

MEMORANDUM

TO: Subcommittee on Procedural Rules to Promote Efficient Case Resolution (“Subcommittee”)
FROM: Michael Carlinsky, Susan L. Shin
DATE: September 26, 2020
RE: Proposal for New Rule on Remote Depositions

INTRODUCTION

This memorandum recommends a new Commercial Division rule clarifying the authority of the courts to order remote depositions. CPLR 3113(d) authorizes remote depositions by stipulation but does not directly address remote depositions upon motion. New York Courts have ordered remote depositions, upon motion, upon a showing of “undue hardship.” This memorandum advises that the Commercial Division adopt a rule explicitly authorizing and regulating remote depositions.

PROPOSED RULE

We recommend that the Commercial Division Advisory Council propose the following Commercial Division Rule (the “Rule”):

- a. The court may, upon the consent of the parties or upon a motion showing undue hardship, order oral depositions by remote electronic means, subject to the limitations of this Rule.
- b. Considerations upon such a motion, and in support of a showing of undue hardship, shall include but not be limited to:
 1. The distance between the parties and the witness, including time and costs of travel by counsel and litigants and the witness to the proposed location for the deposition; and

2. The safety of the parties and the witness, including whether counsel and litigants and the witness may safely convene in one location for the deposition; and
3. Whether the witness is a party to the litigation; and
4. The likely importance or significance of the testimony of the witness to the claims and defenses at issue in the litigation.

For the avoidance of doubt, the safety of the parties and the witness shall take priority over all other criteria. .

- c. Remote depositions shall replicate, insofar as practical, in-person depositions and parties should endeavor to eliminate any potential for prejudice that may arise as a result of the remote format of the deposition. To that end, parties are encouraged to utilize the form protocol for remote deposition, which is reproduced as Appendix __ to these rules, as a basis for reaching the parties' agreed protocol.
- d. No party shall challenge the validity of any oath or affirmation administered during a remote deposition on the grounds that
 1. the court reporter or officer is or might not be a notary public in the state where the witness is located; or,
 2. the court reporter or officer might not be physically present with the witness during the examination.
- e. Witnesses and defending attorneys shall have the right to review exhibits at the deposition independently to the same degree as if they were given paper copies.
- f. No waiver shall be inferred as to any testimony if the defending attorney was prohibited by technical problems from interposing a timely objection or instruction not to answer.
- g. Nothing in this rule is intended to: (i) address whether a remote witness is deemed "unavailable," within the meaning of CPLR 3117 and its interpretive case law, for the purposes of utilizing that witness' deposition at trial; or (ii) alter the Court's authority to compel testimony of non-party witnesses in accordance with New York law.

FACTUAL BACKGROUND

The COVID-19 pandemic has forced rapid and widespread changes in the practice of law: not least among these, the shift to virtual and remote proceedings. The technology for

remote legal proceedings, such as depositions, is not new – in many instances, the technology used was already commonplace in personal use. Remote depositions are explicitly authorized in the Civil Practice Law and Rules and courts have ordered their use before the pandemic.

Whereas, however, remote depositions were previously the exception, they are now the rule.

And although the near-universal shift to remote depositions has been forced upon counsel and litigants by the pandemic, remote depositions are not without their virtues. There is good reason both to regulate remote depositions and to encourage their continued use, as circumstances warrant, after the pandemic is brought under control. The Commercial Division, in its role as one of the nation’s leading courts for the resolution of business disputes, must continue to carry out its vital functions through the pandemic, and should welcome the opportunity to innovate in ways that may improve the practice of law after the crisis is controlled.

LEGAL DISCUSSION

New York courts have the authority to order remote depositions, either by stipulation or upon a showing of undue hardship. CPLR 3113(d) (“The parties may stipulate that a deposition be taken by telephone or other remote electronic means”); *Johnson v. Time Warner Cable New York City LLC*, 2020 N.Y. Misc. LEXIS 2323 at *4–5, 2020 WL 2769117, at *2 (N.Y. Sup. Ct. May 28, 2020) (authorizing remote depositions by motion upon a showing of undue hardship); *Chase-Morris v. Tubby*, 2020 N.Y. Misc. LEXIS 4015 at *6, 2020 WL 4516920 at *3 (N.Y. Sup. Ct., Westchester Cnty. August 3, 2020) (“It is settled law in New York that the court’s discretion to compel a virtual deposition can be invoked upon a showing of undue hardship.”)¹. Courts

