

March 2, 2021

The Honorable Justice Jerry Garguilo
John P. Cohalan, Jr., Courthouse
400 Carleton Avenue,
Courtroom S-33
Central Islip, NY 11722
631-740-3915

Re: Letter in Support of Defendants' Position Regarding Trial Proceedings; *In Re Opioid Litigation*, Index Nos. 400000/2017

Your Honor:

I write to provide the Court with information regarding currently available strategies that can mitigate the risk of COVID-19 transmission during in-court portions of a jury trial, set to begin in March 2021. While known mitigation measures are generally useful in reducing the spread of COVID-19, these strategies will have limited utility in mitigating the risks associated with an in-person trial of this size, scope, and anticipated duration. COVID-19 outbreaks that endanger trial participants, including jurors and others who may have comorbidities that increase the risk for severe disease, and cause lengthy trial delays are likely to occur under the current circumstances of the pandemic. However, in light of the speed with which vaccines are becoming widely available to the public, the threat of the virus will likely wane in a matter of months, allowing for discussion of a viable trial strategy using more traditional procedures at reduced health risk to participants. In light of this possibility, pushing the trial by a few months could prevent serious consequences for participants.

I am a medical doctor trained in both internal medicine and preventive medicine. I served as Deputy Director of the National Center for Infectious Diseases at the Centers for Disease Control and Prevention ("CDC"), where I focused on emerging infectious diseases and coordination of complex outbreak response. I also served in the Commissioned Corps of the U.S. Public Health Service and retired at the rank of Rear Admiral and Assistant Surgeon General. Since 2019, I have been working as a private consultant, including on matters related to emerging infectious diseases, disease investigation, and surveillance based on my prior service at the CDC. Since the COVID-19 outbreak began, my consulting work has focused on assisting private companies in assessing developing science, managing the evolving nature of the pandemic, infectious risk mitigation plans, and best practices for return to work. I am very familiar with the available science on COVID-19 as well as the latest guidance issues by the CDC and other federal agencies.

After more than a year's worth of experience with COVID-19, we have a good sense of the settings that pose a high risk for transmission of the virus. Indoor group activities of extended duration where individuals will be speaking, such as in a courtroom trial, pose a high-risk for transmission of the COVID-19 virus and have been linked to superspreading events. In fact, studies suggest that the risk of transmission of the COVID-19 virus during indoor activities, can be seventeen times higher than similar activities done outdoors. These risks are dramatically increased here, due to what I understand about the presence of a jury, the need to interact with a large jury venire in order to select a jury, the number of plaintiffs and defendants, the number of witnesses, the size of the legal teams involved, the length of the typical trial day and the extended duration anticipated with this trial. Further, trial participants, including jurors and court staff, cannot be kept in a bubble, especially outside of the courtroom. It is inevitable that over a long trial, participants will be exposed to the virus either inside or outside the courtroom, requiring isolation and quarantine resulting in disruption to the trial and placing participants and those non-participants with whom trial participants interact at potentially serious risk.

Other present factors that increase that risk of transmission include:

1. Variants: COVID-19 virus variants from the UK and South Africa have been identified throughout the county. These variants have enhanced transmissibility by a factor of up to 50%, and the variant first seen in the UK is known to be even more virulent. The CDC estimates that the US will see exponential growth of illness caused by the virus variants starting in March 2021. New variants that are still under assessment for transmissibility and severity have recently been identified in New York and California. While known mitigation strategies may be able to control transmission of these variants to some degree, the virus will be even harder to contain than current strains, particularly in an indoor setting like a courtroom, due to their enhanced transmissibility. There is a high probability that the recent declines in COVID-19 incidence in the United States will swiftly be reversed by the increased circulation of these variants. In fact, recent trends suggest declines in transmission seen in January and February have plateaued.
2. Travel: Travel is a known risk factor for acquisition of COVID-19 because of the large number of contacts that occur while in transit and at the destination. I understand that witnesses and counsel will be traveling from all over the country to participate in this trial, which will increase the risk of exposure to the virus with resulting spread either in the courtroom or during preparation activities. This necessary travel poses a high risk of transmission and disruption to trial due to the presence of infected travelers interacting with other trial participants.
3. Interactions among and with trial participants outside the courtroom: I understand that a large trial like this one will require coordination of countless witnesses and collaboration among numerous attorneys to prepare and present complex arguments at trial. This will inevitably require in-person contact between attorneys, witnesses and other vendors outside of the courtroom. These interactions present significant risk of transmission of the virus.

