



WILLIAM P. DENI, JR.
Director

Gibbons P.C.
One Gateway Center
Newark, New Jersey 07102-5310
Direct: (973) 596-4853 Fax: (973) 639-8373
wdeni@gibbonslaw.com

May 19, 2020

VIA ECF

Hon. Colleen McMahon, U.S.D.J.
United States District Court
Southern District of New York
Daniel Patrick Moynihan U.S. Courthouse
500 Pearl Street
New York, New York 10007-1312

Re: Ferring Pharm. Inc., et al. v. Serenity Pharm. LLC, et al.
Case No. 17-cv-9922 (CM) (SDA)

Dear Chief Judge McMahon:

This firm, along with Womble Bond Dickinson (US) LLP, represents the Ferring Plaintiffs (“Ferring”) in the above-referenced matter. We write further to the Court’s invitation in its May 14, 2020 notice to counsel to provide our thoughts regarding the upcoming trial and remote witness testimony.

As an initial matter, Ferring is prepared to proceed with trial on July 6, 2020, even if not all witnesses can appear in person.

Per the Pretrial Order, Ferring may call the follow witnesses in person at trial:

- Andrew W. Carter
- Seymour Fein (by subpoena)
- Kristian V. Juul (resides in Europe)
- Jens Peter Norgaard (resides in Europe)
- Leo Polz (resides in Europe)
- Edwin Spaans (resides in Europe)
- Joseph Verbalis, and
- Peter Vis (resides in Europe).

Counterclaimants may call the following witnesses in person at trial:

- Seymour Fein
- Michael Mayersohn
- Brian Murray, and
- Christopher Velturo.

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Ferring's position is that those witnesses who are able to appear in person should do so. Ferring is prepared to make its U.S. witnesses—Mr. Carter and Dr. Verbalis—available in person for trial. To the extent possible, Ferring intends to bring its non-US witnesses to trial (all of the witnesses have indicated that they are available), subject to any travel or quarantine restrictions. Ferring would also request that Counterclaimants make their witnesses—all of whom reside in the U.S.—available to testify in person. Ferring notes that Dr. Fein is a key witness for this case and he is located in New Canaan, Connecticut, such that it should be possible for him to attend with minimal risk.

With respect to the possibility of remote testimony, Ferring has been in contact with representatives from TrialGraphix. TrialGraphix is now offering a product called TRIALanywhere that has been in several arbitrations and a *Markman* hearing in front of Judge Gilstrap in the Eastern District of Texas in April. A brief summary of these remote presentations is attached. Further, our understanding is that TrialGraphix also have several upcoming remote trials and *Markman* hearings occurring in the coming months. TrialGraphix also has experience with the Southern District of New York (well over 100 matters in the last five years) and has handled several presentations in front of Your Honor, including *Veleron Holding, B.V. v. Morgan Stanley, Genovese v. Garal Realty Co.*, and *Augme Technologies v. Tacoda, LLC and AOL, Inc.*

TrialGraphix utilizes a secure Zoom platform which allows for virtual breakout rooms, side bars, multiple participants, and other discussions that would normally occur during the course of a trial. Our understanding from TrialGraphix is that the remote conferencing capabilities through Zoom allow them to secure the audio and video, and to also control which individuals appear on the screen at any given time. The platform also allows the “hot seat” person to share her screen during the video conference, such that the participants would be able to see, at a minimum, the questioning attorney, the witness, and any demonstratives / exhibits in real time. Our understanding is that TrialGraphix can also display the objecting attorney and the Court, should the Court so desire. We understand that TrialGraphix can mute the audio and video for participants (for example, other experts who are watching the testimony or members in the gallery).¹

In order to facilitate viewing the video conference and exhibits during the trial, Ferring also proposes that the parties install at least a six-foot screen and projector in the Courtroom. Ferring also understands that, to the extent that certain witnesses do not have the necessary equipment to participate by video conference, TrialGraphix can coordinate shipping and delivery of equipment to those witnesses for use during the trial and may also be able to provide certain locations with verified internet speeds that would allow for cross-examination without significant lag time in the video.

¹ To be clear, Ferring does not intend to seek to seal the courtroom for trial.

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With respect to the conduct of the trial, our understanding is that there are no objections to any of the exhibits on the parties' respective exhibit lists.² Accordingly, Ferring would request that the Court pre-admit all disclosed exhibits referenced in the Pretrial Order. Under paragraphs 15 and 16 of the Pretrial Order, the only exhibits not included in these pre-admitted exhibits would be those exhibits used on cross-examination or, per Ferring's position, used during a party's examination of an adverse witness. For witnesses testifying in person but remotely, Ferring proposes that those witnesses be shipped binders of their direct testimony, including all exhibits referenced therein prior to each witness taking the stand. For cross-examination, Ferring proposes that each remote witness be shipped sealed binders containing all potential cross-examination exhibits that are not referenced in the witness's direct testimony, as well as any demonstratives, prior to the witness testifying (and shipped so as to arrive at least 48 hours prior to the date on which the witness will testify). The witness would then break the seal on the binders on camera when the cross-examination is set to begin.

Finally, given the time differences for some of the witnesses, to the extent possible, Ferring would request that the Court allow witnesses testifying from Europe remotely to testify earlier in the trial day (for example, from the start of trial through the Court's lunch recess) in order to account for the time difference.

Ferring will be prepared to discuss the above in more detail with the Court during the May 20, 2020 teleconference, with Mary Bourke from Womble Bond Dickinson being designated to speak for Ferring. Should the Court wish, Ferring can also coordinate a call with a technical representative from TrialGraphix and the Court or one of the Court's information technology specialists to answer any questions about how the remote system would operate.

Respectfully submitted,

s/ William P. Deni, Jr.
William P. Deni, Jr.

Enclosure

cc: All counsel of record (via ECF)

² Under paragraph 26 of the Pretrial Order, Counterclaimants objected to certain exhibits if the Court granted Counterclaimants' Rule 12(c) motion (ECF No. 582). Since that motion was denied, as further confirmed by the Court's recent order denying Counterclaimants' motion for reconsideration, Ferring understands Counterclaimants' objections are moot.

Recent Remote Presentation Venues

- **Second Half of NYIAC Arbitration (March)**
 - 1 week of presentations
 - ~25 participants
 - 3 countries
- **Closing Argument for ongoing Consolidated Arbitration (March)**
 - 9 ½ hours of presentation (+ 3 test days and a run-through day)
 - 42 participants
 - 8 time zones
- **Markman Hearing - Judge Gilstrap, Eastern District of Texas (April)**
 - 3 ½ hours of presentation
 - ~12 participants
 - East and west coast attorneys
- **Mock Arbitration - 2 Days (April)**
 - 10+ hours of presentation
 - 7+ hours of mediation and deliberation
 - 70 participants, 8 breakout rooms, 4 mediators, 3 arbitrators



TRIALanywhere