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May 11, 2020

VIA ECF

Hon. Claire C. Cecchi, U.S.D.J.
United States District Court for the District of New Jersey
Martin Luther King, Jr. Bldg. & U.S. Courthouse
Courtroom MLK 5B
50 Walnut Street
Newark, New Jersey 07101

**Re: Proton-Pump Inhibitor Products Liability Litigation (No. II)
2:17-md-2789 (CCC)(MF) (MDL 2789)**

Dear Judge Cecchi:

The undersigned Defendants submit this letter pursuant to the Court's May 5, 2020 order (ECF No. 580). Per the Court's order, Defendants have continued to make a good faith effort to meet and confer with the PSC on a case management order (CMO) regarding remote depositions, applicable to both company witnesses and plaintiff witnesses. The parties exchanged additional sets of redlined proposals and reached agreement on all but one issue: the delivery of hard copy exhibits for use at remote depositions. Therefore, the parties are submitting a proposed order with the one remaining disputed issue noted for the Court's consideration.

Defendants propose that hard copies of intended exhibits be provided to witnesses and their defending lawyer—*just as in any in-person deposition*—because it is cumbersome to review lengthy and complex documents purely in an electronic format. Moreover, it may be unwieldy for attorneys to review an electronic version of a document while also attempting to watch the video feed of the ongoing deposition. Although Defendants believe that hard copies of all exhibits should be provided in advance of remote depositions, we are only proposing that exhibits of more than 25 pages be provided in this CMO. This is a fair and sensible compromise, given the remote nature of the depositions at issue. Meanwhile, the PSC is only willing to provide hard copies of exhibits over 100 pages, and, in the case of completely remote depositions (i.e. defending counsel will be in a different location than the witness), *only* willing to provide hard copies to the witness. Having a witness receive a set of exhibits that the defending attorney does not have prevents the attorney from verifying whether the witness is reviewing the same document as the electronic version, and from confirming the witness's full

compliance with confidentiality and destruction requirements. This is untenable and would never be appropriate in an in-person deposition.

Defendants are operating in good faith in facilitating remote depositions under reasonable conditions. AstraZeneca, for example, has agreed to dates for three remote depositions of its witnesses in May, and has offered dates in June for additional U.S. witnesses. For the reasons set forth above, Defendants request that the Court adopt their proposed language regarding the delivery of hard copies of exhibits for use at remote depositions.

Dated: May 11, 2020

Respectfully submitted,
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**IN THE UNITED STATES DISTRICT
COURT DISTRICT OF NEW JERSEY
NEWARK DIVISION**

IN RE: PROTON-PUMP INHIBITOR PRODUCTS LIABILITY LITIGATION (NO. II)	MDL No. 2789 Case No.: 2:17-md-2789 (CCC)(MF)
This Document Relates to ALL ACTIONS	

**[PROPOSED] CASE MANAGEMENT ORDER NO. __
(Regarding Remote Depositions)**

The COVID-19 global pandemic has affected virtually every aspect of American society, including civil litigation in this Court and across the federal system. Governmental authorities have responded to this public health emergency by imposing travel restrictions, “stay at home” directives, and other social distancing measures designed to slow the communal spread of the disease. Plaintiffs and Defendants (the “Parties”) have expressed a strong preference to conduct in-person depositions in this litigation, but social distancing restrictions in various jurisdictions may sometimes preclude this option. Accordingly, pursuant to Fed. R. Civ. P. 30(b)(4), this Court hereby issues the following protocol to govern any depositions taken in *In re: Proton-Pump Inhibitor Products Liability Litigation (No. II)* where all, or most, of the participants, including the court reporter and videographer, are attending remotely (“Remote Deposition”). The unique circumstances that have led

to this Order are evolving and the Court may revisit this issue periodically and make any necessary adjustments.

1. Subject to all of the conditions below, depositions for cases filed in *In re: Proton-Pump Inhibitor Products Liability Litigation (No. II)*, Case No. 2:17-md-2789, may be noticed to take place remotely via video or internet video conference technology. The Court understands that certain individuals may have personal or professional circumstances relating to the current crisis that either prevent them from participating in a deposition altogether or significantly limit their ability to sit for a deposition for a sustained period of time, and, based upon representations of counsel, it expects all parties to be respectful and accommodating of such circumstances. A deposition that is noticed to take place remotely without advance agreement that the witness is able to proceed remotely shall be deemed void and unenforceable ab initio, and no motion shall be necessary to quash such a notice. Any disagreements regarding the availability of the witness shall be resolved by the Court.
2. This Order shall apply to depositions of current and former employees of defendants and Bellwether plaintiffs and their family members who work or reside in the United States. Depositions of healthcare providers or other individuals in the Bellwether cases, and witnesses working or residing outside the United States, shall be the subject of further discussions between the

parties and additional orders as necessary.

