



Ganfer
Shore
Leeds &
Zauderer LLP

360 Lexington Avenue
New York, New York 10017
Direct Dial: 212.412.9562
Tel: 212.922.9250, Ext. 232
Fax: 212.922.9335
MZauderer@ganfershore.com

December 17, 2020

Via NYSCEF

Hon. O. Peter Sherwood, J.S.C.
Supreme Court of the State of New York
County of New York
60 Centre Street, Room 252
New York, New York 10007

Re: Ambac Assurance Corp. et ano. v. Countrywide Home Loans, Inc., et al.,
Index No. 651612/2010

Dear Justice Sherwood:

I am writing to address the two issues the Court raised during our pretrial conference on December 15, 2020.

First, we respectfully submit that Ambac has a right to an in-person trial. This is supported by the CPLR, as well as the recently proposed Commercial Division rule requiring consent of all parties for a remote trial.

Second, the health issues posed by a so-called “remote” trial in a case of this size and complexity early next year are insurmountable given the public health conditions that exist in New York City and are expected to continue or intensify over the next 60 days. Even a “remote” trial will involve substantial personal interaction. Indeed, Ambac submits that it would be dangerous to the health of many individuals to hold *this* trial under *these* extraordinary circumstances. Contrary to the picture painted by Countrywide this week, this trial—which will require four weeks to complete—will involve a cast of hundreds of trial participants (dozens of attorneys, paralegals, consultants, and client representatives, and some 40 witnesses), including a number of individuals who are in the high-risk category with regard to COVID-19 (and others who have family members who are in that category). The case concerns 17 transactions containing more than 375,000 loans and will involve thousands of marked exhibits.

While the trial might be “remote” for Your Honor, it would not be nearly as remote for the many other trial participants who would need to work together for long hours in the same law firm conference rooms in the weeks leading up to and during the trial. Indeed, many witnesses would balk at appearing under these circumstances, and counsel will face the ethical dilemma of zealously representing their client while placing their health at risk. A case of this magnitude and with this many participants, conducting a trial during what is forecast to be the peak of a global pandemic, will present a serious health danger to the trial participants and to their families and communities. We respectfully ask that the

Court not schedule an imminent remote trial and instead grant a continuance until, at a minimum, public health conditions permit a safe in-person trial.¹

Ambac Has A Right To An In-Person Trial

Pursuant to CPLR 4013, it is only “upon stipulation of the parties” that a trial can be conducted other than in a courthouse.² The practice commentaries to CPLR 4013, written by Justice Dillon of the Second Department, confirm that a trial conducted by videoconference requires the parties’ agreement since such trials “are, by nature and definition, wholly or partially outside of the courthouse[.]”³ Under CPLR 4013, Ambac’s decision not to stipulate to a remote trial forecloses the possibility of a trial by videoconference.

In addition, as the Court is aware, the Commercial Division has proposed a rule requiring consent of all parties for remote trials, which, if approved, will take effect in the near future. The Commercial Division Advisory Council, made up of a broad cross section of the commercial litigation community (and of which Your Honor and I are members), has issued a supporting memorandum encouraging parties to consider virtual trials, but only with the consent of the parties. Attached as Exhibit 1, this new proposed rule, to be codified at 22 NYCRR § 202.70(g), would permit virtual evidentiary hearings and non-jury trials, “at the discretion of the judges and upon consent of the parties.” The proposed rule is crystal clear: when certain video technology is used, “the court may, *with the consent of the parties*, conduct an evidentiary hearing or a non-jury trial utilizing video technology.”⁴ The OCA memorandum accompanying the proposed rule explains that “[d]iscretion is afforded to judges and litigants to decline to use videoconferencing for *any reason*.”⁵ Thus, even in a rule drafted to encourage the use of remote trials, the authors did not deprive litigants of their right to withhold consent to a remote trial, consistent with the party stipulation requirement in CPLR 4013.

We recognize that there is a role for remote proceedings in the current public health environment, as Chief Judge DiFiore has explained in her public statements this year.⁶ Remote trials might well be

¹ As we advised the Court on December 15, Ambac also seeks a stay pending its appeal of the Court’s decision to dismiss Ambac’s fraud claim.

² See CPLR 4013 (“Upon stipulation of the parties, the judge who is to preside at the trial of an issue may direct trial in whole or in part at a specified place other than the courthouse.”).

³ Dillon, Practice Commentary, McKinney’s Cons. Laws of New York, 2020 Electronic Update, Trial Elsewhere Than at Courthouse, CPLR 4013.

⁴ Ex. 1 (Mem. in Supp. of Proposal for New Commercial Division Rule Permitting Virtual Evidentiary Hearings and Non-Jury Trials on Consent (“Mem. in Supp.”), Commercial Division Advisory Council, at 5 (June 2, 2020) (emphasis added)).

⁵ Ex. 1 (Mem. Request for Public Comment on Proposed New Commercial Division Rule to Allow Virtual Evidentiary Hearings and Non-Jury Trials on Consent, N.Y.S. Unified Court System (“Request for Comment”), at 1 (October 22, 2020)).

⁶ Message from Chief Judge Janet DiFiore (Aug. 17, 2020), <https://www.nycourts.gov/whatsnew/pdf/August17-CJ-Message.pdf>.

welcomed by the parties and the court in certain other types of cases, as an expeditious way to resolve a matter, particularly one with relatively few witnesses and lawyers, or evidentiary hearings that might be largely decided on written submissions. Chief Judge DiFiore described proceedings that are quite different from this case, referring to “virtual summary bench trials in civil matters in Supreme Court, Bronx County. . . streamlined trials, in which the parties consent to relaxed rules of evidence and shorter time frames for presenting their cases, . . . often completed in a single day.”⁷ However, when Chief Judge DiFiore described remote trial efforts, she did not indicate that these were being conducted other than on consent.

Even if the Court concluded, despite the authority cited above, that it has the discretion to require the parties to submit to a remote trial, we submit that it would be inappropriate and dangerous to the participants’ health to do so here. In the parties’ prior submissions, they together disclosed that there would be between 35 and 40 witnesses called to present live testimony, based on which the Court scheduled a five-week trial. Although the absence of the fraud claim might reduce the length of the trial to some extent from the originally calendared five weeks, it is certainly not the two weeks that Ms. Mainigi suggested. Even after the dismissal of the fraud claim, the parties have exchanged exhibit lists that identify literally thousands of documents. Each party in this matter has engaged multiple law firms for trial, with teams involving dozens of individuals who will have to work closely together during and in preparation for trial. What might be feasible in a short trial in Civil Court is not feasible in a complicated, multi-week trial in the Commercial Division. Indeed, we are not aware of any instance in the Commercial Division—or any remotely analogous case—where a court has conducted a remote proceeding over a party’s objection.⁸

As discussed at the December 15 conference, Countrywide’s lead counsel, Enu Mainigi, Esq., made a persuasive (and ultimately successful) case against conducting lengthy remote trials in *City of Huntington v. Amerisourcebergen Drug Corp.*, 3:17-cv-01362 (S.D. W.Va. 2020). As Ms. Mainigi explained, a remote trial “will not result in a fair trial,” as the parties “are entitled to present a full and complete defense *in person*, not a stilted, stymied defense by videoconference.”⁹ Zoom offers “no substitute for trying a case in the courtroom, in the presence of the Court and of witnesses—especially where the Plaintiffs seek potentially billions of dollars.”¹⁰ In this action, the parties have conducted depositions, motion argument, and pretrial conferences using videoconference technology because it was “better than nothing, and a way to keep the case from grinding to a halt during the pandemic.”¹¹

⁷ *Id.*

⁸ The few cases in New York we have located where a remote proceeding was conducted without consent have involved discrete and often exigent issues not present here. *See, e.g., A.S. v. N.S.*, 68 Misc. 3d 767, 768-69 (N.Y. Sup. Ct. 2020) (requiring a remote proceeding over objection from counsel because “[t]his is an extremely protracted custody litigation involving three young children who will be negatively affected by further postponement”).

⁹ Ex. 2 (Reply Br., *City of Huntington v. Amerisourcebergen Drug Corp.*, 3:17-cv-01362, at 1 (S.D. W.Va. 2020)).

¹⁰ *Id.* at 3.

¹¹ *Id.* at 4.

But as Ms. Mainigi explained, “‘better than nothing’ is not the standard for due process in a trial this momentous.”¹² What is required by due process in West Virginia is also required in New York.

Weighed against the many ways in which a remote trial would deprive Ambac of its right to a fair trial is the fact that a pause of just several months—until the population is broadly vaccinated against COVID-19—would make a safe, in-person trial possible. To quote Ms. Mainigi again, “efficacious vaccines already have been developed and are on their way to approval and widespread administration.”¹³ While everyone is eager to see this case tried and resolved, there is no urgency that requires this case to be tried in February and it is unfair to force Ambac to present its case in an inadequate remote trial when a public health solution that would allow an in-person trial is on the horizon.

