**[DRAFT]**

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| SUPERIOR Court of the State of CALIFORNIA County of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ |

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| \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  Plaintiffs,  vs.  \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  Defendants. |  | Case No.  **Stipulation and [PROPOSED] order for Remote Bench Trial procedures[[1]](#endnote-2)**  Date:  Time:  Dept:  Judge:  Trial Date:  Complaint Filed: |
|  |  |  |

# MAINTAINING THE DECORUM OF THE COURT.

Case Participants (as defined in Section VI.A below) are required to observe the typical rules and procedures related to court appearances, including, without limitation, rules related to attire and the consumption of food and drink (other than water, coffee or tea) during the proceedings. Case Participants shall use best efforts to eliminate all visual and auditory distractions.

# PRE-TRIAL ARRANGEMENTS.

## **Remote Platform.** The Court’s designated remote platform is \_\_\_\_\_\_\_\_\_\_\_ (hereinafter described as the “Adopted Platform”). The Parties may, with the approval of the Court, retain an appropriate third-party service provider (“Remote Video Support Provider”) to arrange, monitor, support, and troubleshoot the Adopted Platform during the trial. The Court will not retain or provide any Remote Video Support Provider.[[2]](#endnote-3)

## **Court Management of Platform.** The Court will manage and control the proceedings, including being designated the “Host” of the video conference, and will exercise control over the various technological settings.

## **Preparing to Meet Technological Requirements.** Case Participants shall use best efforts to ensure that there will be clear video and audio transmission during the trial, including adequate familiarity with the Adopted Platform and related software and hardware, *e.g.*, microphones, webcams, headphones, multiple monitors, *etc*.

### **Adequate Equipment.** The Parties are responsible for ensuring that each witness is familiar with the Adopted Platform and that every participant has the following equipment to participate in the proceeding without undue delays: microphone, video camera, laptop or monitor. Counsel may wish to ensure that each witness is able to participate in the videoconference with one device (or screen) and review exhibits on another. Counsel should confer with the Court to determine whether it would be helpful for counsel to loan equipment to the Court to facilitate the Court’s participation in the proceeding.

### **Test Sessions.** At least one test session must be conducted by counsel with each witness in advance of the proceeding in which the witness practices using the Adopted Platform, becomes familiar with the process for viewing electronic exhibits, and tests all audio and video equipment (including settings) that will be used at trial.

## **Court Reporter.** The court reporter will be unmuted for the duration of the proceeding to allow for timely and effective requests for clarification.

## **Camera/Remote Venue Set Up.** The faces of each Case Participant in the trial must be clearly visible while speaking. No masks shall be worn for any Case Participant in the trial appearing remotely. To the extent possible, each Case Participant’s webcam should be positioned at face level relatively close to the Case Participant. The use of virtual backgrounds is not permitted unless otherwise agreed upon by the Parties and the Court.

## **Multiple Participants in the Same Room.** If some Case Participants expect to be in the same room, this should be raised at the pretrial conference so that any related concerns may be discussed and addressed, and appropriate directions may be given regarding the positioning of cameras on each Case Participant and avoiding audio feedback from the use of multiple devices.

## **Party Identification.** All Case Participants shall use their full first and last name when signing on to the Adopted Platform.

## **Scheduling.** If Case Participants are located in materially different time zones, the proceeding will be scheduled to be reasonably convenient for all, which may require a shorter than normal trial day.

## **Confidentiality.** The Parties shall meet and confer in advance of the start of trial regarding a protocol for the use of confidential information, including sealed exhibits, at trial. The Parties shall provide a joint recommendation to the Court before trial commences.

## **Procedure for Sidebars.** The Parties shall meet and confer in advance of the start of trial regarding a protocol for conducting virtual sidebars at trial. The Parties shall provide a joint recommendation to the Court before trial commences.

# PROHIBITION ON RECORDING.

Any recording of a court proceeding held by video or teleconference, including “screen-shots” or other visual or audio copying of a hearing, is prohibited. Violation of these prohibitions may result in sanctions, including restricted entry to future hearings, denial of entry to future hearings, removal of Court-issued media credentials, or any other sanctions deemed appropriate by the Court.

