

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

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JOHN T. FREY
CLERK, CIRCUIT COURT
FAIRFAX, VA

JOHN C. DEPP, II,

Plaintiff,

v.

AMBER LAURA HEARD,

Defendant.

Civil Action No.: CL-2019-0002911

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR LEAVE OF COURT TO PRESENT TESTIMONY BY AUDIOVISUAL MEANS

Plaintiff John C. Depp, II ("Mr. Depp") has moved this Honorable Court to allow the parties to present trial testimony by audiovisual means. In further support thereof, Plaintiff states as follows:

BACKGROUND

Effective March 15, 2020, shortly after the emergence of the coronavirus pandemic that wreaked havoc on daily life across the globe, the Virginia Supreme Court amended the Rules to add Rule 1:27 allowing live testimony by audiovisual means in circuit court civil proceedings and providing the parameters for allowing such testimony. As states and countries around the world imposed travel bans and in-person gatherings became heavily restricted, Rule 1:27 provided a means by which circuit courts could adapt and continue to operate. Nearly a year later, the dangers of the pandemic remain prevalent. Due to the ongoing unpredictable nature of the pandemic, the continued existence of national and international travel bans and restrictions, and the distant locations of potential witnesses in this case, many witnesses are unable to confirm their in-person attendance for the impending May 17, 2021 trial date in this case. Plaintiff seeks

to ensure that all material witnesses can safely provide live testimony at trial, while complying with any travel restrictions. Specifically, Plaintiff seeks the Court's permission to allow all non-party witnesses, including experts, to attend trial by live audiovisual means in accordance with the Rules of the Supreme Court of Virginia. *See also* VA Code § 17.1-513.2.

ARGUMENT

I. Virginia Rule 1:27(c) Provides the Court "Should" Permit Live Video Testimony For Distant Lay Witnesses and Physicians.

Rule 1:27(c) states in part "The court *should* enter an order permitting live testimony by means of any audiovisual technology" (emphasis added) for certain "Distant and Other Specific Witnesses." Specifically, under subsection (c)(2)(i), the Court "should" enter such an order if "a lay witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the Commonwealth, unless it appears that the absence of the witness was procured by the party offering the testimony." Here, most of the witnesses in this case reside in California or abroad (mostly in the UK), both locales obviously outside of the Commonwealth and at a distance much greater than 100 miles from the Court. Further, under subsection (c)(2)(ii), the Court "should" enter an order permitting testimony by audiovisual means for physicians and other medical professionals who have treated or examined either party to a proceeding. Thus, in accordance with Virginia Supreme Court Rule 1:27(c), the Court should enter an order permitting witnesses meeting these criteria to testify by audiovisual means, which would allow them to present live trial testimony in a manner that is both safe and compliant with national and international restrictions.¹

¹ Defendant's counsel has stated she is not necessarily opposed to permitting witnesses to testify at trial by audiovisual means but is concerned that the "rules" of the case are changing in that the parties have already conducted a number of *de bene esse* depositions. Plaintiff disagrees that the rules are changing. Counsel for either party may still choose to use a *de*

II. All Non-Party Witnesses, Including Experts, Should Be Permitted to Testify by Live Audiovisual Means.

For the reasons stated above, most of the potential witnesses in this case fall within the categories covered under Rule 1:27(c) and audiovisual testimony should be permitted on those grounds. However, subsections (b) and (d) of Rule 1:27 provide additional considerations for the Court to consider in connection with other witnesses, including expert witnesses, when the criteria in Rule 1:27(c) do not apply. Plaintiff properly brings this motion more than sixty days before trial as required by Rule 1:27(d) and respectfully requests that the Court allow all non-party witnesses, including expert witnesses, to testify by audiovisual means.

Rule 1:27(d) provides that expert witnesses can be permitted to testify through audiovisual means “Upon a finding that – with due regard for the importance of presenting testimony through witnesses physically present in the courtroom – exceptional circumstances warrant receiving the testimony...by audiovisual means in the interests of justice.”² Here, the world is still in the midst of a once-in-a-century pandemic. There are still exceptional risks to safety and health associated with long-distance travel and in-person, indoor gatherings. Those risks are unlikely to disappear between now and the rapidly approaching May trial date. And, those risks, coupled with the continued imposition of travel bans and restrictions, warrant a

bene esse deposition in lieu of live trial testimony. Similarly, should the Court enter an order permitting audiovisual testimony, counsel for either party could choose to have certain witnesses provide live testimony by those means regardless of whether the witness has had a *de bene esse* deposition taken. Plaintiff’s request is for the Court to enter an order permitting **both** parties to have witnesses testify by audiovisual means, not just witnesses for Plaintiff.

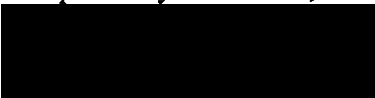
² Rule 1:27(c)(1) states that the Court “should” enter an order permitting expert witnesses to testify via audiovisual means upon consent of the parties. Again, it is Plaintiff’s understanding that Defendant has not yet rejected this possibility but nor has she consented at this time. Should Defendant consent to the testimony of expert witnesses by audiovisual means, the analysis under Rule 1:27(d) is unnecessary. However, even absent consent from Defendant, the Court should permit experts to testify by live video under Rule 1:27(d) for the reasons stated herein.

finding by the Court of the “exceptional circumstances” necessary under Rule 1:27(d) to permit expert witnesses to testify by live audiovisual means.

Permitting witnesses, including expert witnesses, to testify remotely ensures a complete trial record and, with available audiovisual technology, will not impede the jury’s ability to evaluate witness credibility and demeanor. In fact, the parties have already conducted several depositions remotely by video through the Zoom platform and many of the anticipated witnesses already testified remotely at the trial of Mr. Depp’s defamation claim in the United Kingdom.

In consideration of the foregoing, Mr. Depp respectfully moves this Court for leave of court to present testimony by audiovisual means.

Respectfully submitted,



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