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May 20, 2020

**VIA ECF**

Hon. Colleen McMahon, U.S.D.J.  
United States District Court  
Southern District of New York  
Daniel Patrick Moynihan U.S. Courthouse  
500 Pearl Street  
New York, NY 10007-1312

**Re: *Ferring B.V., et al v. Serenity Pharm., LLC et al., C.A. 17-9922-CM (S.D.N.Y.)***

Dear Judge McMahon,

This firm represents Counterclaimants Serenity Pharmaceuticals, LLC and Reprise Biopharmaceutics, LLC (collectively, "Counterclaimants") in the above-referenced matter. We write to provide our thoughts regarding the upcoming trial and remote witness testimony, per the Court's invitation in its May 14, 2020 notice to counsel. We also address certain issues Ferring raised in its May 19 letter to the court. (D.I. 685.)

In light of the ongoing COVID-19 pandemic, Counterclaimants are prepared to proceed with trial on July 6, 2020, using a secure video conferencing platform. Counterclaimants agree with the Court's view that, given this is a bench trial, a secure and reliable video platform would sufficiently allow the Court to hear testimony and make the necessary credibility determinations. Counsel for Counterclaimants have recently conducted hearings before the PTAB and federal district courts via secure video conferencing and believe it is a viable alternative during the pandemic.

While video-conferencing is not ideal, the current pandemic presents unique challenges that must be overcome. As the Court noted, NYC and much of the surrounding area are still under stay at home orders and travel restrictions that will likely still be in place in early July. As of last week, there were nearly 350,000 COVID-19 cases in New York and more than 27,500 deaths, nearly a third of the nation's total. Indeed, NYC remains an epicenter of the ongoing pandemic with daily death toll still around 100. Much of NYC remains shut down, and schools will remain closed through the end of summer. Further, air travel and hotel stays pose additional safety risks given that many airlines and hotels have not mandated face coverings or implemented strict social distancing. In light of these facts, none of Counterclaimants' witnesses, attorneys, or attorney staff feel comfortable putting themselves and potentially others at risk by traveling into NYC for trial

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preparation and testimony in early July. Additionally, as the Court is aware, Dr. Murray is a practicing physician in a hospital and in his view believes he should not be traveling outside of his area during the outbreak because of the likelihood of transmission. Due to these circumstances and the uncertainty surrounding reopening measures, Counterclaimants disagree with Ferring's position that U.S. witnesses should appear in person.

Ferring's position that Counterclaimants make all of their witnesses—three of whom are over sixty years old and one of whom is seventy-five years old—available to testify in person, in the epicenter of the ongoing health crisis, is unfair and dangerous. Ferring's preferred scenario would require Counterclaimants to cross-examine five of Ferring's seven witnesses via video conference, while giving Ferring the unique advantage of cross-examining all of Counterclaimants' witnesses in person. Not only is Ferring's proposal unduly prejudicial to Counterclaimants, it puts the health and safety of witnesses, the Court, courtroom staff, and attorneys at risk. Moreover, conducting the trial with a combination of remote and in-person proceedings would subject the parties and the Court to additional logistical obstacles and unnecessary expenses. In addition to the needless obstacles and expenses that would arise from a mix of in-person and remote proceedings, such a combination approach would also risk the potential of lost trial days in the event a witness—who could have testified remotely at no risk to their health—ends up being prohibited from entering the Court for failure to pass the screening required of all persons seeking entry.

Further, the ongoing uncertainty over whether the trial (or any aspect of it) could proceed in-person was underscored in a New York Law Journal article published today, citing an interview with this Court, and noting that there is “still no date set for restoring in-person court operations, and any reopening would be ‘very gradual,’ relying partly on input from public health experts and the court's own outside scientific consultant.”<sup>1</sup> On the other hand, we know today that the parties' witnesses are available to testify remotely via video conferencing. Counterclaimants contend that all involved will be better off planning for and committing to making a remote trial a success that works for everyone—and the parties should get to work to make that happen—rather than attempting to gain a strategic advantage by forcing the parties and their witnesses to try the case under different rules depending on where they live.

To that end, and given that it was increasingly apparent to Counterclaimants that even the July trial setting would almost certainly need to proceed remotely, Counterclaimants have engaged in discussions and demonstrations with FTI Consulting (“FTI”) regarding its remote trial presentation tool (TrialMax Cloud<sup>®</sup>), and related remote proceeding services. Counterclaimants

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<sup>1</sup> Tom McParland, *‘It Will Look Different’: SDNY's Phased Reopening to Include ‘Physical Changes,’ Continued Remote Hearings*, New York Law Journal (May 19, 2020), <https://www.law.com/newyorklawjournal/2020/05/19/it-will-look-different-sdnys-phased-reopening-to-include-physical-changes-continued-remote-hearings/>.

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are of course ready and willing to work with Ferring to engage one or more suitable technology service providers for conducting the trial remotely, including TrialGraphix, FTI, or both.

Counterclaimants understand the challenges posed by witnesses being in different time zones and are not opposed to arranging the trial schedule so that European witnesses can testify earlier in the trial day such that it is still within, or not much later than, business hours in Europe.

Counterclaimants look forward to discussing this further during the May 20, 2020 teleconference.

Respectfully submitted,

s/ Paul J. Skiermont  
Paul J. Skiermont  
*Counsel for Counterclaimants*