As discussed at the conference, Ambac also seeks to adjourn the current trial date in order that it may first appeal the recent dismissal of its fraud claim. If the fraud claim is reinstated following a remote trial on the contract claim, the Commercial Division will face a second trial in this matter just on liability, during a time in which judicial resources are already constrained. This Court has twice delayed trial in order to allow the Countrywide Defendants to vindicate their procedural rights. First, in January 2019, shortly after the case was reassigned to Your Honor, the Court determined not to conduct or even to schedule a trial in this matter until Defendants could appeal to the First Department from Justice Bransten’s adverse rulings (including an adverse-to-Countrywide ruling on its prior motion to dismiss the fraud claim). Then, in the aftermath of the First Department’s decisions that largely affirmed Justice Bransten’s rulings, the Court set a trial date that allowed Defendants to seek further review of these decisions in the New York Court of Appeals, and suggested an openness to delay the trial if the leave petition was granted. Only after Defendants had exhausted all of their procedural and appellate rights did the Court determine to hold them to a trial date.

Ambac asks only that it be given the same opportunity to seek appellate review that this Court twice afforded to Countrywide when it took appeals on the very same issue that Ambac now seeks to appeal, and while an in-person trial is not feasible. We submit that the Court should grant Ambac’s application for a continuance.

Even If Permitted, The Court Should Not Compel Ambac To Submit To A Remote Trial Due to The Serious Health Risks

The same real health and safety concerns that the Court recognizes make this trial unsafe to hold in a courtroom also make this trial unsafe to hold outside of a courtroom. A remote trial in a case such as this will create for the many lawyers, support professionals, and witnesses a very real risk of contracting COVID-19—and of spreading it to their families and neighboring communities. The idea that with so many participants—a number of them in the high-risk category—not even one would contract COVID-19, with potentially devastating consequences, is difficult to fathom, and truly not a risk worth taking for anyone involved. Scheduling a remote trial will force Ambac’s lawyers and staff to choose between their health (and their families’ health) and their professional obligations. The same would be true for

¹² *Id.*

¹³ *Id.* at 7.

Ambac employees. We ask that the Court not put Ambac's lawyers and other professional staff (and Countrywide's lawyers and staff) on the horns of this dilemma, and instead delay trial until public health conditions have improved.

A remote trial presents significant risks for the participants because a "remote" trial in a complex case like this is not "remote" for most of those involved. The lawyers in a remote trial necessarily work in the same location during the trial and often during the weeks leading up to trial. They are not "working from home" but are in the office, together from early in the morning until late at night. This is the standard practice even for shorter, less complicated trials.

This trial would not be a small gathering of lawyers and staff. As set out in the parties' letter of September 21, 2020, Ambac anticipated that for an in-person trial, it would need to have 8 attorneys and 4 non-attorney staff in the courtroom at any given time. With a remote trial, these people will need to be in one or more nearby conference rooms, each of which will be far smaller than the ceremonial courtroom. Furthermore, as the Court is aware, the attorneys who appear at trial are the tip of the iceberg of their respective legal teams. For every partner who takes a witness, there are multiple associates and paralegals who assist.

Other factors further increase the risk to trial participants:

- Lawyers require support from technical and legal support staff in order to organize exhibits and present demonstrative graphics. This work cannot be conducted effectively from multiple locations. It needs to be done from a central location.
- Most attorneys will need to use public transportation to travel to the office each day, further exposing them to the risk of COVID-19 transmission. For Ambac, certain of its lawyers do not live in New York City or its environs, creating further risks and requiring quarantines associated with interstate transportation.
- Many witnesses lack the technology to prepare for testimony in a remote fashion. In these circumstances, the witnesses or lawyers will need to travel in order to undertake the necessary preparatory work. These witnesses may also need to travel for their trial testimony. At minimum, those witnesses may need to have technical support staff come into their homes before or even during their testimony in order to ensure reliable remote testimony.

While counsel would of course take every effort to protect the health and safety of attorneys, staff, and witnesses, we know COVID-19 is highly contagious and has spread in many places where all involved acted responsibly and took every feasible safety precaution. The past year has taught that *any* event in which dozens of individuals interact with one another creates the risk of becoming a super-spreader event, affecting many beyond the event itself. This risk is projected to be greater in the coming months than at any time in the pandemic—no lower today, and unlikely to be lower in February, than it has been all year. Many trial participants for Ambac are over 65 years' old or are otherwise at high risk of developing a severe response to COVID-19. Other Ambac attorneys and staff who may themselves not

be in the high-risk category live in households with family members who are at high risk, either due to age or medical history (including spouses with compromised immune systems due to recent cancer treatment). Even with the trial participants taking all reasonable safety precautions, this exercise cannot be conducted in a manner that guarantees the safety of the attorneys, staff and witnesses who are expected to participate—not to mention members of their broader communities.

All of this comes at a moment when New Yorkers are being told that the COVID-19 pandemic is spreading dramatically.¹⁴ Worse still, our elected leaders have told us that they expect we will shortly return to an “essential work only” lockdown similar to what we experienced in March and April 2020.¹⁵ It seems likely that such a lockdown may be ordered in the run-up to trial or even during trial, seriously aggravating the lawyers’ difficulties in trying the case. It is also possible, as we have seen in other trials, that attorneys or witnesses will develop COVID-19 during the trial, thereby forcing trial participants to enter quarantine and causing lengthy interruptions.

Countrywide’s cavalier assertion that this trial could be conducted in two weeks is not realistic. Most of the nearly 40 witnesses who would have been called in a jury trial will also be called in a bench trial of the contract claims. Moreover, even after the fraud claim was dismissed, the parties exchanged exhibit lists that each contained several thousand proposed exhibits. Ambac expects that a four-week trial will be necessary to allow the parties to present all of their evidence.¹⁶

By way of example, in July 2019, another RMBS matter, the *MBIA v. Credit Suisse* lawsuit, was tried before Justice Schecter. She released her post-trial decision on November 30, 2020, roughly 16 months after the end of the trial, and roughly 12 months after post-trial briefing. The *MBIA* trial took two weeks of court time for an in-person trial that concerned only a single transaction; the trial in this matter will concern *seventeen* transactions. Justice Schecter personally reviewed all 311 allegedly breaching random sample loans in the course of preparing her 77-page decision. In this matter, Ambac’s reunderwriting expert has identified more than 5,000 allegedly breaching random sample loans. This is not a two-week trial.

The notion advanced by Countrywide that this is a simple contract claim that can be tried from our living rooms should be rejected. The health and logistical challenges for a trial of this complexity are

¹⁴ See Jonathan Wolfe & Adam Pasick, “Dr. Fauci Sees ‘Terribly Painful Months’ Ahead,” N.Y. Times (Nov. 20, 2020) (quoting Dr. Fauci as predicting “that December, January and early February are going to be terribly painful months”).

¹⁵ See Michael Gartland, “NYC COVID shutdown expected after Christmas: de Blasio,” N.Y. Daily News (Dec. 15, 2020) (quoting Mayor de Blasio as stating “[w]e’re going to need to do some kind of shut down in the weeks ahead . . . I think it’s very much going to resemble what we saw in the spring — essential work only”); J. David Goodman and Jesse McKinley, “Cuomo Tries to Jolt Public by Warning of Overwhelmed Hospitals,” N.Y. Times (Dec. 12, 2020) (quoting Governor Cuomo saying that “you could be looking at the shutdown of New York City within a month.”).

¹⁶ In the past, Ms. Mainigi has said that the trial in this matter would take seven weeks to conduct, and the Court allocated five weeks for a hybrid contract-fraud trial. Even a reduction to four weeks, which we think is manageable given the evidence disclosures made by the parties pursuant to the pretrial schedule, still results in a trial that requires the participation of dozens of lawyers, support staff, technical advisors and witnesses.

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extreme and unlike any other bench trial in the Commercial Division of which we are aware. We respectfully ask the Court to adjourn the trial date until it can be tried in-person, and in a safe and responsible manner.

Respectfully,

Mark C. Zauderer

Mark C. Zauderer

cc: All Counsel of Record (via NYSCEF)

Exhibit 1



**NEW YORK STATE
Unified Court System**

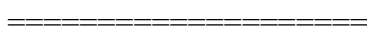
OFFICE OF COURT ADMINISTRATION

LAWRENCE K. MARKS
CHIEF ADMINISTRATIVE JUDGE

EILEEN D. MILLETT
COUNSEL

MEMORANDUM

To: All Interested Persons
From: Eileen D. Millett
Re: Request for Public Comment on a Proposed New Commercial Division Rule to Allow Virtual Evidentiary Hearings and Non-Jury Trials on Consent
Date: October 22, 2020



The Administrative Board of the Courts is seeking public comment on a proposal, proffered by the Commercial Division Advisory Council (“CDAC”), to create a new Commercial Division rule (22 NYCRR § 202.70(g)) to permit virtual evidentiary hearings and non-jury trials, at the discretion of the judges and upon consent of the parties (Exhibit A). The CDAC’s proposed rule is not meant to be a temporary or interim measure, but rather is intended to provide a permanent option for counsel, clients, and judges in the Commercial Division (Ex. A, p. 2).