3. Any Remote Deposition taken pursuant to this Court's Orders must comply with the requirements in Fed. R. Civ. P. 30(b)(5). This includes the requirements that, (a) "[u]nless the parties stipulate otherwise, a deposition must be conducted before an officer appointed or designated under Rule 28," and (2) that officer must administer the oath or affirmation to the deponent. A Remote Deposition taken pursuant to this Case Management Order shall be deemed to have been taken before an appropriate officer despite the court reporter not being in the same physical location as the witness—as long as the court reporter attends the deposition by the same remote means as other participants and is able to hear and communicate with other attendees. To the extent permitted by the law of the state in which the witness is located, the witness may be sworn in remotely with the same effect as an oath administered in person.
4. The deposition notice for any Remote Deposition pursuant to Fed. R. Civ. P. 30 must list the location(s) (city and state) from where the witness, the court reporter, and the videographer will attend.
5. All deposition notices must identify the company that will host and record the Remote Deposition (the "Remote Deposition Vendor") and contain a general description of how those attending may access the remote connection being

utilized (e.g., GoToMeeting, Zoom, WebEx). The party noticing the deposition shall make best efforts to provide the witness and all other attendees with detailed instructions regarding how to participate in the Remote Deposition at least seven calendar days before the deposition.

6. To host a Remote Deposition, a Remote Deposition Vendor must have implemented adequate security measures to ensure the confidentiality of the remote deposition (e.g., video and audio feeds, exhibits). These security measures include using tools such as a “virtual waiting room” that allows the court reporter to admit only individuals authorized to attend the deposition, and disabling the “record” feature in the Remote Deposition Technology for the witness and attending attorneys. In addition, to prevent confidential documents from being downloaded by witnesses, electronic exhibits may only be shared with the witness through the Remote Deposition Technology via a hyperlink to file sharing software (to be agreed upon in advance) with the download function disabled.
7. At least 24 hours before the Remote Deposition is scheduled to start, counsel, the witness, and the Remote Deposition Vendor shall conduct a test of the system and equipment that will be used to conduct the Remote Deposition (the “Remote Deposition Technology”). If a witness noticed for a Remote Deposition does not have a webcam-equipped tablet, desktop or laptop

computer that can be used during the deposition, counsel who noticed the deposition shall provide the deponent with agreed-upon equipment containing the audio, webcam, and Wi-Fi connectivity needed to participate in the deposition. The witness must receive such equipment no later than 48 hours before the deposition.

8. All remote depositions shall be conducted during normal business hours within the witness's local time zone. Parties are expected to grant reasonable accommodations on scheduling and timing of depositions. The deposition shall be subject to the aggregate time limitations set forth in FRCP 30 including direct and recross. If the defending attorney anticipates more than one (1) hour for direct examination of the witness, the parties will meet and confer regarding the total time allotted for the deposition. If a party believes more than seven (7) hours will be required to fairly examine a deponent, the parties shall meet and confer about whether additional time should be allocated for that deposition. Similarly, where the witness has restrictions on the length of time he or she may sit for a remote deposition, defending counsel shall notify examining counsel in advance, so that the parties may confer on a schedule to complete the deposition. Any disputes regarding the length of time needed for a deposition or deposition scheduling shall be resolved by the Court.

9. A witness and/or his/her attorney(s) may reschedule remote depositions up until the time of the deposition in the event of changed circumstances in their health, their family's health, or, upon a written representation of counsel, their professional obligations due to the COVID-19 pandemic.
10. At the time of the deposition, the witness shall advise the court reporter of his or her physical location. The witness should endeavor to participate in the deposition from a quiet, well-lit, indoor location, while seated in front of a neutral background, and facing the camera being used to record the witness. Only the witness's counsel and in-house counsel is/are permitted to be in the same location as the witness during remote testimony, at the sole discretion of the witness.
11. If counsel for the witness attends the deposition in person, that counsel shall also log into the Remote Deposition Videoconference, so that all participants can see and hear the counsel for the witness, or otherwise maintain a camera view showing both the witness and counsel (or any other persons assisting in the deposition, such as a paralegal or legal assistant). Both counsel and the witness shall also comply with any government law, regulation or guidance regarding public health and safety during the COVID-19 pandemic.
12. To avoid any potential disruptions of a Remote Deposition, those attending shall enable "do not disturb" settings for applications not in use, including but

not limited to, Skype, instant messaging, and/or e-mail notifications. The Court recognizes that the microphones for certain attendees (such as the witness, the court reporter, the attorney taking the deposition, and the attorney defending the deposition) must remain on when the deposition is on the record. Other attendees should mute microphones when not speaking. The participating attorneys may be visible to all other participants during the deposition.

13. A videographer employed by the Remote Deposition Vendor will record the witness's deposition testimony, by the best technological means available, including remote video capture/recording. The video recording of the deposition may only be suspended during the deposition upon stipulation by counsel conducting and defending the deposition. With the exception of the videographer and the court reporter, the deposition may not otherwise be recorded electronically without the consent of the Parties. The fact that a deposition was noticed to take place remotely, and was recorded remotely, shall not, by itself, be a sufficient basis for preventing the remote deposition from being admitted at trial with the same effect as a deposition video that was recorded in-person.
14. In advance of any remote deposition, counsel for the witness shall inform counsel taking the deposition whether he or she will be attending in person or

Commented [1]: PSC Position: Defendants request copies of all exhibits greater than 25 pages in advance of the deposition, claiming that it is too cumbersome for a witness to review large documents. While the PSC believes that it is actually easier to review electronic documents, it has offered a compromise under which hard copies of exhibits longer than 100 pages will be provided in advance of the deposition, while creating an exception for deposition exhibits identified after the time of mailing.