If all trial participants, including jurors, are not sequestered, contact between trial participants and non-participants (e.g., family members of jurors and court staff) outside of the courtroom will present significant risk of transmission of the virus among those individuals. That risk to trial participants and non-participants increases as the number of

people involved with in-person trial activities (e.g., the jury venire) increases and as the length of trial increases.

4. Inclusion of high-risk trial participants: It is inevitable that some trial participants will be at higher risk of severe disease due to age or underlying health status. Having such individuals spend extended time indoors with numerous other individuals in poor ventilation, places them at increased risk of significant health concerns.

While these risks can be mitigated to some degree, the available strategies have limited utility considering the challenges posed here. Available measures to mitigate the risk of virus transmission include:

1. Testing: Frequent testing of all in-person trial participants will decrease the likelihood that an infected individual will enter the courtroom. To be truly effective, that testing should be done daily. However, daily testing can only be done using rapid antigen tests as opposed to the higher quality PCR testing, which takes more time to perform. Because all of the rapid antigen tests have suboptimal sensitivity in identifying someone carrying the virus, especially someone without symptoms, testing on a daily basis cannot ensure that the virus will not make its way into the courtroom. Over an extended trial, such tests could miss identifying infected individuals. There may also be significant costs associated with daily testing of a large number of trial participants.
2. Physical distancing and use of masks: Consistent use of high-quality masks will reduce the risk that an infected person will spread the virus to others. However, I understand that testimony of a witness speaking behind a mask complicates the effectiveness of trial testimony and counsel's ability to examine the witness.
Physical distancing of at least six feet reduces risk, but distancing at all times may not be possible. Further, the benefit of physical distancing greatly depends on whether optimal ventilation and filtration systems are used in the courtroom.
3. Ventilation: To successfully conduct what I understand to be a multi-week trial, excellent ventilation will be required in the courtroom. Air purifiers placed around the courtroom would help, but air purifiers are not a substitute for adequate airflow and air filtration. At bare minimum, a courtroom should have six air exchanges per hour coupled with high levels of filtration (MERV 13 or above is the preferred standard). Ideally, the trial would be conducted in a courtroom with windows that could be opened as opposed to a courtroom without windows or sealed windows.
4. Vaccination: The availability of high efficacy vaccines is a significant advancement. If trial participants are vaccinated, this would provide an added level of assurance that participants would not become ill or severely ill by participating in a trial. Although there are still unknowns related to the vaccines, it is likely that these issues will be studied and largely resolved over the next several months. Further, the vaccine landscape is quickly evolving as a new vaccine from Johnson & Johnson became available for authorized use this week, and additional vaccines are in late-stage clinical trials. These new vaccines will further expand availability and the speed in which vaccines become widely available to the general public.

In short, while the present risks of conducting a lengthy in-person trial involving numerous individuals poses serious risks to all participants, light is at the end of the tunnel. In mere months, we should have answers to important questions related to containing the virus. Further, with the widespread focus on vaccine distribution and as new vaccines appear on the market, it is likely that more participants will be vaccinated, which could ameliorate the potentially severe consequences of the COVID-19 pandemic in the coming months.

In light of this potential, risking the potentially severe consequences for all involved in the present should be avoided.

Sincerely yours,



Stephen Ostroff, MD