

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

**IN RE: DAVOL, INC./C.R. BARD,
INC., POLYPROPYLENE HERNIA
MESH DEVICES LIABILITY
LITIGATION**

Case No. 2:18-md-2846

**JUDGE EDMUND A. SARGUS, JR.
Magistrate Judge Kimberly A. Jolson**

**This document relates to:
Johns v. CR Bard, et al.
Case No. 2:18-cv-1509**

CASE MANAGEMENT ORDER NO. 30

Supplemental Protocol Regarding Remote Depositions

Pursuant to Fed. R. Civ. P. 30(b)(4), this Court hereby authorizes the use of remote depositions in the initial Bellwether Trial Cases as follows:

1. In an effort to enable the parties to proceed with remaining discovery efficiently and with due regard for the health and safety of witnesses, court reporters/videographers, counsel, and parties during the ongoing COVID-19 pandemic, the Court sets forth certain provisions for conducting depositions remotely during this period in an Order dated October 8, 2020 (ECF No. 351). Consistent with that Order, the parties have agreed on a supplemental protocol regarding remote depositions that they believe takes consideration of federal, state, and local orders and/or guidance and consistent with the safety concerns of the participating witnesses, counsel, and court reporters. However, given that conditions may vary for some time, the following provisions will govern until they are lifted and/or modified by the Court, or until otherwise agreed between the Plaintiff's Steering Committee ("PSC") and counsel for Defendants. Nothing in this Order precludes individual parties from raising objections as to particular depositions but the goal is for depositions to proceed when scheduled using these procedures and the applicable Rules of Civil

Procedure. The Court and parties may revisit these procedures and the parties shall continue to meet and confer based on developments in the conditions applicable to particular depositions that may allow for certain depositions to proceed in-person or partially in-person in some places and under certain circumstances or with other limitations (including partial live attendance limited to only examining and defending counsel and necessary staff or some other variant so that each side has an equal number of attendees). While the agreements herein shall presumptively control for all depositions going forward per the terms of this Order, and the Court's prior Orders, any objections as to a particular deposition should be brought to the Court's attention promptly if the relevant parties are not able to reach an agreement and shall not be a means to delay a deposition.

2. Until further order, depositions may be noticed to take place remotely via video or internet video conference technology. A deposition taken remotely pursuant to this Case Management Order ("CMO") 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 and, 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 sworn to in person. Other provisions and requirements of Fed. R. Civ. P. 30-32 still apply.

3. Prior to issuing a notice for any fact or expert witness deposition to be conducted remotely, counsel for the relevant party seeking the deposition and counsel for the witness, if any, shall confer so as to identify the witness name sought for deposition and the intent to take the deposition under a remote format. All remote witness deposition notices shall advise the planned location of the witness (city and state shall be sufficient identification for this purpose, with due regard for maintaining the privacy associated with home addresses), the court reporter, and the witnesses' counsel who will attend remotely. The examining and defending attorneys each must

use a private, quiet, and secure room where he or she can be expected to be uninterrupted and where the confidentiality of the proceedings may be preserved for the entirety of the deposition. The attorneys shall work together to ensure that the deponent is located in a private, quiet, and secure room where he or she can be expected to be uninterrupted and where the confidentiality of the proceedings may be preserved for the entirety of the deposition. Notices for depositions of a party to be taken pursuant to Fed. R. Civ. Pro. 30(b)(6) may be issued without the advance meet-and-confer process with the expectation that the parties shall confer in compliance with this Order following such a notice to implement the provisions of this Order with a resulting amended notice as may be appropriate. As noted above, while this CMO contemplates 100% remote participation at depositions with the witness, his/her defending attorneys, the examining attorneys, and any observing attorneys all in different locations (not physically present with the witness), to the extent that it becomes feasible and safe (according to applicable federal, state, and local orders and/or guidance and consistent with the concerns of the participating witnesses, counsel, and court reporters) in the coming weeks or months, the parties will endeavor to move to a partial remote format and, when appropriate and safe, a traditional deposition format. Under a partial remote format, each side shall be permitted the same number of participants and/or attendees at the deposition location with the witness. For example, if the witness has one lawyer to defend the deposition an equal number of lawyers or support staff shall be permitted to be present on behalf of the examining party(ies). The parties shall meet and confer to identify appropriate conditions that would enable an equal number of lawyers and/or designees/representatives for the party taking the deposition to be present as well as the party defending the deposition. If, however, the parties are unable to reach agreement, then the matter shall be brought to the Court for resolution no later than 14 days in advance of any such deposition.