The primary reason the CDAC sees the need for such a rule is because allowing evidentiary hearings and non-jury trials to proceed virtually will reduce travel time and expense for clients, counsel, and witnesses. The rule they have drafted will allow the court, with the consent of parties, to conduct an evidentiary hearing or a non-jury trial using video technology. The video technology must allow a party and a party’s counsel to communicate confidentially, documents must be able to be transmitted to remote participants, and interpretation for those of limited English proficiency must be available. The video technology also must allow for a verbatim record of the trial and public access to remote proceedings (Ex. A, p. 5).

The CDAC submits that videoconferencing provides an “efficient, cost-effective, and satisfactory alternative” to many in-person court proceedings (Ex. A, p. 3). Discretion is afforded to judges and litigants to decline to use videoconferencing for such proceedings for any reason. Public access to proceedings may also be provided via livestream. The CDAC emphasizes that many jurisdictions around the country are increasingly relying on videoconferencing technology for court proceedings and that several courts in New York have implemented videoconferencing technology and are beginning to use it more regularly (Ex. A, p. 15). The CDAC’s memo estimates the cost of implementing videoconferencing technology and also discusses security

issues and procedural requirements that would have to be addressed if a remote hearing or bench trial were held.

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Persons wishing to comment on the proposal should e-mail their submissions to rulecomments@nycourts.gov or write to: Eileen D. Millett, Esq., Counsel, Office of Court Administration, 25 Beaver Street, 11th Fl., New York, New York, 10004. Comments must be received no later than December 18, 2020.

All public comments will be treated as available for disclosure under the Freedom of Information Law and are subject to publication by the Office of Court Administration. Issuance of a proposal for public comment should not be interpreted as an endorsement of that proposal by the Unified Court System or the Office of Court Administration.

EXHIBIT A

MEMORANDUM

TO: The Administrative Board of the Courts

FROM: Commercial Division Advisory Council

DATE: June 2, 2020

RE: Proposal For New Commercial Division Rule Permitting Virtual Evidentiary Hearings and Non-Jury Trials on Consent

Introduction

During the first few months of 2020, the New York State courts have made extraordinary progress in enabling virtual court operations. As we all know, these virtual court operations have been mandated by the current pandemic: they have resulted from necessity, not from choice. As a result of the pandemic, an in person trial has not been a viable option. The only possible option would be a trial which utilizes video technology. Moreover, even if the pandemic “passes,” there is no assurance that a future event could not render in person trials and hearings impossible or impractical. Nevertheless, these virtual operations have provided insights into opportunities and efficiencies which technology can provide for future court operations after the pandemic no longer requires remote participation in court proceedings.

As of mid-May 2020, virtual operations have been used in the New York courts primarily for court conferences. In June 2019, the Commercial Division Advisory Council proposed an amendment to Commercial Division Rule 1 to facilitate participation of counsel in court conferences and oral arguments of motions from remote locations through use of videoconferencing or other technologies. That proposal was generally well-received. In addition, the Appellate Divisions in New York have recently begun to hear oral arguments of appeals by counsel in remote locations using technology.

Based on the advances in technology and positive experiences of courts throughout New York State, this country and many parts of the world, the next logical step is virtual evidentiary hearings and non-jury trials, on consent. Accordingly, the Commercial Division Advisory Council now proposes a new Commercial Division Rule to permit virtual evidentiary hearings and non-jury trials, at the discretion of the judges and on consent of the parties, in the Commercial Division. In proposing this new Rule, the Advisory Council seeks to build on lessons learned in New York, other states, the federal court system, and other countries. The proposal is not intended as a temporary or interim measure to deal only with current constraints on court operations, attorneys, witnesses and parties caused by the pandemic. Instead, this proposal is designed to increase the efficiency and productivity of future court operations and also thereby benefit the public in general and the bar.

The Need for This New Rule

Counsel, their clients, and witnesses in cases pending before the Commercial Division often are required to travel substantial distances to participate in court proceedings. Sometimes those distances are thousands of miles. Such travel is often inefficient, wasteful and expensive. Business clients are often sensitive to the cost issues presented by travel: they sometimes refuse to pay their lawyers for their travel time or at least object to and complain about the cost. Many business clients are also acutely aware that technology enables them to reduce travel time and expense in their own businesses, as evidenced by the rapid and substantial increase in the use of videoconferencing.

Evidentiary hearings and non-jury trials often require counsel, clients, and witnesses to engage in repeated expensive and time-consuming travel because unforeseen pressing other court matters may require the court to adjourn the proceeding for days or weeks on multiple occasions. Such adjournments and continuances are also often required by the unavailability of witnesses or

because of counsel's engagement in other matters. Each time other intervening litigation emergencies require that a proceeding be adjourned, clients may incur substantial additional time and travel charges.

Fortunately, as it has in other areas, technology provides an additional possible solution to these problems. Videoconferencing from remote locations will, in many cases, provide an efficient, cost-effective, and satisfactory alternative to many court proceedings. As discussed in this memorandum, the technology involved has been widely used in many different contexts for many years. The technology is remarkably inexpensive and many lawyers, witnesses and parties already use it for various purposes.

Accordingly, the Commercial Division Advisory Council now proposes a new Commercial Division Rule which will permit virtual evidentiary hearings and non-jury trials on consent. The proposed Rule does not require the court to permit any court proceedings to be conducted remotely and the court may exercise its discretion to decline to permit such participation. In addition, the proposed new Rule enables any litigant to decline to participate from remote locations.

This new Commercial Division Rule will not harm any constituencies or threaten the rights of any participant in court proceedings. What the new Rule will do is provide an optional process that could obviate huge amounts of wasted time and money devoted to unnecessary travel.

The Commercial Division Advisory Council believes that this new Rule will encourage parties to make voluntary use of an easy-to-use and helpful technological tool; will confer appropriate discretion on individual Justices to permit litigants to participate in court proceedings from remote locations where it would further the interests of justice, but not otherwise; and will

avoid any burden on the diminishing population of lawyers and others who lack the technical resources to participate in court proceedings from remote locations. An additional benefit of this new Rule will be to facilitate participation of lawyers, witnesses and parties whom have disabilities which prevent or hamper their attendance in court.

Implementing this proposal at this time will advance the goals of Chief Judge DiFiore's Excellence Initiative, which has already resulted in numerous "measures to improve promptness and productivity, eliminate case backlogs and delays, and provide better service to the public."¹ It will also be consistent with the Commercial Division's role as a laboratory for innovation in the court system; after new rules and procedures have been introduced in the Commercial Division, other parts of the court system can evaluate whether these innovations might be valuable to them as well. This proposal embraces the opportunities technology provides to help the public, the bar and the judiciary, by improving the efficiency and productivity of the New York State courts.

Finally, many of the law firms that regularly appear in the Commercial Division and their clients already use videoconferencing in their everyday business operations, making the Commercial Division the logical place to expand videoconferencing technology to the New York State courts. Thus, this amendment would help achieve the Excellence Initiative's "goal of administering a high-functioning court system that provides all litigants with just and timely dispositions and first-rate judicial service."²

¹ STATE OF N.Y. UNIFIED COURT SYSTEM, THE STATE OF OUR JUDICIARY 2019, EXCELLENCE INITIATIVE: YEAR THREE i (Feb. 2019), https://ww2.nycourts.gov/sites/default/files/document/files/2019-02/19_SOJ-Report.pdf.

² *Id.*

Proposed New Commercial Division Rule

The Commercial Division Advisory Council proposes promulgating the following new Commercial Division Rule:

- (1) If the requirements of paragraph (3) are met, the court may, with the consent of the parties, conduct an evidentiary hearing or a non-jury trial utilizing video technology.
- (2) If the requirements of paragraph (3) are met, the court may, with the consent of the parties, permit a witness or party to participate in an evidentiary hearing or a non-jury trial utilizing video technology.
- (3) The video technology used must enable:
 - (i) a party and the party's counsel to communicate confidentially;
 - (ii) documents, photos and other things that are delivered to the court to be delivered to the remote participants;
 - (iii) interpretation for a person of limited English proficiency;
 - (iv) a verbatim record of the trial; and
 - (v) public access to remote proceedings.

Overview of Videoconferencing Technology

Video calling was introduced at the World's Fair in 1964 by AT&T. In 1992, McIntosh (Apple) released its personal videoconferencing software. At the present time, there are dozens of videoconferencing providers. Some of the most well-known products include FaceTime, WebEx, GoToMeeting, Zoom, and Skype (formerly Lync).³ Videoconferencing is becoming ubiquitous in personal and professional life whether it is being used on a mobile phone, on a computer, or in a conference room. Even a standard business desktop phone can have built-in videoconferencing. For example, the Cisco 8865 desk phone provides videoconferencing capabilities.

³ For more information about videoconferencing providers, see, *Video Conferencing Software*, G2, <https://www.g2.com/categories/video-conferencing> (last visited May 18, 2020).

Information technology consulting firm Gartner publishes a series of market research reports entitled *Magic Quadrant* that rely on qualitative data analysis methods to demonstrate market trends and identify market participants. Gartner's *Magic Quadrant* lists Zoom, Cisco WebEx, and Microsoft Skype as the three leading videoconferencing options. As Gartner requires a login, we have cited Cisco's re-posting of the videoconferencing *Magic Quadrant*.⁴ Confirming the ubiquity of videoconferencing, Cisco notes in its re-post that "Cisco WebEx hosts more than 6 billion meeting minutes every month."

