions for certain witnesses. If the needs of the case then require that certain remote depositions take place (notwithstanding Defendants' significant prejudice), the Court should order a protocol providing witness-by-witness accommodations as needed under the circumstances.").
- ² According to Class Plaintiffs, "For every deposition in this case so far, many attorneys have already attended remotely by telephone, choosing to forgo the benefits of seeing the witness and exhibits as they are stamped, in return for the convenience and time- and cost-savings of not traveling." Class Plaintiffs' Motion [ECF No. 3610], at 4-5.
- ³ For example, to guard against a witness answering a question when the technology prevents the witness's counsel, who like the witness is participating in the deposition remotely and from a different location, from lodging an objection or instructing the witness not to answer a question, the parties might consider adopting a convention that would allow a witness to answer a question only after the lawyer defending the deposition says the witness can answer. A simple, "you may answer" would suffice. The Court is confident the parties can come up with other conventions that can make the taking and defending of remote depositions more palatable.
- ⁴ *See, e.g., Learning Resources, Inc. v. Playgo Toys Enterprises Ltd.*, 2020 WL 3250723, at *3 (N.D. Ill. June 16, 2020) (holding "the health concerns created by the COVID-19 pandemic create 'good cause' for the entry of an order requiring that Ms. Latham's

deposition take place by remote videoconference”); *Wilkens v. ValueHealth, LLC*, 2020 WL 2496001, at *1 (D. Kan. May 14, 2020) (“Video or teleconference depositions and preparation are the ‘new normal’ and most likely will be for some time. Litigation cannot come to an indefinite halt.”); *Grano v. Sodexo Mgmt., Inc.*, 2020 WL 1975057, at *2 (S.D. Cal. Apr. 24, 2020) (observing “that “[a]ttorneys and litigants all over the country are adapting to a new way of practicing law, including conducting deposition and deposition preparation remotely”); *United States ex rel. Chen v. K.O.O. Construction, Inc.*, 2020 WL 2631444, at *1 (S.D. Cal. May 8, 2020) (holding that it is “pure speculation” that the “physical distancing and stay-at-home orders required by the current pandemic will be lessened to allow for in-person depositions in the near future”); *Sinceno v. Riverside Church in City of New York*, 2020 WL 1302053, at *1 (S.D.N.Y. Mar. 18, 2020) (authorizing remote depositions “[i]n order to protect public health while promoting the ‘just, speedy, and inexpensive determination of every action and proceeding’ ”); *Joffe v. King. & Spalding LLC*, 17 Civ. 3392 (VEC)(SDA), at *6 (S.D.N.Y. June 4, 2020) (ordering parties to proceed with remote deposition over plaintiff’s objection because the conditions of in-person depositions create “a bad mix during the pandemic” and a “burden on the witnesses and their families”); *Ogilvie v. Thrifty Payless Inc.*, 2020 WL 2630732, at *2-3 (W.D. Wash. May 12, 2020) (“Although the court understands that the parties may have a preference for taking depositions or meetings in person, given the present circumstances, the court urges the parties to consider available alternatives This pandemic may well be with us for many months to come. We will all need to adjust to keep litigation moving forward.”).

- 5 See, e.g., *Rice’s Toyota World, Inc. v. Southeast Toyota Distributors, Inc.*, 114 F.R.D. 647 (M.D.N.C. 1987) (refusing to limit video depositions to important witnesses who might be unavailable for trial since plaintiff was not requesting that regular stenographer be dispensed with, thus sharply reducing risks of video deposition); *Riley v. Murdock*, 156 F.R.D. 130 (E.D.N.C. 1994) (allowing videotaped deposition); *Fanelli v. Centenary College*, 211 F.R.D. 268 (D.N.J. 2002) (holding that anxiety over videotaping not good cause sufficient to warrant a protective order); *Kaseberg v. Conaco, LLC*, 2016 WL 8729927, at *6 (S.D. Cal. Aug. 19, 2016) (requiring a copy of exhibits intended to be used at a remote deposition to be sent to deponent’s attorney at least twenty-four hours in advance of the deposition); *Carrico v. Samsung Elecs. Co.*, 2016 WL 1265854, at *2 (N.D. Cal. Apr. 1, 2016) (approving methods such as exchanging Bates- stamped documents in advance of a remote deposition or using modern videoconference software to share documents and images); *Lopez v. CIT Bank, N.A.*, 2015 WL 10374104, at *2 (N.D. Cal. Dec. 18, 2015) (disagreeing that reviewing complicated exhibits remotely would be impracticable because exhibits can be shared with modern videoconference software or by distributing Bates-stamped copies); *Lott v. United States*, 2008 WL 2923437, at *1 (N.D. Cal. July 25, 2008) (finding no prejudice incurred in remote depositions that require reference to critical exhibits such as photographs, diagrams, and drawings because the exhibits may be sent to the deponent in advance of the deposition).
- 6 See *In re Fosamax Prod. Liab. Litig.*, 2009 WL 539858, at *2 (S.D.N.Y. Mar. 4, 2009) (citing *R.S. ex rel. S. v. Ridgefield Board of Education*, 2008 WL 1989774, at *2 (D.Conn. May 5, 2008)) (denying request for telephone or video deposition on ground that it could “hamper the Plaintiffs’ attorney’s ability to fully conduct the deposition”); *Willis v. Mullins*, 2006 WL 894922, at *3 (E.D. Cal. Apr. 4, 2006) (requiring in- person deposition in light of “unreasonable restraints” of video conferencing, “especially concerning the review and use of documents”); *Silva Run Worldwide, Ltd. v. Gaming Lottery Corp.*, 2003 WL 23009989, at *2 (S.D.N.Y. Dec. 23, 2003) (rejecting telephonic or video deposition because of importance of testimony and volume of documents).
- 7 In *Quarrie*, the court also denied the plaintiff leave to take a remote deposition on the belief that the officer administering the oath to the witness must be in the same room as the witness, and that was not going to happen in that case due to the COVID-19 risk. 2020 U.S. Dist. LEXIS 63710, at *2-3. *Federal Rule of Civil Procedure 28* does not expressly require the officer who administers the oath to be in the same room as the deponent, and the law is mixed on whether that is necessary. One court recently explained that it is unnecessary for the officer and the witness to be in the same room as technological advances now allow the witness and the officer to see and hear each other. See *SAPS, LLC v. EZCare Clinic, Inc.*, 2020 WL 1923146, at *1-2 (E.D.La. Apr. 21, 2020). Another recent case clarified that the officer can swear the witness either by telephone or video. See *Sinceno*, 2020 WL 1302053, at *1 (“For avoidance of doubt, a deposition will be deemed to have been conducted ‘before’ an officer so long as that officer attends the deposition via the same remote means (e.g., telephone conference call or video conference) used to connect all other remote participants, and so long as all participants (including the officer) can clearly hear and be heard by all other participants.”).
- 8 In fact, Class Plaintiffs argue that if they are not allowed to take depositions by remote means, this case will languish with no real end to the pretrial process in sight. See Joint Status Report [ECF No. 3616], at 1 (“Depositions of the Defendants are the key gate-keeping event required for the case to be trial-ready. While certain motions have been briefed and some written discovery has occurred during the COVID-19 pandemic, the continued inability of Plaintiffs to take Defendant depositions will continually delay trial.”).

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United States District Court, D. Kansas.

Leslie J. REYNARD, Plaintiff,
v.
WASHBURN UNIVERSITY OF TOPEKA,
Defendant.

Case No. 19-4012-HLT-TJJ

|
Signed 07/07/2020

Attorneys and Law Firms

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MEMORANDUM AND ORDER

Teresa J. James, U.S. Magistrate Judge

*1 On July 1, 2020, the Court conducted a telephone hearing on Plaintiff's Motion for Protective Order and to Quash Document Request (ECF No 60). Plaintiff appeared through counsel, Heather J. Schlozman and Mark V. Dugan. Defendant appeared through counsel, Timothy A. Shultz. This order memorializes the Court's oral rulings during the hearing.

I. Relevant Background

Plaintiff filed the present motion on June 23, 2020, seeking a protective order requiring Plaintiff's deposition

be taken remotely by video, and an order that Defendant's request for documents in the deposition notice be quashed. The Court previously conducted a phone status conference regarding Plaintiff's deposition on May 19, 2020.¹ Plaintiff argued then, as she does now, that her age (73 years old),² multiple underlying health conditions,³ and her husband's age (71 years old) and stage 4 cancer⁴ make appearing in person for her deposition dangerous because of the ongoing COVID-19 pandemic. Defendant did not then, and does not now, dispute the health problems asserted by Plaintiff and her husband. However, Defendant opposed taking Plaintiff's deposition via videoconference, stressing the importance of taking the deposition of a *plaintiff* who is asserting a significant damage claim, in person. Defendant argued it would have adequate safeguards in place to protect Plaintiff during her in person deposition.⁵ Defendant also argued taking the deposition remotely would put Defendant at a disadvantage because of its inability to observe Plaintiff in-person, and because a video deposition in this situation would be impossible given the large number of deposition exhibits that will be utilized in Plaintiff's deposition.⁶ Additionally, Defendant expressed concern that Plaintiff does not have sufficient internet capability to appear by video, noting that Plaintiff was unable to participate in a video meeting she previously had with Defendant due to her unstable internet connection.⁷ Plaintiff states now that she has resolved her internet difficulties and is "confident" she "could be available for a videoconference deposition."⁸

During the May 19, 2020 hearing, the Court discussed with counsel various factors it would weigh in determining whether, and if so under what conditions, Plaintiff's remote deposition might be required. The Court extended the discovery deadline to allow Plaintiff's deposition to be delayed and instructed the parties to continue to confer and attempt to resolve their dispute. The Court also instructed that if the parties were unable to resolve the dispute, Defendant should file a notice of deposition, and Plaintiff could file a motion for protective order.