¹ New York district courts interpreting the Federal Rules of Civil Procedure engage in the same analysis. Federal Rule of Civil Procedure 30(b)(4) provides that the parties may stipulate to, or the court may order, a remote deposition. Like CPLR 3113 and CPLR 3103, the FRCP 30(b)(4) provides no standards for determining the circumstances under which a remote deposition may be ordered. Accordingly, in interpreting FRCP 30(b)(4) New York district courts have found that judges should balance claims of prejudice and hardship, along with engaging in a weighing

have sometimes ordered that depositions take place remotely as a form of protective order pursuant to CPLR 3103(a). *See, e.g. Provident Life and Cas. Ins. Co. v. Brittenham*, 283 A.D.2d 629, 630 (2d Dep’t 2001) (affirming Supreme Court order directing out of state depositions to be conducted by videoconference pursuant to a motion made under CPLR 3103(a)); *Goldstein v. Berenbaum*, 2020 WL 5209508 at *1 (N.Y. Sup. Ct. Sept. 1, 2020) (“it is undeniable that forcing a party to appear for an in-person deposition would create an undue hardship considering the circumstances surrounding the ongoing pandemic”) (ordering remote depositions as a form of CPLR 3103(a) protective order).

Undue hardship sufficient to support a court order to conduct a remote deposition has been found in a myriad of cases. The COVID-19 pandemic constitutes an undue hardship sufficient to order a remote deposition. *Chase-Morris v. Tubby*, 2020 WL 4516920 at *3 (N.Y. Sup. Ct., Westchester Cnty., August 3, 2020) (ordering parties to appear for remote deposition during the pandemic rather than adjourning depositions until depositions could be safely taken in-person after the pandemic) (gathering cases); *Fields v. MTA Bus Co.*, 2020 WL 4760424 at *3, 2020 N.Y. Misc. LEXIS 4375 at *11 (N.Y. Sup. Ct., Westchester Cnty. August 17, 2020) (same); *Johnson v. Time Warner Cable New York City LLC*, 2020 WL 2769117 at *3, 2020 N.Y. Misc. LEXIS 2323 at *6–7 (N.Y. Sup. Ct., N.Y. Cnty. May 28, 2020) (“To delay discovery until a vaccine is available or the pandemic has otherwise abated would be unacceptable. It goes without saying that business as usual is no longer the normal.”).

Outside the pandemic, undue hardship has generally been found in circumstances where travel would be difficult or impossible. *See, e.g., Yu Hui Chen v. Chen Li Zhi*, 81 A.D. 3d 818,

of the relevant facts. *Rouviere v. Depuy Orthopaedics, Inc.*, 2020 U.S. Dist. LEXIS 122184 at *6–7 (S.D.N.Y. July 11, 2020).

818–819 (2d Dep’t 2011) (finding of undue hardship for deposition of plaintiff who resided in China); *but see Rodriguez v. Infinity Ins. Co.*, 283 A.D.2d 969, 970 (4th Dep’t 2001) (“As a general rule, a non-resident plaintiff who has invoked the jurisdiction of New York State by bringing suit in its courts must stand ready to be deposed in New York unless it is shown that undue hardship would result”) (denying remote depositions for seasonal agricultural workers generally resident in Mexico). Other considerations when finding undue hardship may include caregiving duties and employment considerations. *See Rogovin v. Rogovin*, 3 A.D.3d 352, 353 (1st Dep’t 2004) (finding undue hardship where defendant resided in Kansas and was the sole caregiver for a nonagenarian grandmother and 10-year-old daughter); *see also Kozak v. Marshall*, 808 N.Y.S.2d 918, 918 (N.Y. Sup. Ct., Suffolk Cnty. 2005) (finding undue hardship where defendant resided in California and could not travel to New York without risking his employment).

Remote depositions are not legally different from in-person depositions with respect to interstate practice and non-party discovery. The Rule proposed to the Commercial Division does not, and is not intended to, change the authority of New York State courts with respect to depositions of persons who reside outside New York State or persons who are not parties to the case. Parties and witnesses may agree or stipulate to remote depositions of an out of state non-party witness.

