

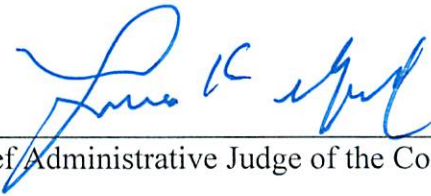
ADMINISTRATIVE ORDER OF THE
CHIEF ADMINISTRATIVE JUDGE OF THE COURTS

Pursuant to the authority vested in me, and with the advice and consent of the Administrative Board of the Courts, I hereby promulgate Rule 37 of section 202.70(g) of the Uniform Rules for the Supreme and County Courts (Rules of Practice for the Commercial Division) and add a new Appendix G (attached), effective December 15, 2021, to read as follows (new material underlined):

Rule 37. Remote Depositions.

- (a) The court may, upon the consent of the parties or upon a motion showing good cause, order oral depositions by remote electronic means, subject to the limitations of this Rule.
- (b) Considerations upon such a motion, and in support of a showing of good cause, shall include but not be limited to:
- (1) The distance between the parties and the witness, including time and costs of travel by counsel and litigants and the witness to the proposed location for the deposition; and
 - (2) The safety of the parties and the witness, including whether counsel and litigants and the witness may safely convene in one location for the deposition; and
 - (3) Whether the witness is a party to the litigation; and
 - (4) The likely importance or significance of the testimony of the witness to the claims and defenses at issue in the litigation.
- For the avoidance of doubt, the safety of the parties and the witness shall take priority over all other criteria.
- (c) Remote depositions shall replicate, insofar as practical, in-person depositions and parties should endeavor to eliminate any potential for prejudice that may arise as a result of the remote format of the deposition. To that end, parties are encouraged to utilize the form protocol for remote deposition, which is reproduced as Appendix G to these rules, as a basis for reaching the parties' agreed protocol.
- (d) No party shall challenge the validity of any oath or affirmation administered during a remote deposition on the grounds that
- (1) the court reporter or officer is or might not be a notary public in the state where the witness is located; or,
 - (2) the court reporter or officer might not be physically present with the witness during the examination.

- (e) Witnesses and defending attorneys shall have the right to review exhibits at the deposition independently to the same degree as if they were given paper copies.
- (f) No waiver shall be inferred as to any testimony if the defending attorney was prohibited by technical problems from interposing a timely objection or instruction not to answer.
- (g) Nothing in this rule is intended to: (i) address whether a remote witness is deemed “unavailable,” within the meaning of CPLR 3117 and its interpretive case law, for the purposes of utilizing that witness’ deposition at trial; or (ii) alter the Court’s authority to compel testimony of non-party witnesses in accordance with New York law.



Chief Administrative Judge of the Courts

Date: December 7, 2021

AO/339/21

APPENDIX G

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK**

XXXX, Plaintiff(s), - against - XXXX, Defendant(s).	Index No. ____ / ____
---	-----------------------

**STIPULATION AND [PROPOSED] ORDER CONCERNING
PROTOCOL FOR CONDUCTING REMOTE DEPOSITIONS**

The Plaintiff(s) and Defendant(s) (collectively, the “Parties”) jointly stipulate to the following protocol for conducting depositions via remote means in the above-captioned manner:

1. All depositions shall be conducted remotely using videoconference technology, and each deposition shall be recorded, either by stenographic or video means.
2. Insofar as practicable, the remote deposition shall be similar to an in-person deposition.
3. The Party that notices the deposition shall contract with a court reporting service for court reporting, videoconference, and remote depositions services. An employee or employees of the service provider shall attend or be available at each remote deposition to record the deposition, troubleshoot any technological issues that may arise, and administer the virtual breakout rooms.
4. The Parties agree that these recorded remote depositions may be used at a trial or hearing to the same extent that an in-person deposition may be used at trial or hearing, and the Parties agree not to object to the use of these recordings on the basis that the deposition was taken remotely. The Parties reserve all other objections to the use of any deposition testimony at trial.