# OPENING STATEMENT / CLOSING ARGUMENT.

The Court will permit counsel to use the “share screen” function in the Adopted Platform to display demonstratives during openings and closings. Counsel must cooperate and meet and confer to exchange any visuals or exhibits to be used in the opening statements or closing argument.

# WITNESSES AND PRESENTATION OF TESTIMONY.

## **Witness List.** The Court’s typical procedures and deadlines for submission of a witness list govern.

## **Joining the Hearing.** Witnesses must access the Adopted Platform using the credentials provided by the Court at least 10 minutes before the scheduled start time for their examination. The witness will be directed to the virtual waiting room where he or she will remain until the Court is ready to admit the witness to the virtual courtroom. Each witness’s participation should be consistent with the court’s exclusion order. The attorney calling the witness is responsible for ensuring the witness has a separate video and audio feed. Attorneys should not attempt to “share” a connection with a witness.

## **Witness Admonition.** Before or after a witness takes the oath, affirmation, or declaration required by Code of Civil Procedure section 2094, and before the witness starts to testify, the Court will ask the witness to affirm that: (i) no one else is present in the remote room where the witness is testifying other than those, if any, authorized by the Court; (ii) all communications with the witness during his or her examination will be on the record, other than communications with the witness and his or her attorney of record during breaks, (iii) the witness will not engage in any direct or indirect communications with anyone during his or her examination other than those communications made on the record, and (iv) the witness will adhere to the Court’s exclusion order. The Court reserves the right to ask any witness to back up from their webcam so the Court and counsel can see the witness’s hands for the duration or portions of the witness’s testimony.

## **Witness Notes.** If a witness will have or use any notes or other documents in front of him or her during testimony, counsel must, at least 24 hours before such witness is called to testify, provide to all other counsel any documents, including notes, that the witness will have before him or her when testifying. Opposing counsel may examine the witness about such documents.

## **Exhibits.** The Parties shall meet and confer in advance of the pretrial conference to discuss a protocol for use of exhibits at trial and present a joint recommendation to the Court at the pretrial conference. The joint recommendation must address the form of exhibits (e.g., electronic and/or paper), acceptable file formats (e.g., .pdf; .doc; .jpeg; .mpeg; *etc.*), how exhibits will be exchanged (e.g., via email, electronic joint repository, or in-meeting file transfer, *etc.*), and any procedures that may be required for “oversized” exhibits, deposition transcripts, physical exhibits, or “non-standard” exhibits of any kind. The Court will give significant weight to the Parties’ joint recommendation. If the Parties fail to reach agreement on a joint protocol, the Court will implement a protocol along the following lines, subject to modifications, as appropriate for each matter.

### **Electronic Form.** All documentary exhibits to be used on direct and cross examination, except for impeachment, shall be submitted electronically to the Court, all counsel, and the court reporter no later than \_\_\_\_\_\_\_. Each exhibit shall be accessible as an individual document, named electronically according to its exhibit number (*e.g.*, Ex. 1). It is the responsibility of the attorney offering the witness to ensure that the witness has the link to the proceedings and to electronic copies of all exhibits that will be used with that witness, including those of the opposing parties.

### **Paper Form.** All documentary exhibits to be used on direct and cross examination, except for impeachment, shall be submitted in tabbed binders to the Court, all counsel, and the court reporter no later than \_\_\_\_\_\_\_. Exhibits shall be printed single sided and in black and white, provided that the exhibit shall be printed in color where reasonably necessary to ascertain its meaning in the context of the proceedings. It is the responsibility of the attorney offering the witness to ensure that the witness has copies in paper form of all exhibits to be used with the witness, including those of the opposing parties, and that those exhibits are available to the witness in the same form that has been provided to counsel and the Court.

### **Original Documents.** If a true “original” document needs to be entered into evidence, the original should be submitted to the Court as part of its copy of the evidence binder. Such a document should be clearly identified as a true “original.” If the document is ultimately admitted into evidence, the court and court reporter can coordinate the inclusion of the true “original” into the official exhibit notebook maintained by the court reporter.

