

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

CHANDRA CATES et al.,

Plaintiffs,

v.

THE TRUSTEES OF COLUMBIA UNIVERSITY IN
THE CITY OF NEW YORK,

Defendant.

Civil Action No. 1:16-cv-06524-GBD-SDA

Hon. George B. Daniels
Hon. Stewart D. Aaron

**DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION
FOR RULING UNDER RULE 43**

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Federal Rule of Civil Procedure 43(a) permits witnesses to testify by live video link “[f]or good cause in compelling circumstances.” As many courts have concluded, the ongoing COVID-19 pandemic satisfies the applicable standard and permits courts to authorize live testimony from a remote location, even when one party objects. *See, e.g., Guardant Health, Inc. v. Foundation Medicine, Inc.*, 2020 WL 6120186, *3 (D. Del. 2020) (“Courts, including this Court, are regularly determining that the ongoing COVID-19 pandemic constitutes good cause for remote testimony.”); *Legacy Church, Inc. v. Kunkel*, 472 F. Supp. 926, 1023 (D.N.M. 2020) (“District courts have typically concluded that COVID-19-related health concerns justify requests to testify telephonically or through audiovisual means, despite one party’s objections.”); *Vitamins Online, Inc. v. HeartWise, Inc.*, 2020 WL 3452872, at *9 (D. Utah June 24, 2020) (agreeing that “the COVID-19 pandemic constitutes ‘good cause and compelling circumstances’ to hold bench trials, or at least portions of bench trials, via remote videoconference technology”); *Argonaut Ins. Co. v. Manetta Enterprises, Inc.*, 2020 WL 3104033, at *2 (E.D.N.Y. June 11, 2020) (“The Court finds that the COVID-19 pandemic, and the months’ long delay it has caused—indeed, continues to cause—in all court proceedings, constitutes ‘good cause and compelling circumstances’ to hold the bench trial in this matter via video-conference.”); *In re RFC & ResCap Liquidating Tr. Action*, 444 F.Supp.3d 967, 971 (D. Minn. 2020) (“Under the circumstances, COVID-19’s unexpected nature, rapid spread, and potential risk establish good cause for remote testimony.”)

COVID-19 has taken a terrible toll. More than half a million lives have been lost and many more have been impacted with long term, adverse health consequences. The economic fabric of the Nation has been upended, with events that have always been conducted in person reenvisioned using videoconferencing technology, to save lives and to protect public health. As

perhaps befits our federalist system, different regions of the country have adopted different policies, and different individuals have exhibited dramatically different adaptations to the ongoing crisis.

At the final pretrial conference in this matter, the Court asked the parties to meet and confer on the logistics of witness testimony:

So see if you can agree first, and if you can't agree, then you propose an alternative that you think is reasonable, and then the other side can oppose it. But I have no problems with not bringing everybody in live or not even bringing anybody in live. But I do want testimony from witnesses either by video or by previous deposition, and under circumstances where both sides feel that they have had an opportunity to examine that witness fully to bring out evidence before the court.

Tr. 51:11-19.

Prior to the meet and confer, Columbia consulted with the witnesses it intends to call at trial. Several said that they were comfortable appearing for trial in person; others said that in-person testimony would make them very uncomfortable due to COVID; and a third group said that they would prefer to testify remotely due to COVID but could appear in person if the Court preferred. Columbia conveyed this information to Plaintiffs, who then demanded that Columbia identify witness-by-witness justifications that Plaintiffs could review, including medical circumstances and vaccination statuses. Columbia declined, seeing no justification for witnesses to make such sensitive disclosures about their personal medical circumstances (and the circumstances of their families) if they were available to testify via live video connection.