FORM REMOTE DEPOSITION PROTOCOL

5. The deponent, court reporter, and counsel for the Parties may each participate in the videoconference deposition remotely and separately. Each person attending a deposition shall be clearly visible to all other participants, their statements shall be audible to all participants, and they should each use best efforts to ensure their environment is free from noise and distractions.

6. No counsel shall privately communicate with any deponent during questioning on the record, except for the purpose of determining whether a privilege should be asserted, and only after the witness has stated on the record that he or she needs to consult counsel regarding a question of privilege. Deponents shall shut off electronic devices, other than the devices that the deponent is using for the videoconferencing software and to display and access the exhibits, and shall refrain from all private communication during questioning on the record.

7. During breaks in the deposition, the Parties may use a breakout-room feature, which simulates a live breakout room through videoconference. Conversations in the breakout rooms shall not be recorded. The breakout rooms shall be established by the court reporting service prior to the deposition and controlled by the remote deposition or relevant service provider.

8. Remote depositions shall be recorded by stenographic means, and may also be video-recorded; but, the court reporter might not be physically present with the witness whose deposition is being taken. The Parties agree not to challenge the validity of any oath administered by the court reporter, even if the court reporter is not a notary public in the state where the deponent resides.

9. The court reporter will stenographically record the testimony, and the court reporter's transcript shall constitute the official record. If the deposition is to be video recorded,

FORM REMOTE DEPOSITION PROTOCOL

the videographer will record the audio and video of the deposition and preserve the recording. The court reporter may be given a copy of the video recording and may review the recording to improve the accuracy of any written transcript. The court reporter shall mark and preserve exhibits used at the deposition.

10. The Parties agree that the court reporter is an “Officer” as defined by CPLR 3113(b) and shall be permitted to administer the oath to the witness via the videoconference. The deponent will be required to provide government-issued identification satisfactory to the court reporter and this identification must be legible on the video record, if the deposition is to be video recorded.

11. The Party that noticed the deposition shall be responsible for procuring a written transcript and any video record of the remote deposition. The Parties shall bear their own costs in obtaining a transcript and/or video record of the deposition or any real-time transcript functionality.

12. The Party that noticed the deposition shall provide the remote deposition or relevant service provider with a copy of this Stipulation and Order at least twenty-four hours in advance of the deposition.

13. At the beginning of each deposition, consistent with CPLR 3113(b), the videographer or stenographer shall “put the witness on oath” (CPLR 3113(b)) and begin the deposition with a statement on the record, consistent with 22 NYCRR 202.15(d), that shall include: (i) the officer’s name and address; (ii) the name and address of the officer’s employer; (iii) the date, time, and place (or method) of the deposition; (iv) the party on whose behalf the deposition is being taken; and (v) the identity of all persons present.

FORM REMOTE DEPOSITION PROTOCOL

14. At the beginning of each segment of the deposition, consistent with 22 NYCRR 202.15(d), the videographer or stenographer shall begin that segment of the remote deposition by announcing the beginning and end of each segment of the remote deposition.

15. If the deposition is being video recorded, the videographer shall monitor the audio and video transmission and shall stop the record if he or she determines that any participant has been dropped from the remote deposition or is otherwise incapable of participating by reason of technical problems. If a videographer is not present, the monitor and/or court reporter shall stop the record as soon as he or she becomes aware that a participant has been dropped from the remote deposition or cannot participate by reason of technical problems.

16. The defending attorney shall make objections and interpose instructions not to answer in substantially the same manner as he or she would at an in-person deposition. If the defending attorney is unable to make objections and interpose instructions not to answer by reason of technical difficulties, such a failure to object or to instruct shall not be construed as waiver and the defending attorney shall have an opportunity to object or to instruct as soon as the technical problem has been remedied. Objections and instructions not to answer shall be regarded as timely if made as soon as practicable.