4. If the witness and counsel defending the witness propose to be present in the same location (i.e., same room) during the deposition (subject to any applicable health restrictions in the local jurisdiction including travel and quarantine restrictions), then this proposed arrangement shall be disclosed to the requesting or noticing counsel as soon as practicable within 14 days of the initial request to deponent's counsel for a deposition and, in any event, no later than 21 days in advance of the confirmed deposition date as reflected in a formal deposition notice in compliance with this Order so that examining counsel shall be permitted to make arrangements to have an equal number of attendees present in-person as well, subject to the safety concerns of the witness, or, alternately, raise the matter of the partial -in-person request with the Court sufficiently in advance of the deposition.

5. In order to aid the planning for the remote deposition, counsel who plan to attend or log in to the Remote Platform shall be required to advise the court reporting service and counsel for Defendants and the PSC three days in advance of the deposition. This requirement shall be plainly set forth in all Deposition notices. The court reporting service shall provide a list of participants to noticing counsel and defending counsel prior to the deposition. At the time of deposition, any persons attending (via any means) the deposition remotely shall advise as to their physical location (city and state), including the plaintiff's lawyers, the defense lawyers, and any other persons who are in attendance in accordance with the Protective Order governing this case (CMO No. 7, ECF No. 48).

6. All deposition notices shall explain how those participating in the deposition may access the remote platform being utilized (*e.g.*, Zoom, GoToMeeting, WebEx) (the "Remote Platform"), provided, however, that detailed instructions for use of the Remote Platform may be provided after the notice has been served, but no later than 10 days before the date of the

deposition, absent agreement between the noticing party and counsel representing the witness.¹ To avoid interruptions and excessive background noise, the Remote Platform vendor may also establish a separate access or conference line that is for listening/viewing only but that will otherwise remain muted throughout the deposition. 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 must be visible to all other participants during the deposition. The court reporting service selected for the deposition shall ensure, to the best of its ability, that the deponent has sufficient internet connectivity and bandwidth to support a video deposition. Sufficient connectivity and bandwidth means sufficient to ensure that, when used with the video platform, there will be: (a) high-quality video upload (from the deponent) and download to the attorneys, videographer, and court reporter; (b) no material time discrepancy between audio and video; and (c) consistent connectivity, with no material disruptions. The available internet connection should be a Broadband connection of at least 10 Mbps or better and counsel and the witness shall work to ensure that no other user is drawing down on the Broadband connection in a manner which would materially impact upload or download speeds. At least 48 hours before the remote deposition is scheduled to start, counsel, the witness, and the Remote Platform vendor should conduct a test of

¹ Because of the need for review and preparation, including potential security/cyber-security review by various parties, any changes the particular software used in the Remote Platform (*e.g.*, from Zoom to some other platform) will require a further meet and confer and cannot be changed without ample time for review and consultation. The 10 day notice period in paragraph 6 is not sufficient for a change in the software or platform but is intended solely to govern provision of the logistical details for a particular deposition.

the system and equipment that will be used to conduct the remote deposition (the “Remote Deposition Technology”). If it is determined that the internet connectivity and bandwidth are not sufficient, then the noticing party, through the court reporter, shall send the witness a portable Wi-Fi hotspot for use at the deposition.

7. To host a remote deposition, the Remote Platform vendor must have implemented adequate security measures to ensure 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. Selection of a national court reporting service with an established Remote Platform shall be considered reasonable efforts to comply with this CMO as to the Remote Platform vendor. 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. During the remote deposition, the Remote Deposition Technology must allow counsel to display and annotate exhibits for the deponent, add and/or remove exhibits and change the order in which the exhibits are presented to the deponent. 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. The Parties do not otherwise waive their objections under the federal rules to exhibits or testimony. The court reporter shall maintain the official records of exhibits introduced via any means during a remote deposition.

8. Use of exhibits at deposition can include, but are not limited to, the following: 1) electronic exhibits that are shared/linked as needed through the Remote Platform vendor, or 2)

hard copies of exhibits sent to the deponent. Regardless of the method utilized by counsel, a copy (print or electronic) of any exhibits used must be made available to opposing counsel (and deponent's counsel in the case of third-party depositions) at or before the time the exhibit is introduced in the deposition. The noticing party and any other party who intends to use exhibits during a deposition shall send electronic copies of all potential exhibits to the Remote Platform vendor unless otherwise agreed between the Parties. Upon request for a particular deposition based on individualized circumstances, for large exhibits, consisting of 100 or more pages in standard print format or a document with a format (*e.g.*, large spreadsheet in light of its tabs, rows, and columns) that would require extensive printing, the noticing party and any other party who intends to use such exhibits shall send hard copies of the exhibits in a legible format to the deponent (and deponent's counsel in the case of third party depositions) and opposing counsel in sealed envelopes for receipt no later than 24 hours before the scheduled start of the deposition or continuation of the deposition, as applicable; such sealed envelopes may not be opened until the exhibit(s) at issue are offered in the deposition. Any unopened exhibits shall remain unopened and the party that provided the documents shall provide instructions on how to have the documents either returned (unopened) or otherwise disposed of within 24 hours of the close of the deposition.