### **Impeachment Exhibits**.

#### **Electronic Form**. If counsel wishes to use a document for impeachment purposes that was not previously disclosed as an exhibit, counsel must email an electronic copy of the document to the Court, trial counsel, and the witness at the time counsel seeks to use the document with the witness. In lieu of email, counsel may use the chat function in the Adopted Platform to send the document to the Court, counsel, and the witness or post the document on a secure document repository that counsel has made available to the Court, counsel, and the witness.[[3]](#endnote-4)

#### **Sealed Paper Copies**. If counsel prefers, he or she may also send a paper copy of the documents that counsel anticipates using for impeachment purposes to the Court and counsel for the other parties at least one business day before the anticipated use of those documents. Two copies of each document must be provided to counsel for the witness with whom the documents will be used. Counsel may enclose the documents in an envelope or box that is sealed and marked DO NOT OPEN UNTIL FURTHER NOTICE. Counsel may package each document in its own sealed envelope so long as it identifies the inner contents in such a way that the recipient can be directed to open a specific envelope. Each envelope shall have a marking across the seal. The envelope shall not be opened unless and until counsel and the witness are instructed to do so by the questioning attorney or the Court. The questioning attorney has the right to request that all recipients return each and every package that they were not authorized to open.

## **Objections.** The witness must stop speaking when either counsel objects. After the objection is made, the Court will be the first to speak and will instruct counsel how the Court wishes to proceed.

# TECHNOLOGICAL CONSIDERATIONS DURING THE TRIAL.

## **How to Join.** Each attorney, witness, and party who plans to attend any portion of the trial will be a “Case Participant” and will receive login credentials from the Court. Case Participant login information is not public and must not be shared with anyone other than counsel of record and other Case Participants.

## **Attendance by Members of the Press and Public.** Everyone who is not a “Case Participant” will be an “attendee” (*i.e.*, a member of the press or public). Separate login credentials for attendees will be available on the Court’s calendar. Attendees will be able to see and hear the court proceeding but will not be able to participate in it beyond observing. As stated in Section V.B above, nonparty witnesses shall participate consistent with the Court’s witness exclusion order.

## **Chat Features.** The chat function allows Case Participants to type text (comments) during the proceeding and also allows Case Participants to send files to other Case Participants. After discussion with the parties, the Court will determine whether the use of the chat function will be allowed during trial.[[4]](#endnote-5) If allowed, the Court will enable the chat function for Case Participants only and the following rules shall apply:

### **“Chats” With the Court.** Counsel may not initiate *ex parte* “chats” with the Court.

### **“Chats” With Witnesses.** Counsel may not “chat” with a witness at any time while the witness is “on the stand” for any purpose unless authorized by the Court.

### **The Record.** Messages relayed through the “chat” feature will not become a part of the Court record unless ordered by the Court.

### **Documents Transmitted Via the “Chat” Feature.** Documents transmitted through the chat feature, such as a document to be used for impeachment purposes, will be made part of the Court record but the text of the message transmitting them will not unless ordered by the Court. If counsel transmits a document through the chat feature, counsel must so state on the record and must identify the document for the record and ensure that the court reporter has a copy of it.

## **Break-out Rooms.** The Court will permit the use of virtual break-out rooms if all parties agree. Discussions that take place in the break-out rooms will not become part of the Court record unless ordered by the Court.

## **Addressing Technological Difficulties.** Ifa Case Participant is disconnected from the videoconference or experiences some other technical failure, the Case Participant shall use best efforts to promptly re-establish the connection and shall take no action which threatens the integrity of the proceeding (*e.g.*, communications with a third party related to anything other than resolving the technical issue). If the connection cannot be re-established within approximately five minutes, the Court may take steps to “pause” the trial, which may include moving Case Participants into the virtual waiting room or one or more separate break-out rooms, at which time counsel shall meet and confer in good faith to develop a joint proposal regarding how to proceed. If the Court deems it unfair to any party to continue the remote hearing because of a technical failure, the Court may postpone or terminate the videoconference at any time and take such other steps as may be necessary to ensure the fairness and integrity of the proceedings.

**IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.**

DATED: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Attorneys for Plaintiffs

DATED: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Attorneys for Defendants

**PURSUANT TO STIPULATION, IT IS SO ORDERED.**

DATED: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Judge of the Superior Court

APPENDIX A: BEST PRACTICES FOR PARTICIPANTS IN REMOTE HEARINGS

**The “Dos”**

**Technology**

* Use hardwired, rather than wireless, internet.
* Know the device password in case of lock-out.
* Keep the device plugged in and/or have extra batteries on hand.
* Use multiple monitors if you anticipate having to present or view exhibits.
* Ensure that all required programs (*e.g.*, Flashplayer) are enabled.
* Disable notifications (*e.g.*, Skype, email, *etc.*).
* Disconnect from VPN.
* Use gallery view to prevent the program from shifting the screen back and forth to the speaker.

**Presentation**

* Dress as if you are in Court because you are. Solid clothing works best on a video conference.
* Position the webcam at your eye level and look directly into it when speaking.
* If counsel uses notes, place them in a way that minimizes loss of eye contact with the camera.
* Keep yourself muted unless you are speaking.
* Use a headset to maximize audio quality.
* Adopt good posture (*i.e.*, don’t slouch, put your feet on the desk, sit in a bed, *etc.*).
* Choose a backdrop that will minimize distractions (*i.e.*, no beds, only neutral artwork, do not sit in front of a window, close all open doors that are visible, *etc.*).
* Avoid making quick movements that could cause the video to lag.
* Raise your hand when objecting in case there is lag time in audio.

**Documents**

* Use an appropriate standard file naming convention that takes into account ease of quick navigation and does not reveal work-product or other sensitive information.
* Determine procedure for handling non-conforming documents (*e.g.*, emailing large excel spreadsheets that do not pdf well; dealing with files that are excessively large in size such as video files).
* Identify page numbers and/or set up bookmarks ahead of time for ease of navigation in pdfs.
* Pre-designate the individual responsible for controlling the exhibits (*e.g.*, selecting it, displaying it, marking it up, navigating through pages, *etc.*).
* Provide paper copies of all exhibits to court reporter well in advance of trial.

**The “Don’ts”**

* **Don’t**log in to the Adopted Platform with a cell phone if you are a Case Participant.
* **Don’t**identify yourself on the Adopted Platform using a phone number if you are a Case Participant.
* **Don’t**access the hearing from an unsecured or public Wi-Fi.
* **Don’t**work on other tasks during the hearing.
* **Don’t**talk over each other.

**Appendix B: endNotes on the TEMPLATE**

1. The Northern California chapter of the Association of Business Trial Lawyers established a working group comprised of judges and practitioners to research best practices and develop a model protocol to address the impact of the COVID-19 pandemic on the conduct of civil bench trials and to protect the health and safety of the public, including court users, witnesses, court personnel, judicial officers, and others. This template is the outgrowth of that effort. Although this template reflects input from the judges in the working group, it has not been endorsed or adopted by any judge; rather, it is being offered as a starting point for discussions among counsel and with courts, to be adapted as appropriate to fit the needs of particular cases. [↑](#endnote-ref-2)
2. There are a number of different platforms that may be suitable for use for a remote bench trial, such as Zoom (https://zoom.us/), WebEx (https://www.webex.com/), BlueJeans by Verizon (https://www.bluejeans.com/), Microsoft Teams (https://www.microsoft.com/en-us/microsoft-365/microsoft-teams/group-chat-software), and CourtCall Remote Appearance Platform (https://courtcall.com/what-is-courtcall/remote-appearance-platform/). Some of these platforms, such as Zoom, have a number of versions, each of which may have advantages and disadvantages. For example, Section V(B) of the template describes differentiating between “Case Participants” and “attendees” in the hearing. At this time, that feature is available in “Zoom Webinar” but not in “Zoom Meeting.” One main advantage of the Case Participant/attendee feature is that it permits the host to restrict the functionality available to attendees of the proceeding. On the other hand, Zoom Webinar does not allow for “breakout rooms” or in-meeting file transfers, but Zoom Meeting does. All of the features described in this template are available in the Zoom platform. The template may need to be modified to account for the functionality of the platform ultimately chosen. [↑](#endnote-ref-3)
3. The Northern District of California has disabled the “chat” feature for security reasons. For a case in that court, or any other court not permitting use of the “chat” feature, this sentence will need to be stricken or revised. [↑](#endnote-ref-4)
4. See endnote iii above. Likewise, if the court does not permit use of the “chat” feature, Section V(B) will need to be stricken or revised. [↑](#endnote-ref-5)