Use of Virtual and Remote Court Proceedings by Other Courts

Videoconferencing technology has been used by courts throughout the United States, beginning in the 1990s.⁵ While initially limited to certain types of proceedings, the use of such remote technology has naturally proliferated over the years. The current constraints on in-person proceedings as a result of the coronavirus pandemic have expedited the adoption of remote technologies in courts worldwide.

What may have been the first fully remote trial took place in London's Commercial Court over five days in early April of this year, having been moved online as a result of travel restrictions imposed due to the coronavirus.⁶ Described by presiding Mr. Justice

⁴ Webex Team, *Cisco Named a Leader in Gartner Magic Quadrant for Meeting Solutions 2018*, WEBEX (Oct. 16, 2018), <https://blog.webex.com/2018/10/cisco-named-a-leader-in-gartner-magic-quadrant-for-meeting-solutions-2018/> (last visited May 18, 2020).

⁵ See MIKE L. BRIDENBACK, NAT'L ASS'N FOR PRESIDING JUDGES AND COURT EXECUTIVE OFFICERS, *STUDY OF STATE TRIAL COURTS USE OF REMOTE TECHNOLOGY* 12 (Apr. 2016), <http://napco4courtleaders.org/wp-content/uploads/2016/08/Emerging-Court-Technologies-9-27-Bridenback.pdf>.

⁶ Reed Smith LLP, *Attending a virtual trial before the London High Court: experience and practical tips*, LEXOLOGY (Apr. 6, 2020), <https://www.lexology.com/library/detail.aspx?g=13a88132-cf12-4e18-a8f3-b6d9a3aee712> (last accessed May 18, 2020).

Teare as a “most remarkable” achievement, participating lawyers state that it was a major success and predict that such remote trials are “here to stay” in a post-COVID world.⁷

Remote trials are also beginning to take place in the United States. An article in the *ABA Journal* on May 11, 2020 stated: “In April, a Florida court held a bench trial over Zoom to decide a child abduction case under the Hague Convention. Later that month, the same state held a major virtual trial on the voting rights of convicted felons, with the public listening in by phone.”⁸

An article in *Law 360* on May 11, 2020 stated: “On Wednesday [May 6, 2020], a virtual bench trial got underway in Virginia federal court. The case, in which Cisco Systems is accused of infringing a startup’s network recovery patents, started out with a technical tutorial, and the judge, attorneys and witnesses all participated remotely. Other virtual bench trials have been taking place across the country, although they have been fairly limited so far.”⁹

Although few trials have gone fully remote, the concept itself is not new. In 2001, Michigan authorized the development of a “cyber court” to hear business and commercial disputes over \$25,000, with a mandate that the court allow the use of audio, video, or Internet conferencing to resolve disputes.¹⁰ Although budgetary constraints meant that the Michigan Supreme Court never funded the cyber court, its existence was permitted by Michigan law until

⁷ *Id.*

⁸ Matt Reynolds, *Could Zoom jury trials become the norm during the coronavirus pandemic?*, ABA JOURNAL (May 11, 2020), <https://www.abajournal.com/web/article/could-zoom-jury-trials-become-a-reality-during-the-pandemic> (last visited May 18, 2020).

⁹ Aebra Coe, *Remote Courtrooms Here To Stay As Judges Tackle Backlogs*, LAW360 (May 11, 2020), <https://www.law360.com/articles/1271812/remote-courtrooms-here-to-stay-as-judges-tackle-backlogs> (last visited May 18, 2020).

¹⁰ Douglas L. Toering, *The New Michigan Business Court Legislation: Twelve Years in the Making*, AMERICAN BAR ASSOCIATION (January 31, 2013), https://www.americanbar.org/groups/business_law/publications/blt/2013/01/03_toering/ (last visited May 18, 2020).

2012, at which point the law was amended: however, the current statute maintains the state judiciary's commitment to implementing technology in business and commercial disputes.

Although occasionally mentioned as a concern, public access to remote trial proceedings is not an issue. It can be accomplished through livestreaming: a court establishes a YouTube channel or other streaming video service and posts public notice containing access instructions to the livestream. An article in the *ABA Journal* on May 11, 2020 states:

“According to the National Center for State Courts, 16 states and the territory of Puerto Rico have ordered virtual hearings in response to the novel coronavirus In Texas, the public has access to hundreds of proceedings on YouTube, where prosecutors, judges, defendants and public defenders convene on Zoom. In Cook County, Illinois, the public can watch bond hearings online.”¹¹

In 2010, the National Center for State Courts conducted a survey covering videoconferencing. When respondents were asked ten years ago to elaborate on whether videoconferencing helps or hinders the administration of justice, one respondent commented, “Video Conferencing can help tremendously with the administration of Justice, IF you have all the stakeholders wanting to make it work. Proactive judges and attorneys that find ways to use it and make it work, reap benefits for all.”¹² More recently, the National Center for State Courts has concluded: “Not only has videoconferencing proven to be effective within the courtroom,

¹¹ Reynolds, *supra* note 9.

¹² See NATIONAL CENTER FOR STATE COURTS, NCSC VIDEO CONFERENCING SURVEY (Sept. 2010), <https://www.ncsc.org/services-and-experts/areas-of-expertise/technology/ncsc-video-conferencing-survey.aspx> (last visited May 18, 2020).

but it likewise benefits attorneys and judges by saving time and cutting costs of the *entire judicial process*.”¹³

Videoconferencing can replicate the experience of talking to a real person across the table, including the nuances and body language. According to the 2010 Future Trends in State Courts Report, vendors have strengthened their understanding of the behavioral issues involved in effectively communicating with remote video technologies.¹⁴ In fact, Judge Ronald Gould of the Ninth Circuit stated, “the technology has improved to the point where it is virtually the same as being in the courtroom, and I believe that there will be a trend to increasing use.”¹⁵

Videoconferencing is also growing in demand as a result of the globalization of legal practice where controversies often cross geographic barriers.¹⁶ Attorneys from outside the local area of the court are requesting this technology to facilitate efficient participation by attorneys and reduce the demand for continuances due to travel constraints. Videoconferencing expands the boundaries of what can be achieved in the legal field.

State courts now routinely rely on remote technologies to take remote testimony, for oral arguments, and for court conferences. A 2016 study of state trial courts’ use of remote technology noted that “there are many trial courts that have experienced great success in integrating remote technologies to improve court performance without compromising established

¹³ *Video Technologies Resource Guide*, NATIONAL CENTER FOR STATE COURTS (Mar. 6, 2018), <https://www.ncsc.org/Topics/Technology/Video-Technologies/Resource-Guide.aspx> (emphasis added) (last visited May 18, 2020).

¹⁴ THOMAS M. CLARKE, NATIONAL CENTER FOR STATE COURTS, FUTURE TRENDS IN STATE COURTS 2010 – TECHNOLOGY REENGINEERING (2010).

¹⁵ Daniel Devoe & Sarita Frattaroli, *Videoconferencing in the Courtroom: Benefits, Concerns, and How to Move Forward*, SOCIAL LAW LIBRARY BOSTON 28 (2009), <http://sociallaw.com/docs/default-source/judge-william-g.-young/judging-in-the-american-legal-system/04devoe-sarita-paper.pdf?sfvrsn=6>.

¹⁶ Pamela Maclean, *Courts Urged to Accept Videoconferencing*, LAW.COM (Apr. 22, 2005) (“The growing internationalization of prosecutions -- particularly international fraud -- raises problems for the government, which can’t force foreign witnesses to come to the United States.”) (last visited May 18, 2020).

legal principles that have guided American courts for centuries.”¹⁷ Indeed, courts in many states, including California, Florida, North Carolina, and New Jersey, rely on videoconferencing. For example, Rule 12.4 of the North Carolina Business Court General Rules of Practice and Procedure provides that in a pretrial attorney conference, “[t]he conference may be an in-person conference or conducted through *remote means*.”¹⁸

Other jurisdictions have adopted similar court rules. Rule 99(a) of the Alaska Court Rules of Civil Procedure states regarding authorization for telephonic, video, or internet participation that the “court may allow one or more parties, counsel, witnesses or the judge to participate *telephonically* in any hearing or deposition for good cause and in the absence of substantial prejudice to opposing parties.”¹⁹ Likewise, the Arizona Supreme Court provides that “when the appearance of a defendant or counsel is required in any court, subject to the provisions of this rule, the appearance may be made by the use of an *interactive audiovisual system*.”²⁰ A Florida survey indicates that seven judicial circuits authorize attorneys to participate in select hearings through videoconferencing at the judge’s discretion. California and New Jersey courts also permit attorneys to appear remotely via video conferences by request in family law cases.²¹

The novel coronavirus outbreak has resulted in many states authorizing the use of remote technology in expanded proceedings. California’s Chief Justice issued a statewide order

¹⁷ See MIKE L. BRIDENBACK, NAT’L ASS’N FOR PRESIDING JUDGES AND COURT EXECUTIVE OFFICERS, STUDY OF STATE TRIAL COURTS USE OF REMOTE TECHNOLOGY 12 (Apr. 2016), <http://napco4courtleaders.org/wp-content/uploads/2016/08/Emerging-Court-Technologies-9-27-Bridenback.pdf>.