Plaintiffs now demand that each witness make an *in camera* submission detailing his or her personal medical circumstances and vaccination history and ask the Court to weigh the submissions and make individual rulings *per witness* (for each of fifteen witnesses) judging the med-

ical situation of each. Plaintiffs have not identified a single authority for this demand. Numerous courts have concluded that the ongoing pandemic is itself sufficient to satisfy the standard of Fed. R. Civ. P. 43(a). Moreover, Plaintiffs have failed to provide any standard for their proposed process and have not explained how requiring disclosures by witnesses would make the trial fairer or more manageable for any party.

On the latter point, Plaintiffs want each witness to disclose his or her “current and anticipated vaccination status” and a justification for preferring to testify by videoconference. But they provide no standard of decision. Do Plaintiffs agree that witnesses should be permitted to testify remotely if they are less than fully vaccinated? What if they are vaccinated but live with unvaccinated individuals? What if they have medical conditions that make COVID particularly dangerous to their health and lives? The better approach—and the approach adopted by judges across the country—is to acknowledge that the pandemic itself constitutes good cause for testimony by live videoconference, without requiring an evidentiary process for each of multiple witnesses.

Plaintiffs believe, apparently, that the pandemic is over for the fortunate few to have received vaccinations. The Centers for Disease Control and Prevention, however, continue to urge caution, even by the fully vaccinated, who may potentially still transmit the disease. More fundamentally, as a district court recognized during the vaccine rollout:

All of [plaintiffs’] objections spring from a false premise that stakeholders have a choice to do a traditional in-person trial (business as usual), unconstrained by pandemic conditions. At this point in epidemiological history, the Court should not have to explain the obvious: that “normal” in-person trials are not possible . . . , especially commencing as early as April 20, 2021. Many of [plaintiffs’] objections are therefore substantially misplaced.

Kieffaber v. Ethicon, Inc., 2021 WL 425822 (D. Kan. Feb. 8, 2021) (authorizing testimony by live video in a trial set to begin *after* the trial in this case). Plaintiffs’ main point seems to be that

it will be difficult for the Court to assess the “demeanor and credibility” of witnesses testifying remotely. Dkt. 428, at 5. But the alternative—viewing testimony through plexiglass from witnesses wearing multiple masks—is hardly ideal. Indeed, given the current technological status, other courts have found video testimony to be a more-than-adequate alternative:

The near-instantaneous transmission of video testimony through current technology permits “the jury [or, in a bench trial, the Court] to see the live witness along with his hesitation, his doubts, his variations of language, his confidence or precipitancy, [and] his calmness or consideration[.]” Given the speed and clarity of modern videoconference technology, where good cause and compelling circumstances are shown, such testimony “satisfies the goals of live, in-person testimony and avoids the short-comings of deposition testimony.” *Id.*

RFC & ResCap, 444 F. Supp. 3d at 970-71 (quoting *In re Vioxx Prods. Litig.*, 439 F. Supp. 2d 640, 644 (E.D. La. 2006) (citations omitted) (cleaned up)). This Court has technology in place to hear testimony remotely in circumstances just like this one.

A final note: Plaintiffs falsely claim that the witnesses are engaged in “pretense” to avoid in-person testimony. Dkt. 428, at 6. The pandemic is not pretense. It presents a real threat to health and safety, and these witnesses, like many others across the country, are reasonable to request video testimony over in-person appearances for this reason. Each of the witnesses is agreeing to give testimony, under oath, and subject to cross-examination. Columbia vehemently objects both to the unfounded accusations and to the style of litigation tactics that would lead counsel to conclude that every action taken by an adverse party is a strategic play. Columbia intends to try this case based on real facts and real evidence, not on innuendo.

CONCLUSION

For the foregoing reasons, the Court should certify the ongoing pandemic as “good cause in compelling circumstances” for witnesses to testify remotely if they are uncomfortable appearing in person or prefer, under the circumstances of the pandemic, to appear by live video.

Dated: March 30, 2021

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on March 30, 2021, a copy of the foregoing was filed electronically using the Court's CM/ECF system, which will provide notice of the filing to all counsel of record.

By: /s/ Brian D. Netter

Brian D. Netter