9. Subject to any separate agreements of counsel, and to aid in the efficient conduct of depositions, to the extent practicable, at least 48 hours prior to a remote deposition of a non-party healthcare provider or other third party (but not retained experts), the noticing party shall exchange with counsel of record copies of all documents shown to, or discussed with, the deponent, if any, in advance of the deposition, whether exhibits plan to be used in electronic or hard copy format.

10. Subject to the terms of this Order, from the date of the entry of this Order, that a

deposition is noticed to take place remotely shall not be grounds to quash the same.

11. Any depositions noticed to take place remotely and recorded remotely may be admitted at trial with the same effect of one recorded in-person. All video recordings should be captured by the best technological means available and can be done via remote capture through a court reporting or conference vendor if necessary. Only the videographer or court reporting service shall be permitted to capture video and no other participants shall make any recordings (video or audio) of the deposition. The videographer shall remotely capture the deposition video and provide a certified recording. The video recording shall be only of the deponent and the documents displayed as they are displayed in the deposition. No one shall be permitted to alter and/or edit the video deposition except editing the video so as to submit and provide deposition testimony clips or deposition cuts in connection with deposition designations for trial when testimony may be offered in whole or in part pursuant to a Case Management Order. Any alterations and/or edits shall only apply to cuts, and no color or other modification to the images. Any alterations and/or edits must be disclosed before any portion of the video recording is offered at trial.

12. During the deposition examination, no attorney shall be permitted to communicate with the witness in any manner not recorded in the same manner as the deposition itself (*i.e.*, no text or email to the witness). However, the witness's counsel (including counsel for a party defending an expert deposition) may communicate with the witness telephonically or otherwise during breaks, consistent with the Federal Rules of Civil Procedure.²

13. The parties shall work cooperatively to implement technology that will allow for the remote depositions permitted herein and will ensure counsel for any non-party witness are

² No counsel, present live or remotely, with a witness shall engage in any improper signaling or non-verbal communication designed to influence an answer of a witness. If examining counsel reasonably suspects such conduct, it can be the subject of inquiry during the deposition and may be raised with the Court as necessary.

familiar with the provisions of this paragraph and this CMO as well. To this end, it shall be the examining attorneys', the defending attorneys', and the witness's responsibility to be fully familiar with the Remote Platform and any other technology necessary to conduct the deposition. Defending lawyers and the witness shall spend whatever time is necessary in advance of the deposition to ensure that the witness is fully fluent in the use of the technology, which shall include testing, by the retained vendor providing the Remote Platform, of the witness's internet or Wi-Fi bandwidth for uploading and downloading. The purpose is to avoid unnecessary delays during the taking of the depositions. Each attorney will therefore be required to spend sufficient time, in advance of the scheduled deposition, to be sure that the witness and the attorney taking or defending the deposition understands how to use the technology. In consultation with defending counsel, the examining attorneys (i.e., attorneys providing the technology) will arrange, if necessary, to have the vendor providing the remote services available to the witness and his/her attorney and staff, well in advance of the scheduled depositions, to help explain and facilitate this process in order to ensure depositions proceed as seamlessly as possible. Moreover, any required technology supplements shall be provided to the witnesses in advance of the deposition, by way of example, a portable Wi-Fi hotspot (to the extent the witness does not have Wi-Fi at his/her home), a portable Wi-Fi camera (to the extent the witness does not have a computer with a camera), an additional monitor for ease of viewing depositions exhibits, a suitable background for video-recording of the deposition if not otherwise available, and any other technology the witness might require for the remote deposition. Any costs for additional technology or related equipment required to conduct the deposition shall be paid in advance by the examining attorney on behalf of examining attorney's client(s). Such technology shall be coordinated with the Remote Platform vendor.

14. To the extent the Court orders, or the parties agree to, a deposition being cross-noticed in a case or proceeding outside this MDL, or a deposition noticed in a case or proceeding outside this MDL being cross-noticed in this MDL, the parties agree to confer on a protocol applicable to such a deposition and present any disputes about the protocol to this Court in a timely manner.

IT IS SO ORDERED.

12/14/2020
DATE

s/Edmund A. Sargus, Jr.
EDMUND A. SARGUS, JR.
UNITED STATES DISTRICT JUDGE

12/14/2020
DATE

s/Kimberly A. Jolson
KIMBERLY A. JOLSON
UNITED STATES MAGISTRATE JUDGE