17. The Parties agree to work collaboratively and in good faith with the court reporting agency to assess each deponent's technological abilities and to troubleshoot any issues at least 48 hours in advance of the deposition so any adjustments can be made. Counsel and deponents may test remote deposition software before any remote deposition. The Parties also agree to work collaboratively to address and troubleshoot technological issues that arise during a deposition and make such provisions as are reasonable under the circumstances to address such issues. This provision shall not be interpreted to compel any Party to proceed with a deposition

FORM REMOTE DEPOSITION PROTOCOL

where the deponent cannot hear or understand the other participants or where the participants cannot hear or understand the deponent. Any period on the record during which a deponent or questioner could not hear or understand the questions or answers due to technical difficulties shall not count toward time limitation under CPLR 3113(b).

18. Counsel shall use best efforts to ensure that they have sufficient technology to participate in a videoconference deposition (e.g., a webcam and computer or telephone audio and sufficient internet bandwidth to sustain the remote deposition). Counsel for the deponent shall likewise use best efforts to ensure that the deponent has such sufficient technology. In the case of non-party witnesses, counsel noticing the deposition shall supply any necessary technology that the deponent does not have.

19. The Parties agree that this Stipulation and Order applies to remote depositions of non-parties under CPLR 3101 and shall work in a collaborative manner in attempting to schedule remote depositions of non-parties. The Party noticing any non-party deposition shall provide this Stipulation and Order to counsel for any non-party under CPLR 3101 a reasonable time before the date of the deposition.

20. The Parties agree that any of the following methods for administering exhibits may be employed during a remote deposition, or a combination of one or more methods:

- (i) Counsel noticing the deposition may choose to mail printed copies of documents that may be used during the deposition to the deponent, the deponent's counsel, counsel for other parties that will appear on the record, and the court reporter. In that event, noticing counsel shall so inform the recipients prior to mailing the documents and shall provide tracking information for the package. Such documents shall be delivered

FORM REMOTE DEPOSITION PROTOCOL

by noon (local-time) the day before the deposition. Recipients shall confirm receipt of the package by electronic mail to Counsel noticing the deposition. If printed copies are mailed, every recipient of a mailed package shall keep the package sealed until the deposition begins and shall only unseal the package on the record, on video, and during the deposition when directed to do so by the counsel taking the deposition. Recipients shall proceed to open the documents and review the documents only upon the instruction of the noticing attorney. This same procedure shall apply to any physical copies of documents any other counsel intends to use for examining the witness.

- (ii) Counsel noticing the deposition may share exhibits digitally, such as by e-mailing a compressed zip folder or sharing a link. The exhibits shall be shared to the deponent, the deponent's counsel, the other Party's counsel, and the court reporter, and any other attorneys who have appeared on the record at the deposition. Every recipient of a digital exhibit shall not open the digital exhibit until directed to do so by the counsel taking the deposition. If sending documents digitally, counsel will be mindful of file size limitations, which presumptively should be less than __ MB. Such file transfers shall be password-protected.
- (iii) If the software for the videoconference supports uploading and sharing digital files in real time (e.g., such as the Chat feature on Zoom), then such function may be equivalently used to distribute exhibits to the deponent and participants in real time. Counsel appearing on the record at the

FORM REMOTE DEPOSITION PROTOCOL

deposition and the court reporter shall confirm receipt of the documents to Counsel noticing the deposition. The method of transferring the documents shall be password-protected, and counsel taking the deposition shall supply the password immediately prior to the commencement of the deposition.

- (ii) Regardless which method of document-sharing is used, the witness and the defending counsel shall have the right to private copies of the exhibits that allow the witness and defending counsel to independently and fully navigate the exhibit while the deposition is on the record.

Dated:

SO ORDERED:

[_____, J.]

Justice of the Supreme Court of the State of New York

Stipulated to:

[ATTORNEY SIGNATURE BLOCKS]