CPLR 3101 authorizes “full disclosure of all matter material and necessary in the process or defense of an action[,]” including specific provisions regarding disclosure by persons outside New York State. *See* CPLR 3101(a)(3)-(4) (discovery may be had from persons outside New York State, including “any . . . person” upon notice). Nonetheless, obtaining discovery from a non-party witness who resides outside New York State is generally subject to the laws of the

state in which the witness is found. *See 23/23 Commc'ns Corp. v. Gen. Motors Corp.*, 660 N.Y.S.2d 296, 296 (N.Y. Sup. Ct., N.Y. Cnty. 1997) (“The law is well settled that the service of a subpoena outside [New York] [S]tate is beyond the court’s power.”) (citing N.Y. Judiciary Law §2-b (New York courts have authority to enforce subpoenas upon a “person found in the state”)); *see also In re 91 St. Crane Collapse Litig.*, 159 A.D.3d 511, 512 (1st Dep’t 2018) (“CPLR 3119, which adopted the Uniform Interstate Deposition and Discovery Act, provides a mechanism for disclosure in New York for use in an action that is pending in another state . . . not the other way around. Thus it is not applicable . . . to an action pending in New York [regarding] discovery from out-of-state witnesses.”); *Lewis v. Baker*, 279 A.D.2d 380 (1st Dept. 2001) (Court lacks authority to compel appearance of out of state non-party for deposition).

CPLR 3101 likewise provides for discovery from persons who are not parties to the case. *See* CPLR 3101(a)(3)-(4) (authorizing discovery by persons who could not be expected to appear at trial and “any other person” upon notice). Discovery from non-parties can be had by service of a subpoena. *See also Kapon v. Koch*, 23 N.Y.3d 32, 34 (2014) (discovery may be had from non-parties by service of a subpoena). Parties to the case are, of course, under the personal jurisdiction of the court (subject to any personal jurisdiction defenses that are presumably addressed or waived at the outset of the case) and may be deposed by notice rather than subpoena, regardless where they reside. *See* CPLR 3107 (parties to the case may be examined pursuant to notice).

Ordinarily the court reporter or officer administering the oath to the witness at a remote deposition “shall be physically present at the place of the deposition[.]” CPLR 3113(d). However, the parties may stipulate that this requirement shall not be enforced. *Id.* Moreover, any objections as to the oath or affirmation at the deposition are waivable. CPLR 3115(b)

(objections as to the oath or affirmation are waived unless made promptly). It is therefore not a requirement of the CPLR that the court reporter or officer must be physically present with the witness. The Rule proposed here, as well as paragraph 8 of the proposed form protocol, provides that the parties shall not challenge any remote deposition taken pursuant to this Rule on the ground that the officer administering the oath was not physically present with the witness or was not a notary public in the state where the witness took the deposition from. Any objection to the remote administration of the oath shall be waived if the deposition proceeds upon stipulation or impliedly overruled if the court finds undue hardship and orders the deposition to proceed remotely. Courts have explicitly contemplated such a waiver in the ordering of remote depositions. *See Cesari S.R.L. v. Peju Province Winery L.P.*, 2020 U.S. Dist. LEXIS 151184 at *4 (S.D.N.Y. Aug. 20, 2020) (“[T]he court reporter will not necessarily be physically present with the witness whose deposition is being taken. The Court will not sustain any challenge the validity of any oath administered by the court reporter, even if the court reporter is not a notary public in the state where the deponent resides.”); *Joffe v. King & Spalding LLP*, 2020 U.S. Dist. LEXIS 137085 at *4 (S.D.N.Y. July 9, 2020) (“Plaintiff and Defendant agree not to challenge the validity of any oath administered by the court reporter, even if the court reporter is not a notary public in the state where the deponent resides.”).

PRACTICAL CONCERNS

The concerns litigants have raised to resist remote depositions are not frivolous. However, these issues can be effectively addressed through planning by counsel and by the stipulation or order of a remote deposition protocol. This memorandum briefly discusses some of the practical considerations that bear upon remote depositions and appends a proposed exemplar or form remote deposition protocol. It is expected that the protocol may be amended as necessary from case to case. A remote deposition protocol is particularly important because

depositions ordinarily proceed without direct judicial involvement. The use of a protocol therefore reduces avoidable motion practice and addresses some of the practical considerations that are better resolved from case to case rather than by the generally-applicable Rule.