¹⁸ N.C. R. BUS. CT. § 12.4 (2019) (emphasis added).

¹⁹ A.K. CT. R. § 99(a) (2019) (emphasis added).

²⁰ A.Z. SUPREME CT., § R-06-0016 (2019) (emphasis added).

²¹ BRIDENBACK, *supra* note 6 at 20.

providing that “[c]ourts may conduct such a trial at an earlier date, upon a finding of good cause shown or through the use of remote technology, when appropriate.”²² In Delaware, the Court of Chancery has issued a standing order requiring that “all hearings and trials shall be conducted only by telephonic or other electronic means.”²³ Connecticut, New Jersey, New Mexico, and Alaska each mandates virtual hearings for the pendency of the pandemic.²⁴ Even in states where the use of remote technologies has been more limited, the types of proceedings that may be conducted by videoconference have been expanded by judicial order in light of the pandemic. In Alabama, witnesses in court proceedings may be sworn in remotely for the first time.²⁵ In Louisiana and Nevada, the respective Supreme Courts have scheduled oral argument by videoconference.²⁶

As acceptance of remote technologies spreads, the Commercial Division is well positioned to act as a leader in the area. The proposed Commercial Division Rule is a response

²² See Hon. Tani G. Cantil-Sakauye, Judicial Council of Cal., Statewide Order, 2 (March 23, 2020), <https://www.mendocino.courts.ca.gov/docs/Statewide-Order-by-the-Chief-Justice-Chair-of-the-Judicial-Council-3-23-2020.pdf>.

²³ See Court of Chancery, Standing Order No. 2 Concerning COVID-19 Precautionary Measures, 1 (March 16, 2020), <https://courts.delaware.gov/rules/pdf/Court-of-Chancery-Standing-Order-No2.pdf>.

²⁴ For an updated list of statewide orders issued in response to the pandemic, see National Center for State Courts Data Visualizations, *Coronavirus & The Courts*, (last updated May 5, 2020) at <https://public.tableau.com/profile/ncscviz#!/vizhome/StateCourtResponsestoCOVID-19/CovidTheCourts> (last accessed May 18, 2020).

²⁵ See Supreme Court of Ala., Administrative Order Approving Remote Administration of Oaths to Witnesses in Court Proceedings and Depositions, 2 (March 24, 2020), <https://www.alabar.org/assets/2020/03/March-24-2020-New-Order-Supreme-Court.pdf>.

²⁶ See Louisiana Supreme Court News, *La. Supreme Court to hear oral argument via video conference June 8-9*, KALB (Apr. 29, 2020), <https://www.kalb.com/content/news/La-Supreme-Court-to-hear-oral-argument-via-video-conference-June-8-9-570040391.html> (last visited May 18, 2020); The Supreme Court of Nevada, *In re Covid-19 Emergency Oral Arguments Procedure* (March 18, 2020), <http://caseinfo.nvsupremecourt.us/document/view.do?csNameID=58467&csIID=58467&deLinkID=766684&onBaseDocumentNumber=20-14952>.

to the practical realities, challenges and opportunities by taking another evolutionary step in a long history of use of remote technology in state courts. The Commercial Division Advisory Council has proposed a limited rule that grants the judge discretion to use, or not use, the technology, with the consent of the parties.

Use of Videoconferencing by Federal Courts

A variety of federal courts are either in the midst of virtual trials or preparing to hold them. In Florida, for example, a constitutional challenge to a law affecting voting rights is being held over Zoom.²⁷ Chief Judge Colleen McMahon of the Southern District of New York intends to go forward with an international drug-patent case by use of remote technologies in light of the statewide stay-at-home order and bans on international travel.²⁸

Videoconferencing technology is used in Federal Courts of Appeals, where attorneys (and judges) may conduct oral arguments from remote locations. As long ago as 2006, the Second, Third, Eighth, Ninth, and Tenth Circuits used some form of videoconferencing technology for conducting oral arguments.²⁹ Moreover, even that long ago, the Second Circuit used videoconferencing with remote appearances from attorneys for approximately 10% of the oral arguments conducted each week.³⁰ The Tenth Circuit includes specific instructions regarding videoconferencing oral arguments.³¹ The Western District of Oklahoma has used

²⁷ See Brad Bennett, *Florida voting rights trial to be argued* online, SPL CENTER (Apr. 25, 2020), <https://www.splcenter.org/news/2020/04/25/florida-voting-rights-trial-be-argued-online> (last visited May 18, 2020).

²⁸ Dorothy Atkins, *Judge Says Drug IP Bench Trial A Go 'Even During Pandemic,'* (Apr. 23, 2020), <https://www.law360.com/articles/1266965> (last visited May 18, 2020).

²⁹ MEGHAN DUNN & REBECCA NORWICK, FEDERAL JUDICIAL CENTER, REPORT OF A SURVEY OF VIDEOCONFERENCING IN THE COURTS OF APPEALS 3 (2006), <https://www.fjc.gov/sites/default/files/2012/VidConCA.pdf>.

³⁰ *Id.* at 5.

³¹ See THE U.S. COURT OF APPEALS FOR THE TENTH CIR., VIDEOCONFERENCED ARGUMENTS GUIDE, <https://www.ca10.uscourts.gov/clerk/videoconferenced-arguments-guide> (last visited May 18, 2020); see

videoconferencing for status conferences, hearings, trials, oral arguments, and other proceedings with remote sites throughout the country, finding it to be a “cost-effective and productive technology.”³²

In a Survey of Videoconferencing in the Courts of Appeals, for the judges interviewed, the benefits of videoconferencing outweighed its disadvantages.³³ As benefits, judges cited the following advantages of videoconferencing:

- saves travel time,
- allows for scheduling flexibility and reduces the administrative burden on the courts,
- decreases litigation cost, and
- increases access to courts for marginalized litigants whose in-person appearance might otherwise be prohibitively expensive.³⁴

One judge remarked, “Not every lawyer wants to show in court, and it’s not a lack of commitment to the case but more an economic decision. Videoconferencing solves that.”³⁵ The disadvantages cited by the survey include technical difficulties, such as poor connections, and decreased level of personal interactions. However, the interviewed judges indicated no difference in their understanding of the legal issues in arguments that were videoconferenced versus those that were not.³⁶

also THE U.S. COURT OF APPEALS FOR THE THIRD CIR., NOTICE: AVAILABILITY OF VIDEO-ARGUMENT (Dec. 2, 2013), <https://www.ca3.uscourts.gov/sites/ca3/files/videonot.pdf>.

³² U.S. DISTRICT COURT, WESTERN DISTRICT OF OKLAHOMA, ATTORNEY’S MANUAL FOR COURTROOM TECHNOLOGY, <http://www.okwd.uscourts.gov/wp-content/uploads/2015/01/Courtroom-Technology-Manual-0411.pdf> (last visited May 18, 2020).

³³ DUNN & NORWICK, *supra* note 7 at 16.

³⁴ *Id.* at 8-9.

³⁵ *Id.* at 9.

³⁶ *Id.* at 12.

Many federal courts have installed videoconferencing equipment, which can be used for remote witness testimony and other court proceedings.³⁷ In fact, the United States Judicial Conference Committee on Automation and Technology has endorsed the use of videoconferencing systems as “necessary and integral parts of courtrooms.”³⁸

Federal courts have often permitted testimony of witnesses through remote transmission. The practice of securing the testimony of a witness through remote transmission is generally accomplished through the use of a live video feed that transmits an image of the witness, along with corresponding audio, onto a video monitor situated in a courtroom. However, the language of Federal Rule of Civil Procedure 43(a) does not mandate that video be the form of transmission and the Rule has been cited in connection with requests for telephonic transmissions as well.

As one appellate judge remarked, “Videoconferencing is the wave of the future.”³⁹

Use of Videoconferencing in New York

The Chief Judge of the State of New York has stated that “The New York State courts are open and welcoming to foreign litigants.”⁴⁰ We believe that business litigants from Argentina or India or Australia are more likely to accept this invitation to litigate in New York

³⁷ See, e.g., UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO, COURTROOM TECHNOLOGY, <http://www.nmd.uscourts.gov/courtroom-technology> (last visited May 18, 2020).

³⁸ LEONIDAS RALPH MECHAM, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, THE COURTROOM TECHNOLOGY MANUAL (Aug. 1999), <https://www.uscourts.gov/sites/default/files/courtroomtechnologymanual.pdf>.

³⁹ DUNN & NORWICK, *supra* note 7 at 17.

⁴⁰ Janet DiFiore, *New York State of Mind*, I ASIA BUS. L. J. 33, 37 (May-June, 2017), <https://www.vantageasia.com/ny-state-of-mind/>.

State courts if they are able to observe and participate in court proceedings in their case through videoconferencing without substantial expense.