*2 On June 15, 2020, Defendant noticed Plaintiff's deposition for July 7 and 8, 2020 at defense counsel's office in Topeka, Kansas.⁹ Plaintiff filed the present motion on June 23, 2020. The Court abbreviated the briefing schedule and set a phone hearing on July 1, 2020, in order to have a ruling in advance of Plaintiff's deposition. Defendant filed its response on June 30, 2020, and Plaintiff filed her reply shortly before the hearing on July 1, 2020, pursuant to the Court's order setting the hearing.¹⁰ Based upon the briefing and arguments of

counsel at the hearing, the Court granted in part and denied in part Plaintiff's motion. The Court ordered that Plaintiff's deposition shall proceed remotely and that Plaintiff shall produce all documents responsive to Defendant's discovery requests to which she did not object prior to her deposition, for all of the reasons explained during the hearing and set out in detail below.

II. Legal Standard

Plaintiff brings this motion pursuant to [Fed. R. Civ. P. 26\(c\)\(1\)](#) and [30\(b\)\(4\)](#). [Rule 26\(c\)\(1\)](#) states, in relevant part:

"A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending—or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken.... The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense ..."

[Rule 30\(b\)\(4\)](#) states:

"The parties may stipulate—or the court may on motion order—that a deposition be taken by telephone or other remote means."

The party seeking a protective order has the burden to show good cause for it.¹¹ This Court has previously noted that "[Rule 30\(b\)\(4\)](#) is permissive, not mandatory, and the Court must exercise its discretion in determining whether the moving party has shown good cause for issuance of a protective order requiring that a deposition be taken remotely."¹² To establish good cause, a party must make "a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements."¹³

The Court "has broad discretion to decide when a protective order is appropriate and what degree of protection is required."¹⁴ The Supreme Court has recognized that trial courts are "in the best position to weigh the fairly competing needs and interests of the parties affected by discovery. The unique character of the discovery process requires that the trial court have substantial latitude to fashion protective orders."¹⁵

III. Analysis

A. Whether Plaintiff has shown good cause for her deposition to be taken remotely

*3 The Court considers first whether Plaintiff has shown good cause for a remote deposition. In support of her motion requesting a protective order requiring her deposition be taken remotely, Plaintiff argues several factors put her at a higher risk for complications, including death, should she contract COVID-19.

The Court finds Plaintiff has met her burden to show good cause for a protective order requiring her deposition be taken remotely for several reasons. Plaintiff's age and multiple health conditions indisputably put her at a higher risk of serious complications if she were to contract the virus. Plaintiff also has legitimate concerns of exposing her husband, who is also high risk because he is 71 years of age and suffering from stage 4 [cancer](#), to the virus. The Court has previously taken and continues to take judicial notice of the COVID-19 pandemic and its rapid spread throughout Kansas, the United States, and the world.¹⁶

Defendant argued in its response filed June 30, 2020 that "the situation and related risks surrounding [COVID]-19 are improving and no longer require the drastic measures originally taken,"¹⁷ relying primarily on the fact that Kansas has entered Phase 3 of its reopening plan. Defendant argues this "suggests that the concerns over the pandemic, generally, are reducing and do not justify the drastic types of measures Plaintiff seeks in her Motion for Protective Order."¹⁸ During the July 1, 2020 phone hearing, Defendant also provided numbers for hospitalizations at a Topeka, Kansas hospital indicating cases had mostly held steady for the past few days.

The Court, however, takes judicial notice of Executive Order No. 20-52, issued by Kansas Governor Laura Kelly on July 2, 2020, requiring masks or other face coverings in public. The Executive Order notes that "after a steady trend of decreasing metrics, recent weeks have seen the numbers of COVID-19 cases, hospitalizations, and deaths spike in Kansas and across the nation" and "this worrying trend of increased COVID-19 spread is a danger to the health and safety of every Kansan and also presents a serious threat to reopening and reviving the Kansas economy."¹⁹ Indeed, on June 29, 2020, Kansas recorded 14,443 cases with 270 deaths.²⁰ Shawnee County, which includes Topeka, recorded 630 cases.²¹ But, just two days later, on July 1, 2020, Kansas recorded 14,990 cases with 272 deaths, and Shawnee County recorded 669 cases.²² Thus, in two days the overall number of cases increased by 547 cases, and by 39 cases in Shawnee County. The

Court is therefore not persuaded by Defendant's argument that the risks surrounding COVID-19 are improving so as to no longer require the protections Plaintiff requests.

*4 Even if the Court were to accept Defendant's position, the fact that Kansas has moved into Phase 3 of its reopening plan does not mean witnesses no longer face health risks. Judge Valerie Caproni in the Southern District of New York recently addressed this argument:

"Whether to reopen the economy and to loosen the related public health restrictions is a complex policy decision that is not guided solely by health and safety considerations. The Court does not purport to judge the wisdom of state and local governments' reopening decisions. What remains clear is that the unique health risks posed by COVID-19 are as present today as they were in May: it is a potentially fatal illness with the ability to spread through asymptomatic or pre-symptomatic carriers, with no approved cure, treatment, or vaccine, and unlike in other countries, new cases here are plateauing (or, in some areas, rising) rather than plummeting."²³

Plaintiff's age and health risks, along with her husband's, support a protective order requiring Plaintiff's deposition be taken remotely in this case. Other courts have also ordered remote depositions because of concerns regarding COVID-19.²⁴

The Court is also not persuaded that Defendant has provided adequate safety precautions for taking Plaintiff's deposition in person. Defendant states only that it "has no objection to Plaintiff wearing a mask and gloves during the deposition" and that "[o]ther participants *may* also wear masks and gloves."²⁵ Defendant does not offer that anyone outside of the conference room will be wearing a mask, making it possible that Plaintiff would encounter people who are not wearing a mask on her way to or into the building, at the front desk, in the waiting area before the deposition begins, and/or any time she were to be in a public space such as the restroom.²⁶ Additionally, Defendant generally states the conference room "is more than adequate to allow social distancing between all participants"²⁷ but provides no specifics to ensure adequate social distancing, such as the size of the conference room or the number of people who will be present.

*5 This is a material difference between this case and *Manley v. Bellendir*,²⁸ which Defendant cites to support its position. In *Manley*, prior to the Court's involvement, the parties had already agreed to conduct the plaintiff's deposition in person. But when the plaintiff's counsel learned the defendant sheriff would be present, the plaintiff filed a motion for a protective order to prevent

the sheriff from attending in person because he was at a higher risk of exposure to the virus given his status as a first responder.²⁹ The defendant opposed taking the plaintiff's deposition remotely because the plaintiff's alleged history of substance abuse prevented him from staying focused.³⁰ In support of his position, the defendant offered to provide all people present at the deposition with masks, gloves, and any other necessary personal protective equipment.³¹ Additionally, the sheriff had tested negative for COVID-19 two days before the scheduled deposition.³² In reaching its decision, the Court specifically noted that the plaintiff did "not contend he ha[d] any medical condition that would place him at heightened risk of contracting the virus, or that the precautions [d]efendant describe[d] for the taking of Plaintiff's deposition would be inadequate to protect Plaintiff," and that the plaintiff's request was "based merely upon very general concerns regarding COVID-19."³³ And, despite the lack of any specific health concerns for the plaintiff in *Manley*, the Court still ordered that the sheriff not be physically present to alleviate his general concerns.³⁴

Unlike the plaintiff in *Manley*, Plaintiff in this case has outlined multiple specific health concerns for herself and her husband, for whom she is the primary caregiver, regarding COVID-19. Again, Plaintiff is 73 years old and suffers from multiple chronic health conditions. Plaintiff's husband is 71 years old and is undergoing treatment for stage 4 **cancer**. These factors place Plaintiff and her husband at a higher risk for serious and potentially fatal complications if they were to contract the virus. The CDC recommends, as Defendant points out in its response, that people who are at a higher risk for complications and severe illness from COVID-19 "*stay home if possible*."³⁵ Requiring that Plaintiff's deposition be taken by video conference will allow Plaintiff to stay home and avoid the risks associated with traveling to the offices of Defendant's counsel for her deposition.

Defendant has not made an adequate showing that sufficient protections would be in place if Plaintiff's deposition were to occur in person or made any particularized showing for why Plaintiff's deposition needs to be taken in person. Defendant does not propose that everyone present be required to wear a mask and offers no guarantee that everyone in the conference room would be at least six feet apart.³⁶ For all the reasons discussed above, the Court finds that Plaintiff has overwhelmingly shown good cause in this case for her deposition to be taken remotely.

B. Whether the burden on Defendant outweighs the

good cause Plaintiff has shown

Finding that Plaintiff has shown good cause for a remote deposition, the burden shifts to Defendant to show it would be unduly burdened by a remote deposition sufficient to outweigh the good cause shown by Plaintiff. Defendant opposes taking Plaintiff's deposition remotely for two main reasons: a remote deposition would place Defendant at an "extreme disadvantage"³⁷ because of the large number of documents defense counsel plans to present to Plaintiff during the deposition, and Plaintiff has had internet issues previously such that a remote deposition cannot be guaranteed to go forth properly. Defendant argues that a remote deposition would be "impossible" because of the large number of documents defense counsel intends to use during the deposition.³⁸ Defendant's counsel stated he has a large binder filled with exhibits that will be used during the deposition. Although the Court is sympathetic to Defendant's concerns, the Court finds they do not outweigh Plaintiff's legitimate health concerns.