Technical Issues

The most common concern regarding remote depositions is technological failures or problems. All participants must have sufficient bandwidth and sufficient hardware, such as computers or tablets equipped with cameras. Counsel are encouraged to test remote deposition software before any remote deposition occurs. No witness or litigator should access the software for the first time at the start of the deposition.

There is always a risk that the parties could suffer connectivity issues. As technology is ever-evolving, it is unwise for a protocol to specify a minimum strength or quality of connection because such a designation could quickly become outdated. However, parties should be required by a protocol to use their “best efforts” to guarantee “sufficient connectivity”. In the event that a connectivity issue does occur, the parties should agree in the protocol that the deposition will be suspended, as is reflected in paragraph 15 of the proposed form protocol. The time consumed by such suspension should not count toward any applicable time limitations. Moreover, above the level of the protocol, the Rule itself requires that any objection or instruction not to answer that cannot be timely interposed on account of technical problems (such as a dropped connection or an audio failure) shall be deemed to have been timely if made as soon as practicable (i.e. after the connection is restored). Regardless of the requirements of the Rule and the proposed form protocol, participants to the deposition should endeavor to establish back-up systems of communication (such as e-mail or landline) to alert the court reporter if there is a technical problem, particularly a technical problem that is not immediately apparent to all parties (e.g. if one participant’s audio transmission fails).

Finally, depending on whether exhibits are shared digitally or in hard copy, witnesses and counsel participating in the deposition should be prepared for uncommonly heavy demands on their screen space: their monitor or tablet will need to support not only the videoconferencing software for the deposition but also the exhibit(s). Some videoconferencing software will automatically pause participants who open a second screen or another application on the device and discovering such problems in advance (and planning around them) will be an essential part of any “dress rehearsal” for the software.

The proposed form protocol aims to address some of these issues in paragraph 20.

Security Issues

Remote depositions are vulnerable to eavesdropping in ways that traditional in-person depositions are not. The specific encryption and security for each deposition should be determined by the parties and their counsel and technical advisers. At a minimum, however, the parties should require that remote depositions be secured by passwords. Cases involving trades secrets or confidential medical information or personal financial information (particularly the financial information of non-parties) may require higher degrees of security. Some vendors offer specific “HIPAA-compliant” versions of videoconferencing software. Although full end-to-end encryption may not be necessary for all depositions, most videoconferencing software offers at least password-protection to prevent unauthorized entry.

Private Communications

Participants to the deposition should sometimes be permitted to communicate privately and should sometimes be prohibited from communicating privately. The witness and defending

counsel may well need to engage in confidential conversations regarding claims of privilege; teams of attorneys may similarly need to communicate with each other privately.

The witness should not, of course, be coached or guided during the questioning. As the parties will not be in the same physical place as the deponent, there is a potential risk that the deponent could privately communicate with counsel or other individuals during the deposition. A deposition protocol should address this concern by placing the responsibility on counsel to eliminate this risk. The protocol should instruct counsel not to privately communicate with the deponent during the questioning on the record, except for the purpose of determining whether a privilege should be asserted. *See Cesari S.R.L. v. Peju Province Winery L.P.*, 2020 U.S. Dist. LEXIS 151184 at *3 (S.D.N.Y. Aug. 20, 2020). An example of such an instruction can be found in paragraph 6 of the proposed form protocol. In addition, the protocol could require the witness to shut off all electronic communication devices during the deposition while on the record. *See Joffe v. King & Spalding LLP*, 2020 U.S. Dist. LEXIS 137085 at *9 (S.D.N.Y. July 9, 2020) (requiring the deponent to turn off all personal communicate devices in the room, except for their personal cell phone, which must be on vibrate with the screen turned away from the deponent). Parties can also agree that the “chat” feature of the platform used to conduct the remote deposition be disabled, except for the sharing of exhibits with all participants. The questioning attorney should also feel free to ask the witness under oath to verify that the witness is not engaged in private communications and does not have chat software open on the computer or device.