In the New York County Commercial Division, Justice Scarpulla's courtroom has recently implemented videoconferencing technology, and she has started using Skype for remote testimony, oral argument, and court conferences. In addition, Kings County Surrogate Margarita Lopez Torres has explained that her court has utilized videoconferencing or Skype to avoid the very expensive use of "commissions" for hearings in other countries. Further, the Appellate Division for the Second Judicial Department has installed Skype equipped large screen computers in both its courtroom and consult room and has started to use Skype for arguments of appeals and motions.

The proposed new Commercial Division Rule is similarly permissive to that adopted by the state courts listed above. The Commercial Division Advisory Council has proposed a limited rule that grants the judge discretion to use, or not use, the technology.

Cost Considerations

The Commercial Division Advisory Council has addressed the cost of videoconferencing in this memorandum to demonstrate how remarkably inexpensive this technology is in comparison to the savings which its use can provide. In general, the Advisory Council seeks to identify technological innovations which provide substantial savings and efficiencies yet are inexpensive for the court and counsel to obtain and use. The Advisory Council cannot think of any other technology (with the possible exception of hyperlinking) which offers such significant economic benefits to court constituencies at such minimal expense.

To be more specific, a lawyer who travels from San Francisco to New York County to participate in an evidentiary hearing or trial will require a minimum of 15 hours of travel time for each trip to New York during the proceeding and will incur out-of-pocket

disbursements for airline tickets, ground transportation, lodging, and meals. If that lawyer bills \$1,000 per hour, the cost of the travel to the lawyer's client for each trip to New York would be \$15,000 in attorney's fees plus at least another \$1,000 in disbursements. A lawyer who travels from White Plains to Albany County to participate in an evidentiary hearing will require a minimum of four hours of travel time and will incur out-of-pocket disbursements for travel by train or automobile. If that lawyer bills \$600 per hour, the cost of the travel to the lawyer's client for each trip to Albany County during the proceeding would be \$2,400 in attorney's fees plus another \$100 in disbursements.

In addition to the minimum costs outlined above, a lawyer who is required to travel to participate in court proceedings is likely to incur other expenses as well. Prudent lawyers do not wait to arrive in the courtroom until the precise minute that their court proceeding is scheduled to begin; instead, prudent lawyers schedule their travel so they will arrive on time no matter what travel difficulties they may encounter. Thus, the number of hours estimated for travel time in the preceding paragraph should generally be increased to provide a "cushion" against travel problems. In addition, lawyers may wish to ask a partner or associate who has participated in the matter to travel with them; such travel can easily double the cost estimates set forth above.

The distance problem is often compounded by significant traffic congestion, not only in the center of urban areas, but on the major traffic arteries that lead to and from urban areas. These traffic issues are part of the reason for the growth of mobile applications such as Waze and Google Traffic and increased consideration of congestion pricing programs. Moreover, travel is often impeded by adverse weather conditions.

When the lawyer arrives in the courtroom, there is, of course, no guarantee that the court will be able to hear the matter at the time originally scheduled. Although the Commercial Division has made substantial efforts to schedule particular proceedings for specific times and to adhere to its schedules, inevitably there will be occasions where other urgent court business will require that counsel must wait to be heard. The cost of any such waiting time must be added to the estimates of minimum costs for travel time outlined above.

In contrast, the cost of videoconferencing is minimal. In addition, the use of videoconferencing permits the lawyer's partners and associates who have participated in the matter (or who are merely interested) as well as the lawyer's client to observe the proceeding in real time and to provide assistance to the lawyer who is making the appearance. If the pendency of other court business prevents the Commercial Division judge from presiding over the court proceeding at the scheduled time, counsel may conduct other business while waiting for electronic notification from the court clerk that the judge is able to proceed.

Use of videoconferencing technology may also provide greater flexibility for the court in scheduling and adjourning evidentiary hearings and non-jury trials. Because so much less time is required for counsel to participate in a court proceeding, the court may be able to schedule a proceeding for a time period that would not be sufficient if counsel had to travel hours in order to participate. In addition, the court may be able to adjourn a proceeding even at the last minute before it is scheduled to commence with little inconvenience to counsel because they do not need to leave their offices to participate.

The cost of trials can be substantially reduced by use of remote technology. Because of the requirements of other court business, judges are often unable to conduct non-jury trials from day to day until completed. Instead, many judges will schedule testimony for a

morning or afternoon or a full day, with a hiatus until more time is available for additional testimony. Videoconferencing technology allows the court much greater flexibility under these circumstances, and saves lawyers and their clients substantial sums as well as alleviating “wear and tear” that travel inevitably causes.

In providing a cost analysis in this memorandum, the Advisory Council has used Skype as an example to enable discussion of specific dollar figures. However, the Advisory Council expresses no preference for Skype or any other particular type of videoconferencing technology. While Skype is only being used as an example, it should be noted that Microsoft has published an End of Life (EOL) date as of July 31, 2021 for Skype On-line.⁴¹ Microsoft is replacing Skype with Teams. Teams was originally made available to select customers by Microsoft in 2017. Today it is available to everyone. Per Microsoft’s “Welcome To Microsoft Teams” website, Teams is a part of O365 and is a “. . . *a complete meeting and calling solution.*”⁴² If the courts decide O365 is the preferred videoconferencing platform, there may be benefit in starting with Teams so that a change will not be necessary in approximately 14 months as Skype reaches EOL. The use of Teams, instead of Skype, may have different pricing under the O365 academic licensing program.

The New York courts are currently using Skype and that will presumably be the default technology for lawyers to use. If a lawyer wishes to use another type of videoconferencing technology, then it should be up to the lawyer who wants to appear by video to provide appropriate access to the other technology and, if necessary, suitable equipment. The

⁴¹ *End of life program for the integration of Skype for Business with third-party audio party audio conferencing providers*, MICROSOFT (May 7, 2020), <https://docs.microsoft.com/en-us/skypeforbusiness/legal-and-regulatory/end-of-integration-with-3rd-party-providers> (last visited May 18, 2020).

⁴² *Welcome to Microsoft Teams*, MICROSOFT (May 1, 2020), <https://docs.microsoft.com/en-us/microsoftteams/teams-overview> (last visited May 18, 2020).

Advisory Committee believes that it is not necessary or appropriate for its proposed new Commercial Division Rule to address specific types or brands of videoconferencing technology because technology changes so rapidly that a rule incorporating specific types of technology may become obsolete within a few months. In addition, the Advisory Council's proposed new Commercial Division Rule recognizes the court's authority to control the technology by providing that the court "may" conduct an evidentiary hearing or a non-jury trial remotely or "may" permit a witness to participate in an evidentiary hearing or a non-jury trial remotely; thus, the court can withhold permission to use videoconferencing unless suitable technology is available or provided.

Skype is a part of Microsoft's Office 365 (O365) offering. O365 is a collection of on-line (hosted) products and services. Microsoft offers multiple personal and business plans for O365. The higher the plan cost, the more products and/or services that are included.

For illustrative purposes, we have set forth below a simple comparison of two Enterprise plans including the applications and the services included in each plan and the cost:

Office 365 Enterprise E1:

- Applications: Not included
- Services: Includes Skype for Business and the ability to "Host unlimited HD videoconferencing meetings"
- Cost: \$8 per user per month, with an annual contract

Office 365 Enterprise E3:

- Applications: Outlook, Word, Excel, etc.
- Services: Includes Skype for Business and the ability to "Host unlimited HD videoconferencing meetings"
- Cost: \$20 per user per month, with an annual contract

Consumer pricing is illustrated above. Microsoft provides special pricing for governmental organizations.⁴³ Microsoft does not display the cost or discounts associated with governmental plans.

Generally the only other cost is a camera as long as the person joining a videoconference already has a computer and Internet connectivity. Logitech is a commonly known brand of USB (plugs into a computer) camera. Depending upon the resolution and features, pricing ranges from \$40 to \$200. Features can include the camera following persons if they move, a built-in microphone, wide-angle lens, light adjusting, and so forth.⁴⁴ Relatedly, iPads, tablets, and laptops commonly have cameras built-in.

Security and Control Considerations

As with all forms of technology, there are security and control considerations. Due to the work from home requirements around COVID-19, the use of videoconferencing increased dramatically overnight. At the same time, so have inappropriate uses of it. In an article entitled “FBI Warns of Teleconferencing and Online Classroom Hijacking During COVID-19 Pandemic,” the following example is noted. “March 2020, a Massachusetts-based high school reported that while a teacher was conducting an online class using the teleconferencing software Zoom, an unidentified individual(s) dialed into the classroom. This individual yelled a profanity”⁴⁵

⁴³ *Office 365 Government Plans*, MICROSOFT (May 5, 2020), <https://docs.microsoft.com/en-us/office365/servicedescriptions/office-365-platform-service-description/office-365-us-government/office-365-us-government> (last visited May 18, 2020).

⁴⁴ *WEBCAMS for Video Conferencing and Video Calling*, LOGITECH, <https://www.logitech.com/en-us/video/webcams> (last visited May 18, 2020).

⁴⁵ *FBI Warns of Teleconferencing and Online Classroom Hijacking During COVID-19 Pandemic*, FBI (Mar. 30, 2020) https://www.fbi.gov/contact-us/field-offices/boston/news/press-releases/fbi-warns-of-teleconferencing-and-online-classroom-hijacking-during-covid-19-pandemic/layout_view (last visited May 18, 2020).