*6 With technological advancements in recent years, video depositions can be used very effectively in many settings³⁹ and have become much more common as a result of the pandemic. In this district, Judge Gale has noted in light of the COVID-19 pandemic that "[v]ideo or teleconference depositions and preparation are the 'new normal' and most likely will be for some time."⁴⁰ Other courts have considered this issue as well and found that "a witness can be well-prepared to give a deposition, even a deposition that may involve a large number of documents and a relevant time period of many years, without being in the same room with her or his counsel."⁴¹ Further, the witness and counsel could "have the same universe of documents in front of them, either in hard or electronic copy," which "are identifiable by a Bates number or other unique identifier," such that the deposition "should proceed without too much trouble even if the process takes a bit longer than in person."⁴²

Despite the difficulties with using documents during a remote deposition, the Court is confident counsel in this case are very capable and can make the deposition work effectively with exhibits. For example, defense counsel could duplicate the binder filled with exhibits to provide Plaintiff in advance of the deposition so counsel and Plaintiff are able to refer to the same thing throughout the deposition. Although there are challenges, the Court finds the health risks in this case outweigh the practical problems of making effective use of exhibits.

And again, as discussed thoroughly above, the Court is not convinced that the protections outlined by Defendant would be fully effective. As suggested by the CDC, Plaintiff will be safer staying at home for her deposition.

Although Defendant understandably has some concerns about having Plaintiff's deposition go smoothly, the unique health risks in Plaintiff's medical conditions and in the COVID-19 pandemic world we are living in now outweigh any of those concerns.

The Court also notes that Defendant previously argued conducting Plaintiff's deposition remotely would put it at a disadvantage because it would not be able to observe Plaintiff.⁴³ Although Defendant does not include that argument in its response to the present motion, the Court notes that if the deposition were in person, Plaintiff would wear a mask covering most of her face, which would eliminate many of the advantages of observing her at an in-person deposition. Alternatively, if she were to be deposed remotely from her home, she would not need to wear a mask, giving Defendant the opportunity to observe her.⁴⁴ Although there is the risk of technological challenges, including image quality issues resulting in a less-than-clear picture, generally video capabilities have improved dramatically and have become more commonplace, even since the Court noted the reliability of video technology in *Shockey v. Huhtamaki, Inc.*⁴⁵ in 2012.⁴⁶ Thus, in this case the chance that Defendant will be able to observe Plaintiff is much higher if the deposition is conducted remotely rather than in person.

Finally, Plaintiff has indicated through counsel that she has resolved her internet issues. Plaintiff's counsel stated that Plaintiff has taken steps to improve the internet signal in her home, including installing a Mesh WiFi, which strengthens the internet signal throughout her house. Plaintiff's counsel also confirmed that Plaintiff is capable of operating Zoom, and that Plaintiff would be willing to participate in a test Zoom session with counsel before the deposition to ensure there are no issues. If Plaintiff continues to have internet connectivity issues or is unable to use Zoom (or whatever video conferencing service the parties agree on) properly such that it is impossible to conduct the deposition by remote means, Defendant may file another motion or a motion for reconsideration after conferring in good faith. However, the Court warned the parties that it is construing that possibility very narrowly and expects that counsel will make every effort to go forward with completing the deposition remotely.

*7 During the conference, Plaintiff's counsel requested that the deposition not take place on July 7 and 8 as noticed because her husband is scheduled for chemotherapy those days. Defendant had no objection to rescheduling the deposition. The parties may confer and agree to other dates, but Plaintiff's deposition must be completed by the end of July.

For all the reasons discussed above, Defendant has failed

to show any undue burden on it that outweighs Plaintiff's good cause for conducting her deposition remotely. Therefore, the Court will issue a protective order requiring that Plaintiff's deposition be taken remotely by videoconferencing.

C. Document requests

Plaintiff also seeks to quash the *duces tecum* request in Defendant's deposition notice, arguing the documents Defendant seeks exceed the scope of permissible discovery. The notice states, in part:

"The deponent is requested to bring and produce at the deposition any and all documents relating to Washburn University of Topeka and deponent's employment with Washburn University of Topeka, and any and all records relating to her claims and factual allegations ..."⁴⁷

In its response, Defendant stated it was "willing to agree to limit the *duces tecum* request to documents not already produced, and to limit the time period for documents to the dates Plaintiff was employed by Washburn University."⁴⁸ Plaintiff stated in her reply that "[w]ith that limitation, Plaintiff's motion to quash is moot" and that she "has responded fully to Defendant's document requests, and is withholding no documents."⁴⁹

During the July 1, 2020 hearing, the Court confirmed with the parties that Plaintiff has in fact produced all responsive documents. The Court ruled that Plaintiff is required to provide all documents responsive to Defendant's discovery requests to which she did not object prior to her deposition. Therefore, Plaintiff's motion to quash Defendant's document request is granted insofar as the request shall be limited to documents not already produced and limited to the time period for the dates Plaintiff was employed by Washburn University, and is otherwise denied.

IT IS THEREFORE ORDERED BY THE COURT that Plaintiff's Motion for Protective Order and to Quash Document Request (ECF No 60) is granted in part and denied in part as outlined above. Plaintiff's deposition shall proceed remotely. Plaintiff shall produce all documents responsive to Defendant's discovery requests to which she did not object prior to her deposition.

IT IS SO ORDERED.

All Citations

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Footnotes

¹ See ECF No. 57.

² ECF No. 60-1 at 2, ¶ 1.

³ *Id.* at ¶ 2 (Plaintiff's conditions include chronic-acute Epstein Barr virus, [fibromyalgia](#), probable [myalgic encephalomyelitis](#), complex migraine/probable reversible cerebral vascular syndrome, [erosive esophagitis](#), and deteriorating vision in left eye).

⁴ *Id.* at ¶ 3–4.

⁵ See ECF No. 57 at 1–2.

⁶ *Id.* at 1.

⁷ *Id.*

⁸ ECF No. 60-1 at 3, ¶ 7.

⁹ ECF No. 58. The parties previously agreed to certain aspects of the deposition, including that it will be limited to seven hours, and it will be split into two sessions. See ECF No. 57 at 2. There is a disagreement now as to whether the deposition is limited to seven

hours or eight hours. See ECF No. 63 at 4–5 (“The deposition, by agreement of parties and pursuant to the Scheduling Order issued in this case ... is scheduled for 8 hours.”) and ECF No. 64 at 2 n.2 (“The parties’ more recent discussions, however, have addressed a seven-hour deposition, and the Court’s May 26, 2020 Third Amended Scheduling Order notes that the deposition ‘will be limited to seven hours.’ ”). The original Scheduling Order in this case does reflect that Plaintiff’s deposition will be limited to eight hours (ECF No. 25 at 8). But, as Plaintiff indicates in her reply, and as counsel represented to the Court during the May 19, 2020 telephone status conference, the parties have since agreed to limit Plaintiff’s deposition to seven hours. Therefore, Plaintiff’s deposition shall be limited to seven hours split into two days.

10 See ECF No. 61.

11 *Univ. of Kan. Ctr. for Research, Inc. v. United States*, No. CIVA 08-2565-JAR-DJW, 2010 WL 571824, at *3 (D. Kan. Feb. 12, 2010) (citing *Reed v. Bennett*, 193 F.R.D. 689, 691 (D. Kan. 2000)).

12 *Manley v. Bellendir*, No. 18-CV-1220-EFM-TJJ, 2020 WL 2766508, at *2 (D. Kan. May 28, 2020).

13 *Univ. of Kan. Ctr. for Research, Inc.*, 2010 WL 571824, at *3 (quoting *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 102 n.16 (1981)).

14 *Shockey v. Huhtamaki, Inc.*, 280 F.R.D. 598, 600 (D. Kan. 2012) (internal quotations omitted).

15 *Id.* (quoting *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36, (1984)).

16 See, e.g., *Manley v. Bellendir*, No. 18-CV-1220-EFM-TJJ, 2020 WL 2766508, at *2 (D. Kan. May 28, 2020).

17 ECF No. 63 at 6.

18 *Id.*

19 Executive Order No. 20-52, Requiring masks or other face coverings in public, <https://governor.kansas.gov/wp-content/uploads/2020/07/20200702093130003.pdf>.

20 See COVID-19 Cases in Kansas Daily Case Summary & Historical Data, <https://www.coronavirus.kdheks.gov/DocumentCenter/View/1125/Historical---July-1?bidId=>. Kansas updates this information every Monday, Wednesday, and Friday. See also <https://www.coronavirus.kdheks.gov/160/COVID-19-in-Kansas>.

21 *Id.*

22 *Id.*

23 *Joffe v. King & Spalding LLP*, No. 17-CV-3392 (VEC), 2020 WL 3453452, at *7 (S.D.N.Y. June 24, 2020).

24 See, e.g., *In re Broiler Chicken Antitrust Litig.*, No. 1:16-CV-08637, 2020 WL 3469166, at *5 (N.D. Ill. June 25, 2020) (noting “[c]ourts are beginning to recognize that a ‘new normal’ has taken hold throughout the country in the wake of the COVID-19 pandemic that may necessitate the taking of remote depositions unless litigation is going to come to an indefinite halt until there is a cure or a vaccine for COVID-19.”); *Learning Res., Inc. v. Playgo Toys Enterprises Ltd.*, No. 19-CV-00660, 2020 WL 3250723, at *2–3 (N.D. Ill. June 16, 2020) (finding “[t]he general concern over the risks posed by COVID-19 are heightened” where lead counsel and members of his family were in a high-risk category. One of Plaintiff’s counsel also represented to the Court during the July 1, 2020 hearing that her daughter is in a high-risk category).