To encourage appropriate private communications, some videoconferencing software allows for break-out rooms within the software, as is contemplated in paragraph 7 of the proposed form protocol. Courts have explicitly allowed for such rooms to be used to facilitate

permissible private conversations. *See Cesari S.R.L. v. Peju Province Winery L.P.*, 2020 U.S. Dist. LEXIS 151184 at *3 (S.D.N.Y. Aug. 20, 2020). If no such “room” is possible within the software, then the defending attorney and the witness may need to disconnect or step away from the software and communicate privately through a different medium, such as by phone call or through another videoconferencing app or service. They can briefly discuss claims of privilege. This is not significantly different from the existing common practice at in-person depositions. Moreover, New York courts have allowed the witness and defending attorney to participate in the remote deposition from the same place, with the taking attorney participating from a separate location. *See Melkonian v. Albany Medical Center*, 2020 WL 5294231 at *2, 2020 N.Y. Misc. LEXIS 5462 at *4 (N.Y. Sup. Ct., Albany Cnty. June 3, 2020); *see also Johnson v. Time Warner Cable New York City LLC*, 2020 WL 2769117 at *3, 2020 N.Y. Misc. LEXIS 2323 at *6–7 (“Although [defendant’s] counsel feels that he will be prejudiced by not being able to physically sit next to the Remote Witnesses during their depositions, this order does not prohibit him from doing so. To the extent that the law and social distancing guidance allow, [defendant’s] counsel... may be in the same room sitting next to these Remote Witnesses while Plaintiff’s counsel appears by remote means.”).

Exhibits

While the sharing of exhibits in real time can be more difficult during a remote deposition, it is manageable. *See Rouviere v. Depuy Orthopaedics, Inc.*, 2020 U.S. Dist. LEXIS 122184 at *9–10 (S.D.N.Y. July 11, 2020) (finding that an argument a deposition would be document intensive was not sufficient to prevent a remote deposition from going forward, as parties could exchange hard copy exhibits prior to the deposition, or utilize technology to share documents during the deposition). Paragraph 20 of the proposed form protocol details the

potential ways in which parties can share agree to disseminate full exhibits during a remote deposition. Exhibits at a remote deposition can be shared as paper documents in advance of the deposition, or digitally in real time. The advantage to paper documents is their familiarity and the general avoidance of technical problems that might plague the dissemination of digital files. However, paper exhibits must be shared and therefore decided upon in advance, which may inhibit the general free-flow of questioning and as discussed below, reveal attorney work product. Although, parties can combat this by agreeing to allow for the electronic sharing of exhibits when necessary and by instructing the witness to disregard and not examine certain files that the attorney decides to skip.

Some attorneys may also feel concern about sharing their proposed deposition exhibits with the witness or opposing counsel before the deposition, as doing so reveals attorney work product. The proposed form protocol addresses these concerns by obliging the recipients of paper exhibits to refrain from opening or reviewing the exhibits before being directed to do so, on camera, by the taking attorney.

Parties should be encouraged to share exhibits digitally. Digital exhibits can be withheld from adverse parties before the deposition, which obviates the concern about revealing work product, Exhibits can be shared instantaneously through the “chat” feature of the remote deposition software, or through other instantaneous electronic distribution such as file sharing software. This enables all individuals to have instantaneous access to the exhibits, while providing them with the ability to review the document in its entirety at their own control.

Digital exhibits can be shared by “screensharing” (i.e. when the video transmission displays the questioning attorney’s computer screen rather than the questioning attorney herself). However, screensharing alone does not allow the witness and defending attorney to review the

document independently and fully and are held captive to the view shared by the questioning attorney. Furthermore, screensharing does not easily provide the witness with the ability to review the entire exhibit prior to being questioned on it, as they are entitled to do. Accordingly, the draft form protocol recommends using screensharing as a visual aid to questioning, rather than a the sole means for sharing an exhibit.