Additionally, Defendants are requiring advance paper copies to also be sent to the attorney's location, even where the attorney is attending remotely and the electronic copy and paper copy are identical. If there were a difference between the hard copy and the paper copy, the witness would be able to detect that, as the examiner will be using the electronic copy during the deposition and the paper copy is only being provided as a convenience.

Commented [2R1]: Defendants believe that all exhibits should be provided in hard copy, as would be the case in an in-person deposition, to both the witness and the attorney. In response to discussions with the PSC about a concern over the burden, Defendants are proposing that only exhibits of more than 25 pages in length should be provided in advance. Neither the attorney nor the witness would be allowed to open the box or exhibits except on camera on the record. However, having the witness receive a set of exhibits that the defending attorney does not have, cannot verify whether what the witness is reviewing is the same as the electronic document on the screen, and cannot track after the deposition to confirm compliance with confidentiality and destruction requirements (including some witnesses who are former employees who now work for a competitor), is untenable and would never be the case in an in person deposition.

To expect the witness to compare hard copy documents with what is being shown on the screen is unnecessary and time consuming and easily remedied by simply sending a set of hard copy documents to the attorney as well.

attending remotely. For any deposition exhibit that exceeds 100 pages, counsel taking the deposition shall provide a hard copy for (i) the witness and (ii) the witness's attorney (only if that attorney is attending in person). If the witness's attorney is attending remotely, that attorney will be provided with electronic copies of the exhibits which are identical to the hard copy and electronic exhibits provided to the witness. All exhibits less than 100 pages shall be provided to the witness and counsel electronically, as described herein. If defending counsel will be attending remotely, hard copies of exhibits will be shipped in boxes to the witness's and attorney's locations so as to arrive at least one (1) day prior to the deposition. If defending counsel will be attending in person, both sets of hard copy exhibits will be shipped to a location identified by the defending attorney so as to arrive at least one (1) day prior to the deposition. Within the box each exhibit may be sealed in its own envelope. Neither the box nor an envelope maybe opened by the witness or attorney until instructed to by the examining attorney and both the box and envelopes will be opened on camera. This provision shall not preclude the examining attorney from utilizing electronic versions of unanticipated exhibits where reasonably necessary. Following the deposition, it shall be the defending attorney's responsibility to ensure that any hard copy documents sent to the witness are destroyed in according with the Confidentiality Order.

Commented [3]: Defendants' position, as explained below, is that this limitation is not appropriate or justified, or consistent with how a deposition would typically proceed.

Commented [4]: Also to the attorney, as explained above.

Commented [5]: PSC position: This is unnecessary and creates additional safety risks. As described herein, the attorney will receive an identical electronic copy.

Commented [6]: PSC position: Electronic and hard copy versions are required to be identical under this order, so there is no real issue here.

Commented [7]: This is only feasible if the attorney knows what documents the witness was sent, by receiving an identical set themselves. Not every exhibit sent to the witness in advance will necessarily be used during the deposition, so the fact that electronic versions of some of them are used during the deposition does not alleviate the issue of the attorneys not knowing what was sent to the witness.

15. During the deposition, full and complete copies of deposition exhibits must be provided to the witness and counsel who are attending the deposition via the Remote Deposition Technology through file sharing software (with download disabled for the witnesses). A witness may be required to use a keyboard, mouse, or other similar means to open and/or advance the pages of an exhibit. The fact that a witness was provided with an electronic copy of an exhibit will be an insufficient basis to object to the admissibility of that exhibit at trial. During the deposition, the Remote Deposition Technology must allow counsel to display and annotate exhibits for the witness, add and remove exhibits, and change the order in which the exhibits are presented to the witness.
16. During the deposition examination, no person attending the deposition shall be permitted to communicate with the witness by any means not recorded in the same manner as the deposition itself (*e.g.*, no text or email exchanges with the witness). However, the witness's counsel may communicate with the witness, including telephonically, by other electronic means, or directly if he or she is present with the witness, during breaks, consistent with Federal Rule of Civil Procedure 30(c)(1).
17. Technical difficulties, including but not limited to pauses, lags, and/or interruptions in Internet connection, shall be addressed as they would be in

any in-person deposition. The parties shall go off the record and attempt to resolve the issue. Technical difficulties shall not result in waiver of objections by any party. If any pauses, lags, and/or disruptions are persistent or prolonged, the Parties should consider rescheduling the remote deposition for a later date.

18. In the event that a party proceeds with a remote deposition of a witness pursuant to the terms of this Case Management Order, then that party shall not be allowed to re-depose the witness for a second time absent a showing of good cause and obtaining leave of Court or agreement of the parties.

SO ORDERED, on this ____ day of May 2020.

CLAIRE C. CECCHI
UNITED STATES DISTRICT
JUDGE