25 ECF No. 63 at 5 (emphasis added).

- 26 Importantly, though Governor Kelly's executive order requires everyone to wear a mask while in public spaces, including workspaces, Shawnee County (where counsel for Defendant offices and Defendant proposes to take Plaintiff's in-person deposition) has rejected the order and does not impose such a requirement. See "Shawnee Co. Commissioners reject Governor's mask order, develop less severe standards," WIBW-TV (July 2, 2020), <https://www.wibw.com/2020/07/02/shawnee-co-commissioners-reject-governors-mask-order-keep-current-mask-requirements-in-place/>.
- 27 ECF No. 63 at 5.
- 28 No. 18-CV-1220-EFM-TJJ, 2020 WL 2766508 (D. Kan. May 28, 2020).
- 29 *Id.* at *1.
- 30 *Id.*
- 31 *Id.* at *3.
- 32 *Id.*
- 33 *Id.*
- 34 *Id.*
- 35 ECF No. 63 at 6 (emphasis added) (citing CDC, Coronavirus Disease 2019 (COVID-19), Older Adults, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html> (noting that "[a]s you get older, your risk for severe illness from COVID-19 increases," and "[t]here are also other factors that can increase your risk for severe illness, such as having underlying medical conditions.")).
- 36 Even if Defendant did show everyone would be six feet apart, that might not be sufficient given all the other factors at issue here. See *Joffe v. King & Spalding LLP*, No. 17-CV-3392 (VEC), 2020 WL 3453452, at *7 (S.D.N.Y. June 24, 2020) (finding proposed social distancing would not guarantee a safe deposition environment because "CDC guidelines do not suggest that the coronavirus magically decomposes or hits an invisible wall after traveling six feet in the air. Rather, the CDC has made clear that a distance of six feet is the minimum requirement, that greater separation reduces risk of transmission further, and that risk of infection increases with prolonged indoor interaction" and noting "the oft-repeated six-feet rule may not be sufficient in a high-risk environment, such as an indoor setting with prolonged exposure.").
- 37 ECF No. 63 at 3.
- 38 *Id.* at 2.
- 39 See generally *Shockey v. Huhtamaki, Inc.*, 280 F.R.D. 598 (D. Kan. 2012) (finding good cause for video depositions).
- 40 *Wilkens v. ValueHealth, LLC*, No. 19-1193-EFM-KGG, 2020 WL 2496001, at *2 (D. Kan. May 14, 2020).
- 41 *In re Broiler Chicken Antitrust Litig.*, No. 1:16-CV-08637, 2020 WL 3469166, at *3 (N.D. Ill. June 25, 2020).
- 42 *Id.*

43 See ECF No. 57 at 1.

44 See *Shockey v. Huhtamaki, Inc.*, 280 F.R.D. 598 at 602 (finding video conferencing “addresses Defendant’s objection that the deponent’s nonverbal responses and demeanor cannot be observed.”).

45 *Id.*

46 *Manley v. Bellendir*, No. 18-CV-1220-EFM-TJJ, 2020 WL 2766508, at *2 (D. Kan. May 28, 2020).

47 ECF No. 58.

48 ECF No. 63 at 11.

49 ECF No. 64 at 5–6.

2020 WL 3967665

Only the Westlaw citation is currently available.

United States District Court, S.D. New York.

Jodi ROUVIERE, et al., Plaintiffs,

v.

DEPUY ORTHOPAEDICS, INC. et al., Defendants.

1:18-cv-04814 (LJL) (SDA)

|

Signed July 11, 2020

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OPINION AND ORDER

[STEWART D. AARON](#), United States Magistrate Judge:

*1 Before the Court is a Letter Motion by Plaintiffs, Jodi Rouviere and Andre Rouviere (collectively, “Plaintiffs”), filed on July 7, 2020, to compel corporate representative(s) of Defendant Howmedica Osteonics Corporation (“Howmedica”), doing business as Stryker Orthopaedics, to appear in person for a deposition, pursuant to [Rule 30\(b\)\(6\) of the Federal Rules of Civil Procedure](#), or, in the alternative, to extend the discovery deadline until an in-person deposition of Howmedica’s corporate representative(s) can be conducted. (Pls.’ 7/7/20 Ltr. Mot., ECF No. 135.)¹ For the following reasons, Plaintiffs’ Letter Motion is DENIED.

BACKGROUND

This is a medical device product liability case that was commenced on May 31, 2018 arising from injuries allegedly sustained by Plaintiff Jodi Rouviere after receiving a purportedly defective [hip implant](#) containing components manufactured by Howmedica and another defendant, Defendant DePuy Orthopaedics, Inc. (“DePuy”). (See Compl., ECF No. 1, ¶ 1; Am. Compl., ECF No. 26, ¶ 1.) On January 15, 2019, a Case Management Plan and Scheduling Order was entered (Case Mgt. Plan, ECF No. 58), and discovery commenced in early 2019.²

Plaintiffs’ Letter Motion that currently is before the Court relates to one of several discovery disputes that has required court intervention in this case. For example, on June 1, 2020, DePuy filed a Letter Motion, pursuant to [Rule 26\(c\) of the Federal Rules of Civil Procedure](#), for a protective order with respect to certain of Plaintiffs’ [Rule 30\(b\)\(6\)](#) deposition categories that DePuy contended were improper and burdensome. (DePuy 5/26/20 Ltr. Mot., ECF No. 108.) By Opinion and Order, dated June 10, 2020, this Court granted in part and denied in part DePuy’s Letter Motion and set forth the disputed categories as to which testimony must be provided by the DePuy corporate representative(s). See [Rouviere v. DePuy Orthopaedics, Inc.](#), 2020 WL 2999229, at *6 (S.D.N.Y. June 10, 2020). After the Court issued its Opinion and Order relating to the DePuy [Rule 30\(b\)\(6\)](#) deposition topics, Howmedica and Plaintiffs reached agreement as to the topics for the Howmedica [Rule 30\(b\)\(6\)](#) deposition, which were approved by the Court on June 10, 2020. (See 6/10/20 Order, ECF No. 120.)

As of early June 2020, this Court already had granted the parties three extensions of the discovery deadlines. On March 23, 2020, the Court had granted the parties’ joint request for a 90-day extension of the discovery deadlines due to the coronavirus pandemic, which was the third extension. (3/23/20 Order, ECF No. 106.) On June 16, 2020, Plaintiffs filed a Letter Motion for another extension of the discovery deadlines (Pls.’ 6/16/20 Ltr. Mot., ECF No. 124), which Defendants opposed. (Howmedica 6/18/20 Resp., ECF No. 125; DePuy 6/19/20 Resp., ECF No. 126.) By Order, dated June 22, 2020, the Court granted in part and denied in part Plaintiffs’ Letter Motion, and fact discovery is due to close on August 21,

2020. (6/22/20 Order, ECF No. 128.) The June 22 Order states, as follows:

*2 This case has been pending for over two years. In granting a discovery extension in October 2019, the Court stated that “[t]he Parties are encouraged to work diligently to complete discovery within the revised time line as set forth above. Any further extensions will be granted only for good cause shown” (ECF No. 93). Then, in granting another discovery extension in January 2020, the Court stated that “NO FURTHER EXTENSIONS SHALL BE GRANTED EXCEPT IN EXIGENT CIRCUMSTANCES AND THEN ONLY FOR A LIMITED PURPOSE” (ECF No. 100).

However, due to the COVID-19 pandemic, the Court in March 2020 granted a request made jointly by all parties for an additional 90-day extension (ECF No. 106). In the circumstances presented, the Court in its discretion grants one final extension. Any discovery not taken in the time periods set forth herein shall be deemed to be waived.

Fact depositions shall be completed by August 21, 2020, Plaintiffs’ expert disclosures shall be made by September 21, 2020, the deposition of Plaintiffs’ experts shall be completed by October 21, 2020, Defendants’ expert disclosures shall be made by November 20, 2020, the deposition of Defendants’ experts shall be completed by December 23, 2020 and the parties shall jointly advise the Court whether they would like to be referred for mediation no later than January 15, 2021.

Pursuant to Fed. R. Civ. P. 30(b)(3) and (b)(4), all depositions in this action may be taken via telephone, videoconference, or other remote means, and may be recorded by any reliable audio or audiovisual means. This Order does not dispense with the requirements set forth in Fed. R. Civ. P. 30(b)(5), including the requirement that, unless the parties stipulate otherwise, the deposition be “conducted before an officer appointed or designated under Rule 28,” and that the deponent be placed under oath by that officer. For avoidance of doubt, a deposition will be deemed to have been conducted “before” an officer so long as that officer attends the deposition via the same remote means (e.g., telephone conference call or video conference) used to connect all other remote participants, and so long as all participants (including the officer) can clearly hear and be heard by all other participants.

(Id.)

In their Letter Motion now before the Court, Plaintiffs seek to compel corporate representative(s) of Howmedica to appear in person for deposition, or, in the alternative, to extend the discovery deadline until an in-person deposition of Howmedica’s corporate representative(s) can be conducted. (Pls.’ 7/7/20 Ltr. Mot. at 1.) Plaintiffs state that they have rented a recreational vehicle and that they intend to drive it from their home state of Florida to New Jersey in order to take the Howmedica deposition in person. (See *id.* at 1-2.) Howmedica opposes Plaintiffs’ Letter Motion, and argues that Howmedica’s witness and counsel would “place their health at risk by attending an in-person deposition with the Florida plaintiffs,” noting that all travelers from Florida are subject to 14-day quarantine in New Jersey, and advocate for a video deposition. (See Howmedica Resp. at 1-3.) In reply, Plaintiffs restate their arguments and “request the Court either order the [Howmedica] witness to appear for an in-person deposition on the date cleared for deposition or extend the deadline for this one witness until the deposition of [Howmedica]’s corporate witness(es) can be conducted in person.” (Pls.’ Reply at 2.)