CONCLUSION

Remote depositions have, by necessity, been occurring with increasing frequency. It would benefit both litigants and the courts in the Commercial Division to more clearly regulate remote depositions. By adopting the proposed Rule, the Commercial Division will also have the ability to guide litigants in the creation of their remote deposition protocol, which will be used to solve the problems that otherwise could be associated with remote depositions. This proposed new rule will serve litigants and courts in the Commercial Division well, not only for the duration of the COVID-19 pandemic, but for the future. Even once the undue hardship of COVID-19 is over, litigants may very well elect to participate in remote depositions by a matter of preference. We now know, from experience, that remote depositions can be quicker, easier, less costly, and more efficient than in-person depositions. By crafting this new rule, the Commercial Division will be prepared for the new future of litigation.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK**

XXXX, Plaintiff(s), - against - XXXX, Defendant(s).	Index No. _____ / _____
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**STIPULATION AND [PROPOSED] ORDER CONCERNING
PROTOCOL FOR CONDUCTING REMOTE DEPOSITIONS**

The Plaintiff(s) and Defendant(s) (collectively, the “Parties”) jointly stipulate to the following protocol for conducting depositions via remote means in the above-captioned manner:

1. All depositions shall be conducted remotely using videoconference technology, and each deposition shall be video-recorded.
2. Insofar as practicable, the remote deposition shall be similar to an in-person deposition.
3. The Party that notices the deposition shall contract with a court reporting service for court reporting, videoconference, and remote depositions services. An employee or employees of the service provider shall attend or be available at each remote deposition to video record the deposition, troubleshoot any technological issues that may arise, and administer the virtual breakout rooms.
4. The Parties agree that these video-recorded remote depositions may be used at a trial or hearing to the same extent that an in-person deposition may be used at trial or hearing, and the Parties agree not to object to the use of these video recordings on the basis that the deposition was taken remotely. The Parties reserve all other objections to the use of any deposition testimony at trial.

5. The deponent, court reporter, and counsel for the Parties may each participate in the videoconference deposition remotely and separately. Each person attending a deposition shall be clearly visible to all other participants, their statements shall be audible to all participants, and they should each use best efforts to ensure their environment is free from noise and distractions.

6. No counsel shall privately communicate with any deponent during questioning on the record, except for the purpose of determining whether a privilege should be asserted, and only after the witness has stated on the record that he or she needs to consult counsel regarding a question of privilege. Deponents shall shut off electronic devices, other than the devices that the deponent is using for the videoconferencing software and to display and access the exhibits, and shall refrain from all private communication during questioning on the record.

7. During breaks in the deposition, the Parties may use a breakout-room feature, which simulates a live breakout room through videoconference. Conversations in the breakout rooms shall not be recorded. The breakout rooms shall be established by the court reporting service prior to the deposition and controlled by the remote deposition or relevant service provider.

8. Remote depositions shall be recorded by stenographic and videographic means; but, the court reporter might not be physically present with the witness whose deposition is being taken. The Parties agree not to challenge the validity of any oath administered by the court reporter, even if the court reporter is not a notary public in the state where the deponent resides.

9. The court reporter will stenographically record the testimony, and the court reporter's transcript shall constitute the official record. The videographer will record the audio and video of the deposition and preserve the recording. The court reporter may be given a copy

of the recording and may review the recording to improve the accuracy of any written transcript. The court reporter shall mark and preserve exhibits used at the deposition.

10. The Parties agree that the court reporter is an “Officer” as defined by CPLR 3113(b) and shall be permitted to administer the oath to the witness via the videoconference. The deponent will be required to provide government-issued identification satisfactory to the court reporter and this identification must be legible on the video record.

11. The Party that noticed the deposition shall be responsible for procuring a written transcript and video record of the remote deposition. The Parties shall bear their own costs in obtaining a transcript and/or video record of the deposition or any real-time transcript functionality.

12. The Party that noticed the deposition shall provide the remote deposition or relevant service provider with a copy of this Stipulation and Order at least twenty-four hours in advance of the deposition.

13. At the beginning of each deposition, consistent with CPLR 3113(b), the videographer or stenographer shall “put the witness on oath” (CPLR 3113(b)) and begin the deposition with a statement on the record, consistent with 22 NYCRR 202.15(d), that shall include: (i) the officer’s name and address; (ii) the name and address of the officer’s employer; (iii) the date, time, and place (or method) of the deposition; (iv) the party on whose behalf the deposition is being taken; and (v) the identity of all persons present.

14. At the beginning of each segment of the deposition, consistent with 22 NYCRR 202.15(d), the videographer shall begin that segment of the remote deposition by announcing the beginning and end of each segment of the remote deposition.

