

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: DAVOL, INC./C.R. BARD,
INC., POLYPROPYLENE HERNIA
MESH PRODUCTS LIABILITY
LITIGATION

Case No. 2:18-md-2846

JUDGE EDMUND A. SARGUS, JR.
Magistrate Judge Kimberly A. Jolson

This document relates to:
Johns v. CR Bard et al,
Case No. 2:18-cv-01509

ORDER

A hearing was held in this matter on September 10, 2020 to address outstanding motions in limine. (ECF No. 327.) During this conference, the parties were instructed to confer and present to the Court which witnesses' depositions remain in dispute, specifically whether the depositions should proceed live and in-person or by video in light of the ongoing COVID-19 pandemic. The parties conferred and were unable to agree via email letter briefing which depositions must be conducted live, if any. The PSC narrowed their list of live depositions to three and suggested that during video depositions the witness, videographer, court reporter, and defending counsel (upon agreement of the witness) would be present in the same room. The defendants did not agree to any live depositions and maintained that no individuals should be in the same room during video depositions. Additionally, the parties did not agree on a set of rules and procedures for video depositions.

After carefully weighing the arguments raised during the hearing and in the letter briefing, the Court concludes that it will not order live, in-person depositions over the concerns and objections of counsel, the parties, and/or witnesses during the COVID-19

pandemic. Indeed, no federal court to date has concluded that it was proper, much less wise, to force individuals to appear in person and in the presence of others for live depositions—as Magistrate Judge Jolson concluded in a recent, well-reasoned decision. *Mitchell v. Columbus Urb. League*, Nos. 2:18-cv-747, 2:18-cv-748, 2020 U.S. Dist. LEXIS 168413, at *2–3 (S.D. Ohio Sept. 15, 2020) (collecting cases); *see also In re Broiler Chicken Antitrust Litig.*, No. 1:16-cv-08637, 2020 U.S. Dist. LEXIS 111420, at *98–99 (N.D. Ill. June 25, 2020) (concluding that remote depositions are justified by the threats posed by the pandemic to the health and safety of “witnesses, counsel, court reporters, videographers, and other persons”). “Video or teleconference depositions and preparation are the ‘new normal’ and most likely will be for some time.” *Wilkins v. ValueHealth, LLC*, No. 6:19-1193-EFM-KGG, 2020 WL 2496001, at *2 (D. Kan. May 14, 2020); *accord Doe v. Exxon Mobil Corp.*, No. 1:01-cv-1357 (RCL/AK), 2020 U.S. Dist. LEXIS 151238, *13 (D.D.C. Aug. 10, 2020) (“In the midst of a pandemic—when personal and public health requires minimizing travel and close confinement—the parties must rely on technology to continue with discovery.”).

The primary concern that the PSC raises is that the depositions of certain witnesses are too document intensive for video deposition technology. These concerns are understandable, but federal courts around the country have uniformly concluded that this concern does not justify the imposition of an in-person deposition in the midst of a global pandemic, “particularly given the advancements in remote deposition technology.” *See, e.g., Sonrai Sys., LLC v. Romano*, No. 16 CV 3371, 2020 U.S. Dist. LEXIS 122339, at *12–13 (N.D. Ill. July 13, 2020) (explaining that “these concerns [regarding voluminous documents] are insufficient to outweigh the health risks” and “that ‘voluminous and

highly detailed exhibits’ are not a bar to remote video conference depositions” (citation omitted)); *Rouviere v. DuPuy Orthopedics, Inc.*, --- F. Supp. 3d ----, No. 1:18-cv-04814 (LJL) (SDA), 2020 WL 3967665, at *3 (S.D.N.Y. July 11, 2020). Courts have also suggested additional procedures to manage a high number of complex documents, such as “sending . . . exhibits to deponents prior to the depositions.” *Rouviere*, 2020 WL 3967665, at *3 (quoting *U.S. ex rel. Chen v. K.O.O. Constr., Inc.*, 445 F. Supp. 3d 1055, 1057 (S.D. Cal. 2020)). In fact, the defendants put forward this approach in the letter briefing. As other courts have concluded, “[d]espite the difficulties with using documents during a remote deposition, the Court is confident counsel in this case are very capable and can make the deposition work effectively with exhibits.” *Sonrai*, 2020 U.S. Dist. LEXIS 122339, at *12–13 (quoting *Reynard v. Washburn Univ. of Topeka*, No. 19-4012-HLT-TJJ, 2020 U.S. Dist. LEXIS 118631, at *14 (D. Kan. July 7, 2020)).

Accordingly, the Court orders the following:

- The parties shall conduct depositions by video. Deponents, parties, counsel, court reporters, and videographers shall participate from separate locations. No participants may be in the same room.
- The party noticing the deposition shall question first, to which the parties appear to agree in their letter briefing.
- The parties shall make a good faith effort to complete the depositions in the time and manner pursuant to the Federal Rules of Civil Procedure. If the parties are unable to do so due to the challenges inherent to video depositions, particularly when the questioning heavily relies on documents or when objections are made, the opposing party shall grant a reasonable extension of time so that the

questioning can be completed.

If both sides are in full agreement, the parties may modify and/or supplement the above rules and procedure, including, but not limited to, the nature of the depositions (live or video), whether and which participants are in the same room, the order of questioning, the manner in which documents are presented and provided to witnesses, etc.

Finally, the parties shall confer on the matter of Plaintiff reopening the deposition of Dr. Amit Badhwar, as raised in the email letter briefing. Then, they shall present the matter to the Court via email letter briefing by **5:00 p.m. on October 5, 2020.**

IT IS SO ORDERED.

9/28/2020
DATE

s/ 
EDMUND A. SARGUS, JR.
UNITED STATES DISTRICT JUDGE

9/28/2020
DATE

s/ 
KIMBERLY A. JOLSON
UNITED STATES MAGISTRATE JUDGE