LEGAL STANDARDS

Rule 30(b)(4) of the Federal Rules of Civil Procedure provides that “[t]he parties may stipulate—or the court may on motion order—that a deposition be taken by telephone or other remote means.” Fed. R. Civ. P. 30(b)(4). “Since Rule 30(b)(4) does not specify the standards to be considered in determining whether to grant a request [for a remote] deposition ..., the decision to grant or deny such an application is left to the discretion of the Court, which must balance claims of prejudice and those of hardship ... and conduct a careful weighing of the relevant facts.” *RP Family, Inc. v. Commonwealth Land Title Ins. Co.*, No. 10-CV-01149 (DLI) (CLP), 2011 WL 6020154, at *3 (E.D.N.Y. Nov. 30, 2011) (citations & internal quotation marks omitted); see also 2 *Civil Practice in the Southern District of New York* § 17:3 (2d ed. 2020) (“While Rule 30(b)(4) does not specify the standard for evaluating motions to have depositions conducted remotely, courts generally consider the hardship on the party to be deposed, and the prejudice to the party seeking the deposition.”).

ANALYSIS

***3** Conducting court proceedings remotely in the Southern District of New York has become the “new normal” since the advent of the public health emergency created by the spread of the coronavirus and COVID-19. Indeed, Chief Judge McMahon currently is conducting a bench trial via Zoom in a patent case in our Court. *See* D. Siegal, *Ferring And Serenity’s SDNY Patent Trial Kicks Off Over Zoom*, Law360 (Jul. 6, 2020).

So too, conducting depositions remotely is becoming the “new normal.” *See In re Broiler Chicken Antitrust Litig.*, No. 16-CV-08637, 2020 WL 3469166, at *5 (N.D. Ill. June 25, 2020) (“Courts are beginning to recognize that a ‘new normal’ has taken hold throughout the country in the wake of the COVID-19 pandemic that may necessitate the taking of remote depositions unless litigation is going to come to an indefinite halt until there is a cure or a vaccine for COVID-19.” (citing cases)). “The more recent court decisions [permitting remote depositions during the pandemic] build on pre-pandemic case law that liberally allowed for and encouraged remote depositions as the technology for taking depositions in that way has improved significantly over time.” *Id.* (citing cases).

Against this backdrop, the Court considers the hardship imposed upon Howmedica if its Rule 30(b)(6) deposition were held in person and the potential prejudice to Plaintiffs if the deposition were held by videoconference. The hardship that would be caused to Howmedica’s witness(es) and its counsel by an in-person deposition is obvious. There is a significant health risk to Howmedica’s representatives (and to Plaintiffs’ counsel as well) if the deposition were to proceed in person. COVID-19 “is a potentially fatal illness with the ability to spread through asymptomatic or pre-symptomatic carriers, with no approved cure, treatment, or vaccine, and unlike in other countries, new cases here are plateauing (or, in some areas, rising) rather than plummeting.” *Joffe v. King & Spalding LLP*, No. 17-CV-03392 (VEC), 2020 WL 3453452, at *7 (S.D.N.Y. June 24, 2020) (footnote omitted). “[T]he minimum distance to prevent transmission of COVID-19 may vary depending on environmental conditions—and ... the oft-repeated six-feet rule may not be sufficient in a high-risk environment, such as an indoor setting with prolonged exposure.” *Id.* (footnote omitted). Moreover, “social distancing does not guarantee a safe deposition environment.” *Id.* Thus, holding a deposition in a room with a witness, counsel and a stenographer present would place everyone in the room at risk. Indeed, Plaintiffs themselves recognize the risk involved. (*See* Pls.’ Reply at 1-2 (arguing that Plaintiffs have been “forced into a desperate, risky action at the defendants’ behest”).)

The Court next considers the potential prejudice to Plaintiffs if the Howmedica Rule 30(b)(6) deposition is held remotely by videoconference. The only prejudice Plaintiffs articulate in their submissions is that the deposition will be “document intensive” and “document laden.” (Pls.’ 7/7/20 Ltr. Mot. at 1-2; Pls.’ 7/10/20 Reply at 2.) However, this is not an obstacle to a successful remote videoconference deposition. “[C]ourts have found that exhibits can be managed in remote depositions by sending Bates-stamped exhibits to deponents prior to the depositions or using modern videoconference technology to share documents and images quickly and conveniently.” *United States for Use & Benefit of Chen v. K.O.O. Constr., Inc.*, 106 Fed. R. Serv. 3d 1383, 2020 WL 2631444, at *2 (S.D. Cal. 2020) (citing cases). Moreover, there are training and informational videos available online and vendors who host videoconferenced depositions are available to communicate with Plaintiffs’ counsel to ensure that they are comfortable with the process of taking a remote deposition. *See Grano v. Sodexo Mgmt., Inc.*, No. 18-CV-01818 (GPC) (BLM), 2020 WL 1975057, at *3 (S.D. Cal. Apr. 24, 2020) (“There are numerous resources and training opportunities available throughout the legal community to assist Sodexo’s counsel in the operation and utilization of the new technology.”).

***4** Notwithstanding the foregoing, the Court recognizes that there may be delays during the deposition in the handling of exhibits by the witness and counsel. To ameliorate any prejudice caused by such delays, the Court hereby grants Plaintiff an extra hour to conduct Howmedica’s Rule 30(b)(6) deposition. Thus, the duration of the deposition shall be no longer than eight hours, rather than the seven hours allotted by Rule 30(d)(1).

The only other potential prejudice to Plaintiffs by proceeding remotely is that the examiner will not be physically present to interact with, and observe the demeanor of, the deponent. However, a remote deposition by its nature is not conducted face-to-face. If the lack of being physically present with the witness were enough prejudice to defeat the holding of a remote deposition, then Rule 30(b)(4) would be rendered meaningless. *See Robert Smalls Inc. v. Hamilton*, No. 09-CV-07171 (DAB) (JLC), 2010 WL 2541177, at *4 (S.D.N.Y. June 10, 2010) (“accepting Plaintiffs’ arguments absent a particularized showing of prejudice ‘would be tantamount to repealing [Fed. R. Civ. P. 30(b)(4)]’ ” (citation omitted)); *see also Usov v. Lazar*, No. 13-CV-00818, 2015 WL 5052497, at *2 (S.D.N.Y. Aug. 25, 2015) (“remote depositions are ‘a presumptively valid means of discovery’ ” (citations omitted)).

In addition, in the unique circumstances presented by the COVID-19 pandemic, holding a deposition by videoconference actually would provide a better opportunity for Plaintiffs' counsel to observe the demeanor of the witness. If an in-person deposition were to be held in New Jersey, as Plaintiffs propose, then those in attendance at the deposition would need to wear masks. New Jersey Governor Murphy's Executive Order No. 163, dated July 8, 2020, which requires masks to be worn *outdoors* if social distancing cannot be achieved, reiterates the prior requirement that masks must be worn indoors in commercial office spaces when individuals are in prolonged proximity to one another. *See* N.J. Gov. Exec. Order No. 163, available at <https://nj.gov/infobank/eo/056murphy/pdf/EO-163.pdf>

("For indoor commercial spaces that are not open to members of the public, such as office buildings, those spaces must have policies that at a minimum, require individuals to wear face coverings when in prolonged proximity to others."). The witness's wearing of a mask eliminates many of the advantages of observing the witness at an in-person deposition; however, if the witness were to be deposed remotely from home, the witness would not need to wear a mask, giving Plaintiffs' counsel the opportunity to observe the full face of the witness. *See Shockey v. Huhtamaki, Inc.*, 280 F.R.D. 598, 602 (D. Kan. 2012) ("Taking the depositions via videoconferencing, as proposed by Plaintiffs here, addresses Defendant's objection that the deponent's nonverbal responses and demeanor cannot be observed.").

Plaintiffs' alternative request to adjourn the deadline for completion of fact discovery until the Howmedica Rule 30(b)(6) deposition can be taken in person is unworkable and an attempt to reargue Plaintiffs' prior motion for an extension of time that the Court only granted in part. There is no basis to believe that the current conditions that require a remote deposition to be taken will not continue for the foreseeable future, and the Court declines to indefinitely delay the completion of discovery in this case. *See In re Broiler Chicken Antitrust Litig.*, 2020 WL 3469166, at *8 ("Recent statements by public health officials about the staying power of COVID-19 ... belie Defendants' speculation that things may be so different in the Fall as to render remote depositions in this or any other case unnecessary, or at least less likely."). The Court finds that having the Howmedica Rule 30(b)(6) deposition proceed remotely by videoconference will accomplish the just, speedy and inexpensive determination of this case. *See Fed. R. Civ. P. 1* (Federal Rules of Civil Procedure "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding"); *see also Sinceno v.*

Riverside Church in City of New York, No. 18-CV-02156 (LJL), 2020 WL 1302053, at *1 (S.D.N.Y. Mar. 18, 2020) (authorizing remote depositions "[i]n order to protect public health while promoting the 'just, speedy, and inexpensive determination of every action and proceeding' " (citation omitted)).