15. The videographer shall monitor the audio and video transmission and shall stop the record if he or she determines that any participant has been dropped from the remote deposition or is otherwise incapable of participating by reason of technical problems. The monitor, videographer and/or court reporter shall stop the record as soon as he or she becomes aware that a participant has been dropped from the remote deposition or cannot participate by reason of technical problems.

16. The defending attorney shall make objections and interpose instructions not to answer in substantially the same manner as he or she would at an in-person deposition. If the defending attorney is unable to make objections and interpose instructions not to answer by reason of technical difficulties, such a failure to object or to instruct shall not be construed as waiver and the defending attorney shall have an opportunity to object or to instruct as soon as the technical problem has been remedied. Objections and instructions not to answer shall be regarded as timely if made as soon as practicable.

17. The Parties agree to work collaboratively and in good faith with the court reporting agency to assess each deponent's technological abilities and to troubleshoot any issues at least 48 hours in advance of the deposition so any adjustments can be made. Counsel and deponents may test remote deposition software before any remote deposition. The Parties also agree to work collaboratively to address and troubleshoot technological issues that arise during a deposition and make such provisions as are reasonable under the circumstances to address such issues. This provision shall not be interpreted to compel any Party 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. Any period on the record during which a deponent or

questioner could not hear or understand the questions or answers due to technical difficulties shall not count toward time limitation under CPLR 3113(b).

18. Counsel shall use best efforts to ensure that they have sufficient technology to participate in a videotaped deposition (e.g. a webcam and computer or telephone audio and sufficient internet bandwidth to sustain the remote deposition). Counsel for the deponent shall likewise use best efforts to ensure that the deponent has such sufficient technology. In the case of non-party witnesses, counsel noticing the deposition shall supply any necessary technology that the deponent does not have.

19. The Parties agree that this Stipulation and Order applies to remote depositions of non-parties under CPLR 3101 and shall work in a collaborative manner in attempting to schedule remote depositions of non-parties. The Party noticing any non-party deposition shall provide this Stipulation and Order to counsel for any non-party under CPLR 3101 a reasonable time before the date of the deposition.

20. The Parties agree that any of the following methods for administering exhibits may be employed during a remote deposition, or a combination of one or more methods:

- (i) Counsel noticing the deposition may choose to mail printed copies of documents that may be used during the deposition to the deponent, the deponent's counsel, counsel for other parties that will appear on the record, and the court reporter. In that event, noticing counsel shall so inform the recipients prior to mailing the documents and shall provide tracking information for the package. Such documents shall be delivered by noon (local-time) the day before the deposition. Recipients shall confirm receipt of the package by electronic mail to Counsel noticing the

deposition. If printed copies are mailed, every recipient of a mailed package shall keep the package sealed until the deposition begins and shall only unseal the package on the record, on video, and during the deposition when directed to do so by the counsel taking the deposition. Recipients shall proceed to open the documents and review the documents only upon the instruction of the noticing attorney. This same procedure shall apply to any physical copies of documents any other counsel intends to use for examining the witness.

- (ii) Counsel noticing the deposition may share exhibits digitally, such as by emailing a compressed zip folder or sharing a link. The exhibits shall be shared to the deponent, the deponent's counsel, the other Party's counsel, and the court reporter, and any other attorneys who have appeared on the record at the deposition. Every recipient of a digital exhibit shall not open the digital exhibit until directed to do so by the counsel taking the deposition. If sending documents digitally, counsel will be mindful of file size limitations, which presumptively should be less than __ MB. Such file transfers shall be password-protected.
- (iii) If the software for the videoconference supports uploading and sharing digital files in real time (e.g., such as the Chat feature on Zoom), then such function may be equivalently used to distribute exhibits to the deponent and participants in real time. Counsel appearing on the record at the deposition and the court reporter shall confirm receipt of the documents to Counsel noticing the deposition. The method of transferring the

documents shall be password-protected, and counsel taking the deposition shall supply the password immediately prior to the commencement of the deposition.

- (iii) Regardless which method of document-sharing is used, the witness and the defending counsel shall have the right to private copies of the exhibits that allow the witness and defending counsel to independently and fully navigate the exhibit while the deposition is on the record.

Dated:

SO ORDERED:

[_____, J.]

Justice of the Supreme Court of the State of New York

Stipulated to:

[ATTORNEY SIGNATURE BLOCKS]