While videoconferencing providers have and are making changes to help prevent misuse, many firms are instituting policies requiring the use of passwords for participants to join meetings. Some videoconferencing software companies provide protocols that only allow people to join the meeting if admitted at the time of the meeting. That is, when a participant connects to a meeting, they wait in a virtual lobby until the Host admits them.

Several courts have already enhanced public access to court proceedings by arranging for live-streaming and video recording of court proceedings. We encourage the expansion of such public access.

If and when court proceedings allow the public to attend, it will be vital to have controls in place to prevent interruptions. As people would not be required to travel to the court to watch proceedings, more people may attend. Also, as people will be connected anonymously, it is a possibility an individual may take some disruptive action that they would not do in person where they would be seen. To this end, it will be important to have the ability to mute all public participants. This should include the ability for people to verbally interject, start a chat / IM in the conferencing software, or in any other way interact with the videoconference other than to watch and listen.

Procedural Requirements

Different facets of court proceedings may require some adjustments, but should still be viable through videoconferencing. Evidentiary hearings are an example of this. Continuing with the example of using Skype / O365, there is an option in Skype to allow participants to share their computer desktop and thereby show a document, PowerPoint presentation, picture, or other evidence. Additionally, for evidence storage, control, and tracking, Microsoft offers a few products that can be bundled in with O365. Microsoft's OneDrive On-line is a very simplistic file storage application that offers some control over who

can access files.⁴⁶ SharePoint On-line allows for more granular controls and document storage structures. Depending upon how it is used, some setup may be required.⁴⁷ Other functions of the court, such as having Court Reporters attend, can be accomplished as well. A stenographer may participate in a videoconference the same as Judges and counsel.

There appears to be at least a growing belief that through the use of videoconferencing and other technologies, all court proceedings will be viable remotely. The National Center for State Courts (NCSC) has provided a state by state listing of rulings that direct, in-part, how courts should operate during the COVID-19 pandemic. In a document published by the NCSC, Louisiana notes “All essential court functions should be conducted with the use of video and telephone conferencing whenever possible.” Under New Mexico, the document notes that “Judges must conduct audio and video teleconferencing for civil and criminal proceedings.”⁴⁸

Preparation

All software, no matter how simple, requires some time to install and/or become accustomed to. Additionally, as some people use Windows PCs, others use Macs, and others may be using a Chromebook or tablet, there are nuances between each of the operating systems that can vary the way software needs to be interacted with. This is true even when working with software that is web based. To this end, it may be prudent to provide potential participants with

⁴⁶ *OneDrive*, MICROSOFT, <https://www.microsoft.com/en-us/microsoft-365/onedrive/online-cloud-storage> (last visited May 18, 2020).

⁴⁷ *Compare SharePoint Online options*, MICROSOFT, <https://www.microsoft.com/en-us/microsoft-365/sharepoint/compare-sharepoint-plans> (last visited May 18, 2020).

⁴⁸ *Coronavirus and the Courts*, NATIONAL CENTER FOR STATE COURTS (March 24, 2020), <https://www.ncsc.org/~media/Files/PDF/Newsroom/Coronavirus-News-Updates-Roundups/Coronavirus%20and%20the%20Courts%20State%20Profiles%203-24-2020%2012pm.ashx> (last visited May 18, 2020).

basic instructions, a frequently asked questions list, and a way for them to test videoconferencing with the courts' IT department.

Conclusion

Videoconferencing is a great option familiar to all or almost all Commercial Division constituencies. It enables lawyers and their clients to save time and money. The case for making greater use of this cost effective technology in evidentiary hearings and non-jury trials is obvious and compelling, and it presents an opportunity for the Commercial Division to continue its innovation and leadership in the smart adoption of technology in aid of the efficient administration of justice. The proposed new Commercial Division Rule is in line with the approach of other state and federal courts, confers discretion on individual Justices to permit participation in court proceedings from remote locations in the way that makes sense for their particular docket, and is calculated to avoid any burden or prejudice to the few lawyers who might not want to use this technology. The Commercial Division Advisory Council recommends building on the experience of other courts by adopting the proposed new Rule.

Exhibit 2

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

THE CITY OF HUNTINGTON,

Plaintiff,

v.

AMERISOURCEBERGEN DRUG
CORPORATION, *et al.*,

Defendants.

Civil Action No. 3:17-01362
Hon. David A. Faber

CABELL COUNTY COMMISSION,

Plaintiff,

v.

AMERISOURCEBERGEN DRUG
CORPORATION, *et al.*,

Defendants.

Civil Action No. 3:17-01665
Hon. David A. Faber

DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR A TRIAL CONTINUANCE

The parties appear to agree that an in-person trial in January is an impossibility in light of current Covid conditions and predictions about conditions in the near term. Instead of a brief continuance, however, Plaintiffs offer an amorphous proposal in which the parties would present opening statements and "some testimonial evidence" through Zoom or similar means while giving the Court depositions to watch or read. That proposal raises more problems than it solves. As a threshold matter, the proposal will not result in a fair trial. Defendants are entitled to present a full and complete defense *in person*, not a stilted, stymied defense by videoconference. Given the amount of money Plaintiffs are seeking and the bellwether nature of these proceedings,

nothing less will suffice to provide due process of law. Plaintiffs cite no other opioid trial—or *any* trial nearly as long and complex and consequential as this one—that has been done by video.

At a practical level, moreover, Plaintiffs’ proposal is unworkable. The parties cannot simply dump several boxes of deposition testimony on the Court for it to read or watch out of order, removed from all context. And depositions cannot, under the Rules, be offered as substitutes for the testimony of witnesses who are available to testify at trial and thus required to be presented live.¹ Plaintiffs’ proposal to offer “some testimon[y]” by video seems to concede that a trial of this size and magnitude cannot proceed *entirely* by video—that in-person testimony also would be required at some stage. But an orderly and coherent trial requires that witnesses be presented in a logical sequence that effectively communicates the evidence to the finder of fact—not one in which some witnesses appear in January by Zoom and then the rest in April or May in person.

While a bench trial may permit certain flexibilities not available in a jury trial, the parties still must be permitted to present their case to the Court as a *whole*, not through a jumble of evidentiary fragments to be pieced together later like a jigsaw puzzle.² This is not just a matter of theme or coherence. Presenting witnesses out of order can materially affect the testimony and evidence. For example, what Plaintiffs propose could foreclose the opportunity to adjust examinations based on recent trial testimony, or require the parties to recall witnesses later in the case to address testimony or evidence that was introduced out of order.

¹ See Fed. R. Civ. P. 32.

² Earlier this year, the Court rejected a similar proposal to conduct a piecemeal trial. Status Conf. Tr. 30-31 (Mar. 5, 2020).

There is no reason, in any event, to attempt the hodge-podge approach Plaintiffs suggest. Plaintiffs are not seeking injunctive relief; they do not assert that Defendants need to change anything they are doing *today*. Rather, Plaintiffs want money that they say would fund various long-term programs over a span of *decades*. Discovery has confirmed that they have no need for any money immediately. On the contrary, the state has tens of millions of dollars in unspent federal funds to address the opioid problem, for which Plaintiffs are eligible. Huntington says it gets all the opioid abatement money it needs from grant funding. A relatively brief continuance to permit a trial that is both safe and fundamentally fair will not impair Plaintiffs' long-term aims.

If the trial is continued, next week's pretrial conference logically should be continued, as well. It goes without saying that travel to Charleston next week for an in-person conference would be needlessly risky. And there is no obvious reason to attempt a video pretrial conference involving dozens of attorneys months in advance of trial.

I. Defendants cannot effectively present their defense by video or deposition dumps.

Internet videoconferencing is inadequate to present any substantial part of the defense in a case of this magnitude. Zoom and similar services have their uses, but they are no substitute for trying a case in the courtroom, in the presence of the Court and of witnesses—especially where the Plaintiffs seek potentially billions of dollars. It scarcely seems necessary to catalogue the limitations of videoconferencing as a communication tool, but here are some:

- It depends entirely on the availability of a high-speed internet connection, which in many locations can fluctuate.
- It gives the Court no control over witnesses—no way to monitor who is in the room with them or what they may be viewing as they testify.
- It sharply limits counsel's ability to work with exhibits during witness testimony and let the Court see both the exhibit and the witness simultaneously, at least at a useful size.

- In all likelihood, it would cause the trial to take *longer*, due both to the inevitable technological disruptions and the unavoidable loss of efficiency as compared to in-person proceedings.

And most fundamentally, a trial by videoconference would drastically diminish the force and immediacy of counsel’s arguments to the Court and their questioning of witnesses, along with the Court’s ability to evaluate arguments and testimony. An opening statement or cross-examination viewed over a computer screen can never be more than a pale substitute for the real thing. Defendants should not be forced to trial, with the stakes that exist in this case, without the ability to present the strongest possible defense.