*5 The Court has carefully weighed the relevant facts. Based upon the hardship that would be imposed upon Howmedica by an in-person deposition and the relative lack of prejudice to Plaintiffs in holding a remote deposition by videoconference, the Court, in its discretion, denies Plaintiffs' Letter Motion. The Howmedica deposition shall proceed by videoconference and shall be completed by August 21, 2020.

Due to the greater expenses that will be incurred in taking the Howmedica Rule 30(b)(6) deposition by videoconference, the Court, in its discretion, allocates the additional expenses associated with taking a remote deposition by videoconference equally between Howmedica and Plaintiffs. *See Fed. R. Civ. P. 26(c)(1)(b)* ("The court may, for good cause, issue an order to protect a party or person from ... undue ... expense, including ... specifying ... the allocation of expenses ..."). Although Plaintiffs are the ones taking the deposition, they are incurring greater expenses by being compelled to take the deposition by remote means. As such, the Court finds that there is good cause to allocate the increased expenses associated with taking the deposition in this manner. Plaintiffs and Howmedica shall meet and confer to identify a suitable firm to host and administer the remote deposition at reasonable expense. They also shall seek to agree upon the amount of expenses that are incurred over and above what normally would have been expended had the deposition been taken in person and thus the amount of additional expenses that will be shared between Plaintiffs and Howmedica. If they are unable to agree, the Court shall determine the allocation based upon a joint submission made by the parties setting forth the parties' respective positions.

CONCLUSION

For the foregoing reasons, Plaintiffs' Letter Motion (ECF No. 135) is DENIED. The deposition of Howmedica's corporate representative(s) shall be taken by videoconference no later than August 21, 2020, and shall not exceed eight hours in duration. Plaintiffs and Howmedica shall share the additional expenses of taking

the deposition remotely by videoconference, as set forth above.

All Citations

Slip Copy, 2020 WL 3967665

SO ORDERED.

Footnotes

- 1 In deciding the Letter Motion, the Court has reviewed and considered, in addition to Plaintiffs' Letter Motion, Howmedica's Letter Response (Howmedica 7/9/20 Resp., ECF [No. 138](#)) and Plaintiffs' Letter Reply. (Pls.' 7/10/20 Reply, ECF [No. 139](#).)
- 2 Although Rule 5(d)(1)(A) provides that Rule 26(a) disclosures and discovery requests and responses are not to be filed with the Court "until they are used in the proceeding or the court orders filing" (see [Fed. R. Civ. P. 5\(d\)\(1\)\(A\)](#)), Plaintiffs filed their Rule 26(a) disclosures and their discovery requests and responses in February and March 2019. (See ECF Nos. 59-64.)

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United States District Court, N.D. Illinois, Eastern
Division.

SONRAI SYSTEMS, LLC, Plaintiff,

v.

Anthony M. ROMANO, Geotab, Inc., and Heil Co.,
Defendants.

No. 16 CV 3371

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Signed 07/13/2020

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MEMORANDUM OPINION AND ORDER

Jeffrey Cummings, United States Magistrate Judge

*1 Plaintiff Sonrai Systems, LLC brought this suit against its former employee Anthony Romano, Geotab, Inc. and Heil Co. alleging, *inter alia*, breach of fiduciary duty arising out of an alleged scheme by Romano to assist his new employer in developing and launching a product first developed by Sonrai. The parties are proceeding with expert discovery and the depositions of defendants'

experts must be completed by July 31, 2020. (Dkt. 392.) Geotab recently offered to produce its experts -- who reside near Durham, North Carolina -- for deposition by either phone or video. Plaintiff's counsel responded that he intended to proceed with in-person depositions of Geotab's experts either in Chicago or North Carolina. Geotab now seeks a protective order pursuant to [Federal Rule of Civil Procedure 26\(c\)](#) requiring that its experts' depositions be conducted remotely in light of the COVID-19 pandemic. For the reasons set forth below, Geotab's motion for a protective order (Dkt. 393) is granted.

I. STANDARD

[Federal Rule of Civil Procedure 26\(c\)](#) provides that this Court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. [Fed.R.Civ.P. 26\(c\)](#). This Court is vested with "broad discretion to decide when a protective order is appropriate and what degree of protection is required." [Schokey v. Huhtamaki](#), 280 F.R.D. 598, 600 (D. Kan. 2012). [Federal Rule of Civil Procedure 30\(b\)\(4\)](#) authorizes this Court in its discretion to order that a deposition "be taken by telephone or other remote means." [Fed.R.Civ.P. 30\(b\)\(4\)](#); [In re Broiler Chicken Antitrust Litig.](#), No. 1:16-CV-08637, 2020 WL 3469166, at *7 (N.D. Ill. June 25, 2020) ("Courts have long held that leave to take remote depositions pursuant to [Rule 30\(b\)\(4\)](#) should be granted liberally."); [Usov v. Lazar](#), No. 13 CIV 818, 2015 WL 5052497, at *1 (S.D.N.Y. Aug. 25, 2015); [Graham v. Ocwen Loan Servicing, LLC](#), No. 16-80011-CIV, 2016 WL 7443288, at *1 (S.D. Fla. July 1, 2016) ("courts enjoy wide discretion to control and place appropriate limits on discovery, which includes authorizing depositions to be taken by remote means"). When exercising its discretion, this Court "must 'balance claims of prejudice and those of hardship and conduct a careful weighing of the relevant facts.'" [Usov](#), 2015 WL 5052497, at *1, quoting [RP Family, Inc. v. Commonwealth Land Title Ins. Co.](#), No. 10 Civ. 1149, 2011 WL 6020154, at *3 (E.D.N.Y. Nov. 30, 2011).

II. DISCUSSION

Geotab seeks to proceed with remote depositions of its experts in light of safety concerns created by the

COVID-19 pandemic. Specifically, Geotab's lead attorneys are of the Wolf, Greenfield & Sacks firm located in Boston, Massachusetts. Geotab argues that proceeding with in-person depositions either in Chicago or North Carolina would require interstate travel and increased risk of exposure to COVID-19. Additionally, Jason Balich, Geotab's attorney who would be traveling for the experts' depositions, explains that he has regular contact with family members who are in a high-risk category if exposed to COVID-19 due to age and underlying health conditions. Lastly, Geotab points out that currently, "all travelers arriving to Massachusetts – including Massachusetts residents returning home – are instructed to self-quarantine for 14 days ..." See <https://www.mass.gov/info-details/travel-information-related-to-covid-19#travel-to-massachusetts> (last visited July 9, 2020). Thus, any Geotab attorneys who travel for the depositions would be required to self-quarantine for fourteen days upon returning home.

*2 For its part, Sonrai contends that Geotab's attorneys do not need to travel or undertake any health risks because they (and any other attorneys for that matter) can participate via remote conferencing while Sonrai's counsel proceeds with the depositions in-person. According to Sonrai, because Geotab did not provide statements from the experts themselves expressing concerns, the experts should travel to Chicago and Sonrai's counsel can conduct the depositions with appropriate social distancing measures in place. Alternatively, Sonrai offers to travel to North Carolina to take the depositions, again with social distancing measures in place and with any out-of-state counsel appearing remotely. Lastly, Sonrai argues that its need to properly assess witness credibility and have proper access to the numerous documents that will be referenced during the depositions warrant in-person depositions.

A. COVID-19 related health concerns provide "good cause" for remote videoconference depositions under the circumstances of this case.

As this Court and others have recently recognized, "[t]he President of the United States has declared a national emergency due to the spread of the COVID-19 virus, and the Centers for Disease Control have noted that the best way to prevent illness is to minimize person-to-person contact." *Learning Res., Inc. v. Playgo Toys Enterprises Ltd.*, No. 19-CV-00660, 2020 WL 3250723, at *2 (N.D. Ill. June 16, 2020), quoting *Sinceno v. Riverside Church in City of New York*, No. 18-CV-2156 (LJL), 2020 WL 1302053, at *1 (S.D.N.Y. Mar. 18, 2020). To protect

Court personnel, the bar, and the public against the severe risks posed by COVID-19, federal courts around the country -- including in this District and the Middle District of North Carolina where Durham is located -- have authorized video teleconferencing for both criminal and civil proceedings and courts continue to advise caution when proceeding with litigation. See e.g., Northern District of Illinois Fifth Amended General Order 20-0012 – In Re: Coronavirus COVID-19 Public Emergency ("Civil case hearings, bench trials, and settlement conferences may be scheduled and conducted by the presiding judge by remote means. In-court hearings are limited to urgent matters that cannot be conducted remotely."); Middle District of North Carolina Standing Order 13 (Amended) – Court Operations Under the Exigent Circumstances Created by COVID-19 ("To the extent possible, especially in civil cases, Judges may elect to hold hearings and conferences via video-conferencing or telephonically."). These guidelines remain in effect and are changing rapidly as the COVID-19 pandemic continues to evolve around the United States.

The general concern over the risks posed by COVID-19 are heightened in this case for a number of reasons. First, lead counsel for Geotab who would travel to either Chicago or North Carolina for the experts' in-person depositions has regular contact with immediate family members in high-risk categories if exposed to COVID-19. Second, whether traveling to Chicago or North Carolina, Geotab's counsel would have to self-quarantine for fourteen days upon his return to Massachusetts. Third, as Geotab points out, North Carolina, where the experts reside and would be traveling from (or where counsel might travel to) has recently experienced a surge in COVID-19 cases and hospitalizations. North Carolina's health secretary stated just last week that she "continue[s] to be concerned that North Carolina's key COVID-19 metrics are moving in the wrong direction ... Daily case counts are up and the percent of tests returning positive has stayed high." <https://www.newsobserver.com/news/coronavirus/article244096432.html> (last visited July 9, 2020); see also "North Carolina Gov. Roy Cooper issues order requiring masks, delays phase 3 of reopening plan," *Charlotte Business Journal*, June 24, 2020, available at <https://www.bizjournals.com/charlotte/news/2020/06/24/n-c-requires-face-masks-delays-reopening.html> (last visited July 9, 2020).

*3 Contrary to Sonrai's assertions, the Court does not agree that Geotab's concerns can be alleviated by simply allowing certain attorneys to appear remotely while the experts, Sonrai's counsel, and other local counsel appear in-person in Chicago. Since briefing the motion, Chicago has issued an Emergency Travel Order that requires

individuals entering or returning to Chicago from states experiencing a surge in new COVID-19 cases, including North Carolina, to quarantine for fourteen days upon arrival.

See <https://www.chicago.gov/city/en/sites/covid-19/home/emergency-travel-order.html> (last visited July 9, 2020). Thus, Geotab's experts would have to travel to Chicago and self-quarantine for fourteen days before sitting for a deposition. Similarly, even if Sonrai's counsel traveled to North Carolina for the depositions, they would be required to self-quarantine for fourteen days upon returning to Chicago. This new travel restriction renders Sonrai's proposal impracticable.

For these reasons, the Court finds that the health concerns created by the COVID-19 pandemic create "good cause" for the entry of an order requiring that Geotab's experts' depositions take place by remote videoconference under the circumstances in this case. See, e.g., *In re Broiler Chicken Antitrust Litig.*, 2020 WL 3469166, at *8 (remote depositions appropriate "to protect the safety and health of witnesses, counsel, court reporters, videographers, and other persons, and to move this case through the pretrial process at an acceptable pace during a time when in-person depositions may present risks to the health and safety of people participating in them."); *Learning Res.*, 2020 WL 3250723, at *2-3 (finding that COVID-19 related health concerns provided "good cause" for a remote video deposition); *In re RFC & ResCap Liquidating Tr. Action*, No. 013CV3451SRNHB, 2020 WL 1280931, at *3 (D. Minn. Mar. 13, 2020) ("[u]nder the circumstances, COVID-19's unexpected nature, rapid spread, and potential risk establish good cause for remote testimony"); *SAP, LLC v. EZCare Clinic, Inc.*, No. CV 19-11229, 2020 WL 1923146, at *2 (E.D. La. Apr. 31, 2020) ("This court will not require parties to appear in person with one another in the midst of the present pandemic.")¹

B. Sonrai's desire to question Geotab's experts in-person does not create prejudice sufficient to overcome the risks created by COVID-19 under the circumstances of this case.

Having found that Geotab has shown good cause, the burden shifts to Sonrai to show it would be unduly prejudiced by remote depositions sufficient to outweigh the good cause. *Reynard v. Washburn Univ. of Topeka*, No. 19-4012-HLT-TJJ, 2020 WL 3791876, at *5 (D. Kan. July 7, 2020). Sonrai expresses two main concerns with taking the experts' depositions remotely: (1) that it would be "prejudiced by the inability to meet and assess

Geotab's experts and their testimony in person;" and (2) remote depositions of Geotab's experts will be too cumbersome given the number of documents that will be referenced throughout the depositions. Although these are valid concerns, they are not sufficient to outweigh the good cause shown to conduct the depositions remotely.

First, Sonrai is indeed correct that "a party's ability to observe a deponent in person does have value." *Usov*, 2015 WL 5052497, at *2. But as this Court recently reiterated, "remote depositions are a presumptively valid means of discovery even without the in-person interaction and many courts have held that remote videoconference depositions offer the deposing party a sufficient opportunity to evaluate a deponent's nonverbal responses, demeanor, and overall credibility." *Learning Res.*, 2020 WL 3250723, at *3 (collecting cases) (internal quotations and citations omitted); see also *Joffe v. King & Spalding LLP*, No. 17-CV-3392-VEC-SDA, 2020 WL 3432871, at *3 (S.D.N.Y. June 23, 2020) ("Plaintiff does not identify a single case endorsing his view that depositions by videoconference present an impediment to assessing witness credibility. This is unsurprising, because courts have *repeatedly* rejected this argument, both before and during the current pandemic.") (emphasis in original) (citing cases).

*4 The Court further notes that Sonrai's ability to assess witness credibility might actually be impeded during an in-person deposition given the face mask mandates in both Illinois, see <https://www.dph.illinois.gov/covid19>, and North Carolina, see <https://files.nc.gov/governor/documents/files/EO147-Phase-2-Extension.pdf>. While Sonrai might argue that its offer to provide a conference room large enough for six feet of social distancing could moot the mask requirement, the witnesses would certainly still be permitted -- if not encouraged -- to wear masks, which would "eliminate many of the advantages of observing [them] at an in-person deposition." See *Reynard*, 2020 WL 3791876, at *6. Certainly Sonrai could not force the experts to testify without masks if they chose to wear them. Thus, Sonrai's ability to assess witness credibility would arguably be enhanced if the depositions are conducted via video because masks would not be necessary and counsel will be able to observe the experts' facial expressions and non-verbal responses during their testimony. See *Shockey*, 280 F.R.D. at 602 (holding that video conferencing "addresses Defendant's objection that the deponent's non-verbal responses and demeanor cannot be observed"); *Reynard*, 2020 WL 3791876, at *6 & n.44.

Second, the Court is sympathetic to Sonrai's logistical concerns regarding a remote deposition in light of the number of documents involved and counsel's apparent

difficulties accessing documents in a prior remote deposition in this matter. (See Sonrai's Resp. at 10.) But, again, these concerns are insufficient to outweigh the health risks here particularly given the advancements in remote deposition technology and Geotab's offer to make available the LiveLitigation platform to all parties.² Indeed, courts have held that "voluminous and highly detailed exhibits" are not a bar to remote video conference depositions. *United States for use & benefit of Chen v. K.O.O. Constr., Inc.*, No. 19CV1535-JAH-LL, 2020 WL 2631444, at *2 (S.D. Cal. May 8, 2020) (citing cases). "Despite the difficulties with using documents during a remote deposition, the Court is confident counsel in this case are very capable and can make the deposition work effectively with exhibits." *Reynard*, 2020 WL 3791876, at *6; see also *In re Broiler Chicken Antitrust Litig.*, 2020 WL 3469166, at *5. Thus, notwithstanding the potential challenges that lie ahead, the Court "finds that the health risks in this case outweigh the practical problems of making effective use of exhibits." *Reynard*, 2020 WL 3791876, at *6.

In sum: under the circumstances of this case, Sonrai's preference for in-person depositions of Geotab's experts is outweighed by the risks posed by the COVID-19 pandemic. The Court orders that both depositions be conducted remotely via remote videoconference. The

Court further orders -- as Sonrai urges -- that Geotab bear any additional costs (including those associated with using the LiveLitigation platform) that are created by use of the videoconferencing format. See, e.g., *Learning Res.*, 2020 WL 3250723, at *4 (imposing videoconferencing costs on the party who successfully moved to have the deposition conducted by videoconference); *Graham*, 2016 WL 7443288, at *2 (same); *Tangtiwatanapaibul v. Tom & Toon Inc.*, 2017 WL 10456190 at *4 (S.D.N. Y Nov. 22, 2017) (same).

CONCLUSION

For these reasons, Geotab's motion to require remote depositions of its expert witnesses due to the COVID-19 pandemic (Dkt. 393) is granted.

All Citations

Slip Copy, 2020 WL 3960441

Footnotes

- ¹ The Court's holding in this case is not tantamount to a finding that concerns raised regarding COVID-19 will *always* suffice to support the entry of an order requiring a remote videoconference deposition. Cf. *Manley v. Bellendir*, No. 18-CV-1220-EFM-TJJ, 2020 WL 2766508, at *3 (D. Kan. May 28, 2020) (in light of Plaintiff's substance abuse history "[d]efendant's need and ability to safely depose Plaintiff in person with the precautions outlined by Defendant outweigh[ed] Plaintiff's general concerns regarding COVID-19.>").
- ² The Court trusts that none of the difficulties that Sonrai asserts arose during the [Rule 30\(b\)\(6\)](#) deposition of Charles Palmer will recur during these depositions.

2020 WL 4218804

Only the Westlaw citation is currently available.
United States District Court, D. Minnesota.

Grupo Petrotekem, S.A. DE C.V., DAK Americas
LLC, Plaintiffs,

v.

Polymetrix AG, Defendant.

Case No. 16-cv-2401 (SRN/HB)

|
Filed 07/23/2020

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ORDER

SUSAN RICHARD NELSON United States District
Judge

*1 This matter is before the Court on Plaintiffs' Objections [Doc. No. 655] to Magistrate Judge Hildy Bowbeer's July 20, 2020 Order ("the Order") [Doc. No. 653]. In the Order, Magistrate Judge Bowbeer granted Defendant's Motion to Compel, in which Defendant requested that the depositions of its employees and Rule 30(b)(6) corporate designees be conducted remotely. (Order at 2–10.) For the reasons set forth below, the Court overrules Plaintiffs' Objections and affirms the Order.

I. BACKGROUND

Plaintiffs Grupo Petrotekem, a Mexican corporation in the business of manufacturing polyethylene terephthalate ("PET"), a chemical used to make a variety of plastic products, and DAK Americas, a U.S. company that is the exclusive licensee of the patents in suit, brought this patent infringement lawsuit against Defendant Polymetrix, a Swiss corporation that designs, engineers, supplies, and builds plants that manufacture PET. (*See* Compl. [Doc. No. 1] ¶¶ 2–4, 17.) Plaintiffs allege that Polymetrix develops and sells polymer processing equipment that practices Plaintiffs' patented inventions. (*Id.* ¶ 15.)