The parties’ real-world experience with Zoom depositions in this case serves to underscore the point. Connectivity problems arose often. Forceful, probing examinations were far harder to conduct than they would have been in person. Witnesses’ demeanors and reactions were difficult to gauge. Handling exhibits was unwieldy. Zoom depositions were a Band-Aid to move the case through discovery. While it might fairly be said that the Zoom depositions were better than nothing, and a way to keep the case from grinding to a halt during the pandemic, “better than nothing” is not the standard for due process in a trial this momentous.

The idea of beginning trial by dumping a load of depositions on the Court is no more helpful. Viewed out of order, and without the context of live testimony—including cross-examination—of witnesses who are available and thus must appear at trial, *see* Fed. R. Civ. P. 32, a deposition dump would sow only confusion. It would accomplish little if anything, because the Court would need to re-read or re-watch the depositions again after hearing the other trial evidence needed to contextualize them.

II. The video proceedings that Plaintiffs cite are not like this trial.

Plaintiffs cite a number of cases in which courts have authorized videoconference trials during the Covid pandemic. But even a cursory review of the cited cases reveals the weakness of

Plaintiff's proposal. In *Sunoco Partners Marketing & Terminals L.P. v. Powder Springs Logistics, LLC*, in the District of Delaware, trial has in fact been continued until June 2021.³ *Guerra v. Rodas*, in the Western District of Oklahoma, was a three-hour evidentiary hearing.⁴ *Chambers v. Russell*, in the Middle District of North Carolina, was a one-day trial.⁵ *Petersen Energia Inversora S.A.U. v. Argentine Republic*, in the Southern District of New York, involved an abstract discussion of the possibility of a remote trial in the context of a *forum non conveniens* analysis—not an actual remote trial.⁶ *Argonaut Ins. Co. v. Manetta Enterprises, Inc.*, in the Eastern District of New York, was a two-day trial.⁷ *Xcoal Energy & Resources v. Bluestone Energy Sales Corp.*, in the District of Delaware, lasted six days. Two of Plaintiffs' examples were somewhat longer, but neither approaches the length of this trial.⁸ And *none* of the cases that Plaintiffs cite used the piecemeal approach that Plaintiffs offer here—video openings, then a deposition dump, then “some” unspecified video testimony, and then, presumably, a wait followed by the presentation of other pieces of evidence in person.

³ *Sunoco Partners Marketing & Terminals L.P. v. Powder Springs Logistics, LLC* (D. Del. Nov. 24, 2020) (Dkt. No. 619) (order continuing trial).

⁴ *Guerra v. Rodas*, No. 5:20-cv-00096-SLP (W.D. Okla. June 1, 2020) (Dkt. No. 43) (minute entry).

⁵ *Chambers v. Russell*, No. 1:20-cv-00498 (M.D.N.C. Aug. 26, 2020) (Dkt. No. 24) (minute entry).

⁶ *Petersen Energia Inversora S.A.U. v. Argentine Republic*, No. 1:15-cv-2739 (LAP), 2020 WL 3034824, at *9–11 (S.D.N.Y. June 5, 2020).

⁷ *Argonaut Ins. Co. v. Manetta Enters., Inc.*, No. 1:19-cv-00482 (E.D.N.Y. Aug. 24–25, 2020) (unnumbered docket minute entries for trial days).

⁸ *Vitamins Online, Inc. v. HeartWise, Inc.*, No. 2:13-cv-00982-DAK (D. Utah June 24, 2020); *Centripetal Networks, Inc. v. Cisco Sys., Inc.*, No. 2:18-cv-00094 (E.D. Va. Apr. 23, 2020).

III. Plaintiffs are pursuing long-term claims for monetary damages, not for injunctive relief—and discovery showed that current abatement needs are met.

Plaintiffs' opposition to a continuance might have more force if they were seeking injunctive relief against some conduct that they claim is ongoing today. They are not. On the contrary, they have abandoned all their claims except one for money damages to fund an abatement plan that they say would take decades to unfold. Even if Plaintiffs were to prevail at trial, a relatively brief delay in the interest of Covid safety will have no material impact on that plan.

Discovery revealed other reasons to discount Plaintiffs' insistence on haste. It emerged, for example, that West Virginia has already received so much federal money to address the opioid problem that it cannot begin to spend it. A year ago, the state Department of Health and Human Resources was forced to admit to Congress that it had not even *allocated*—much less spent—more than \$81 million of the \$147 million it received from Washington for that purpose in the previous three fiscal years.⁹ Plaintiffs are eligible for those funds. And Huntington's mayor testified that his city does not need to spend its own money on opioid abatement because it can already get the money it needs from grants.¹⁰ West Virginia's health secretary testified, moreover, that the state's inpatient opioid treatment facilities are 25% to 30% empty; supply far exceeds demand.¹¹

⁹ Letter from Christina R. Mullins, Commissioner, West Virginia Bureau for Behavioral Health, to Hon. Frank Pallone, Jr., Chairman, United States House of Representatives Committee on Energy and Commerce, at 3, 5 (Oct. 18, 2019) (Dkt. No. 1092-1 at 4, 6).

¹⁰ Steve Williams Dep. 210:17-20 (June 30, 2020) (Dkt. No. 1092-1 at 33).

¹¹ Sec'y Bill Crouch Dep. 143:16-144:2 (Dkt. No. 1092-1 at 42-43).

IV. A safe, live trial promises to be possible relatively soon.

Plaintiffs' bid to scramble the trial format might gain more purchase were there no end in sight to the pandemic's worst phase. But as Defendants' motion details, efficacious vaccines already have been developed and are on their way to approval and widespread administration. Just today, the United Kingdom approved use of a vaccine in that country. The question now is one of months, not years, and the relatively brief continuance that Defendants seek correctly balances the goals of safety, fundamental fairness in the presentation of the defense, and the need to reach a resolution of the case.

V. Conclusion

It is apparent to both sides that an in-person January trial is out of the question. Plaintiffs' alternative proposal, however, is neither fair to the defense nor workable in practice. Nor is it necessary, since their requested relief in this case is for a future abatement program (and an extremely long-term one, at that) rather than to enjoin ongoing conduct. Soon, the Court will be able to hold a trial that is safe, fair, and orderly. For now, it should follow the lead of the vast majority of courts around the country and wait—relatively briefly—until such a trial is possible. The pretrial hearing scheduled for next week, along with the other pretrial deadlines, should be continued accordingly.

Dated: December 2, 2020

Respectfully submitted,

CARDINAL HEALTH, INC.

/s/ Steven R. Ruby

Michael W. Carey (WVSB No. 635)

Steven R. Ruby (WVSB No. 10752)

David R. Pogue (WVSB No. 10806)

/s/ Enu Mainigi

Enu Mainigi

F. Lane Heard III

Ashley W. Hardin

Raymond S. Franks II (WVSB No. 6523)
**CAREY DOUGLAS KESSLER & RUBY
 PLLC**
 901 Chase Tower, 707 Virginia Street, East
 P.O. Box 913
 Charleston, WV 25323
 Telephone: (304) 345-1234
 Facsimile: (304) 342-1105
 mwcarey@csdlawfirm.com
 sruby@cdkrlaw.com
 drpogue@cdkrlaw.com
 rsfranks@cdkrlaw.com

Jennifer G. Wicht
WILLIAMS & CONNOLLY LLP
 725 Twelfth Street NW
 Washington, DC 20005
 Tel: (202) 434-5000
 Fax: (202) 434-5029
 emainigi@wc.com
 lheard@wc.com
 ahardin@wc.com
 jwicht@wc.com

AMERISOURCEBERGEN DRUG CORPORATION

/s/ Robert A. Nicholas
 Robert A. Nicholas
 Shannon E. McClure
REED SMITH LLP
 Three Logan Square
 1717 Arch Street, Suite 3100
 Philadelphia, PA 19103
 Tel: (215) 851-8100
 Fax: (215) 851-1420
 rnicholas@reedsmith.com
 smcclure@reedsmith.com

/s/ Gretchen M. Callas
 Gretchen M. Callas (WVSB #7136)
JACKSON KELLY PLLC
 Post Office Box 553
 Charleston, West Virginia 25322
 Tel: (304) 340-1000
 Fax: (304) 340-1050
 gcallas@jacksonkelly.com

MCKESSON CORPORATION

/s/ Jeffrey M. Wakefield
 Jeffrey M. Wakefield (WVSB #3894)
 jwakefield@flahertylegal.com
 Jason L. Holliday (WVSB #12749)
 jholliday@flahertylegal.com
**FLAHERTY SENSABAUGH BONASSO
 PLLC**
 P.O. Box. 3843
 Charleston, WV 25338-3843
 Telephone: (304) 345-0200

/s/ Timothy C. Hester
 Timothy C. Hester
 Paul W. Schmidt
 Christian J. Pistilli
 Laura Flahive Wu
COVINGTON & BURLING LLP
 One CityCenter
 850 Tenth Street NW
 Washington, DC 20001
 Tel: (202) 662-5324
 thester@cov.com
 pschmidt@cov.com
 cpistilli@cov.com
 lflahivewu@cov.com

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on this 2nd day of December, 2020, the foregoing *Defendants' Reply in Support of Motion for a Trial Continuance* was served upon counsel of record electronically.

/s/ Steven R. Ruby
Steven R. Ruby (WVSB No. 10752)