In the underlying motion, Polymetrix moved the Court for an order requiring that the previously noticed depositions of its employees and Rule 30(b)(6) designees, Messrs. Polyakov, Müller, and Christel, be taken the week of August 3, 2020, by remote video conference, with the witnesses physically located in Switzerland. (*See* Order at 1.) Plaintiffs opposed the motion, arguing that the depositions should occur in-person, at a time and place mutually convenient to the parties, and in a manner consistent with the travel limitations necessitated by the COVID-19 pandemic. (*Id.*) In particular, Plaintiffs proposed to conduct the depositions in St. Maarten, a country in the Caribbean. (*Id.*)

Magistrate Judge Bowbeer found, pursuant to Rule 30(b)(4), that the depositions should be taken by remote means. (*Id.*) While the magistrate judge acknowledged that in-person depositions are desirable under ordinary circumstances, "these are not ordinary circumstances," given the serious risks of COVID-19 posed by travel and in-person gatherings at this time. (*Id.* at 2–3.) And although Plaintiffs' proposed location of St. Maarten might be permissible from a legal or regulatory standpoint, Magistrate Judge Bowbeer observed that holding depositions there could still require the parties and witnesses to self-quarantine upon returning home, and both travel and in-person proceedings could expose the participants to a substantially greater risk of contracting COVID-19 than if the depositions proceed remotely. (*Id.* at 3.)

In addition, Magistrate Judge Bowbeer addressed the schedule and protocol for the depositions. (*Id.* at 4–10.) Due to the time-sensitive nature of the matters addressed in the Order, the magistrate judge set a truncated period of time for a party to file an objection to the order, and for the opposing party to respond.

Plaintiffs timely objected to the Order. They argue that the magistrate judge's ruling "does not meaningfully address the specific facts of record here which demonstrate that any general concern over the risks posed by COVID-19 are lessened in this case for a number of reasons." (Pls.' Objs. at 2.) They first note that none of Defendant's witnesses have filed declarations identifying any specific health concerns that would prevent them from traveling to St. Maarten for in-person depositions. (*Id.*) Second, Plaintiffs assert that the magistrate judge failed to consider that St. Maarten has had less than 80 confirmed COVID-19 cases, only 15 deaths since March 2020, and, as of the Plaintiffs' July 21, 2020 filing, only one confirmed case on the entire island. (*Id.*) Third, they contend that Switzerland currently has no requirement for self-isolation for travelers returning from St. Maarten. (*Id.*) Fourth, while Plaintiffs acknowledge that Rule 30(b)(4) does not require a showing of good cause to permit remote depositions, they argue that the balance of interests requires Polymatrix to provide more than a "generalized fear of travel in light of the COVID-19 pandemic." (*Id.* at 2–3.) Finally, Plaintiffs assert that Defendant has slowed the progression of this case on failed jurisdictional challenges, such that it would be reasonable to "wait a while to see if the depositions could take place in person in London, Europe, or the U.S. in the not too distant future." (*Id.* at 3.)

***2** In response, Defendant takes issue with several aspects of Plaintiffs' proposal to conduct the depositions in St. Maarten, and urges the Court to affirm Magistrate Judge Bowbeer's Order. For instance, Defendant disputes Plaintiffs' calculation of the estimated travel time for the witnesses, who would be flying from Zurich, Switzerland to St. Maarten, and the potential risk for defense counsel, who would be traveling from the San Francisco Bay Area through the COVID-19 hotspot of Miami. (Def.'s Resp. to Objs. [Doc. No. 659] at 2–3.) In addition, Defendant contends that it is entirely unclear whether St. Maarten will even be accepting flights from the United States in early August, and whether counsel for both sides would meet St. Maarten's entry requirements, which include testing within 72 hours prior to travel. (*Id.*) On a more fundamental level, Defendant asserts that it is unnecessary to provide statements or declarations expressing specific health concerns because the *sole* health concern of the defense witnesses and counsel is COVID-19, for which the risks and hardships of in-person depositions are "obvious." (*Id.* at 3, 7.)

II. DISCUSSION

In reviewing an order from a magistrate judge on nondispositive matters, such as a motion to compel, the standard of review "is extremely deferential." *Magee v. Trs. of the Hamline Univ., Minn.*, 957 F. Supp. 2d 1047, 1062 (D. Minn. 2013). The Court must set aside portions of an order only if they are "clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. Proc. 72(a); Local Rule 72.2.

Here, the magistrate judge's Order was neither clearly erroneous nor contrary to law. Rule 30(b)(4) allows parties to stipulate, or the court to issue an order upon a motion, that a deposition "be taken by telephone or other remote means." Fed. R. Civ. P. 30(b)(4).

COVID-19 "is a potentially fatal illness with the ability to spread through asymptomatic or pre-symptomatic carriers, with no approved cure, treatment, or vaccine[.]" *Rouviere v. DePuy Orthopaedics, Inc.*, No. 1:18-CV-04814 (LJL)(SDA), 2020 WL 3967665, at *3 (S.D.N.Y. July 11, 2020) (quoting *Joffe v. King & Spalding LLP*, No. 17-CV-03392 (VEC), 2020 WL 3453452, at *7 (S.D.N.Y. June 24, 2020)) (footnote omitted). Due to the COVID-19 pandemic, conducting depositions remotely has become the "new normal." See *In re Broiler Chicken Antitrust Litig.*, No. 16-CV-08637, 2020 WL 3469166, at *5 (N.D. Ill. June 25, 2020) ("Courts are beginning to recognize that a 'new normal' has taken hold throughout the country in the wake of the COVID-19 pandemic that may necessitate the taking of remote depositions unless litigation is going to come to an indefinite halt until there is a cure or a vaccine for COVID-19." (citing cases)). Recent court rulings that have permitted remote depositions during the pandemic have "buil[t] on pre-pandemic case law that liberally allowed for and encouraged remote depositions as the technology for taking depositions in that way has improved significantly over time." *Id.* (citing cases).

Magistrate Judge Bowbeer acknowledged the indisputable health risks connected with travel and in-person gatherings during this pandemic. (Order at 2–3.) Defendant's concerns are understandable, regardless of the current level of outbreak in St. Maarten or the self-quarantine requirements for travelers returning to Switzerland. In between those start and end points, travelers must find transportation to and from airports, interact with security personnel, airline personnel, and other travelers, sit in relatively close proximity to other travelers on airplanes, and stay in hotels. Should these deponents or counsel become ill while in St. Maarten, they would be thousands of miles away from home, their families, and their own medical providers.

In addition, even with the protection of masks and social distancing, an in-person deposition generally requires the participants to sit in a shared, enclosed space, for prolonged periods of time. Indeed, “the hardship that would be caused to [witness(es) and ... counsel] by an in-person deposition is obvious,” *Rouviere*, 2020 WL 3967665, at *3, as “ ‘social distancing does not guarantee a safe deposition environment.’ ” *Id.* (quoting *Joffe*, 2020 WL 345452, at *7).

*3 As to the potential prejudice that Plaintiffs identify if the depositions proceed remotely, the Court appreciates that this case involves a great deal of complex document discovery. However, “ ‘courts have found that exhibits can be managed in remote depositions by sending Bates-stamped exhibits to deponents prior to the depositions or using modern videoconference technology to share documents and images quickly and conveniently.’ ” *Rouviere*, 2020 WL 3967665, at *3 (quoting *United States for Use & Benefit of Chen v. K.O.O. Constr., Inc.*, 106 Fed. R. Serv. 3d 1383, 2020 WL 2631444, at *2 (S.D. Cal. 2020)). In addition, there are many resources available from vendors and throughout the legal community to assist counsel in preparing for remote depositions. *Id.* (citing *Grano v. Sodexo Mgmt., Inc.*, No. 18-CV-01818 (GPC) (BLM), 2020 WL 1975057, at *3 (S.D. Cal. Apr. 24, 2020) (“There are numerous resources and training opportunities available throughout the legal community to assist Sodexo’s counsel in the operation and utilization of the new technology.”)).

As to the lack of the ability to replicate witness examination in a courtroom when taking a remote deposition, “[i]f the lack of being physically present with the witness were enough prejudice to defeat the holding

of a remote deposition, then Rule 30(b)(4) would be rendered meaningless.” *Id.* (citing *Robert Smalls Inc. v. Hamilton*, No. 09-CV-07171 (DAB) (JLC), 2010 WL 2541177, at *4 (S.D.N.Y. June 10, 2010)).

On balance, the Court finds that the potential risk of danger and hardship to witnesses, counsel, court reporters and videographers will be considerably lessened through remote video depositions, and outweighs the potential prejudice to Plaintiffs.

Finally, Plaintiffs also object to the starting date of August 3, 2020, at 7:30 a.m. EDT, arguing that the depositions should be delayed until the parties agree on a mutually acceptable starting date in September or until they agree on a date and time for in-person depositions. (Objs. at 4.) The Court assigns no error to the magistrate judge’s scheduling decisions. Given the extensive motion practice in this case—which was filed four years ago—it is in the interest of all parties to proceed expeditiously.

Based upon the foregoing, and all the files, record, and proceedings herein, **IT IS HEREBY ORDERED** that

1. Plaintiffs’ Objections [Doc. No. 655] to the July 20, 2020 Order are **OVERRULED**; and
2. Magistrate Judge Bowbeer’s July 20, 2020 Order [Doc. No. 653] is **AFFIRMED**.

All Citations

Slip Copy, 2020 WL 4218804