IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

IN RE: EPIPEN (EPINEPHRINE INJECTION, USP) MARKETING, SALES PRACTICES AND ANTITRUST LITIGATION *(This Document Relates to Class Cases)*	Case No. 2:17-MD-02785-DDC-TJJ MDL No. 2785

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO ALLOW LIVE TRIAL TESTIMONY VIA CONTEMPORANEOUS TRANSMISSION

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INTRODUCTION

Plaintiffs' Motion is both premature and inconsistent with the Federal Rules of Civil Procedure. In 2017, nearly all of the named Plaintiffs made the strategic decision to file their suits in this District, even though neither of the Defendants nor their primary witnesses have any connection to Kansas.[1] Several months later, Plaintiffs doubled down on that decision by asking the Judicial Panel on Multidistrict Litigation to centralize all of the EpiPen-related lawsuits across the country in this District. Following discovery and class certification, the handful of Plaintiffs that did not initially file in this District then knowingly and voluntarily waived their *Lexecon* rights and relinquished the right to return to their home districts for trial—including New Jersey, where one of the defendants has a substantial presence.

But now Plaintiffs face a conundrum: they chose this District for trial, and yet potential witnesses that they apparently want to call are not within the Court's subpoena power under Rule 45. So Plaintiffs seek a form of relief the Rules do not countenance: permission to call any witness by video transmission at trial—no matter where the witness is located or whether Plaintiffs can demonstrate good cause. And Plaintiffs are asking for this extraordinary relief before the parties have even disclosed who their trial witnesses will be or have had the opportunity to discuss whether those witnesses will appear live for trial.

Simply put, this is an unwarranted and premature request that violates Federal Rules of Civil Procedure 43 and 45, and Plaintiffs' motion should be denied. "[T]he requirements of the Civil Rules in an MDL case . . . 'are the same as those for ordinary litigation on an ordinary docket.'" *In re Nat'l Prescription Opiate Litig.*, 956 F.3d 838, 844 (6th Cir. 2020) (quoting *In re Korean Air Lines Co.*, 642 F.3d 685, 700 (9th Cir. 2011)). Indeed, outside of the unique circumstances occasioned by the pandemic, Defendants are not aware of a single court that has ever approved such a sweeping request where, as here, the case set for trial is not a bellwether trial or mass action. Plaintiffs chose the District of Kansas as the location of this MDL; the vast

[1] *See* Second Am. Class Action Compl., ECF No. 40, *In re: EpiPen Auto-Injector Litig.*, No. 2:16-cv-2711-DDC-TJJ (D. Kan. Feb. 3, 2017).

majority of named plaintiffs filed their claims directly in the District of Kansas; and all of the remaining named plaintiffs agreed to try the case in this District. This case is, therefore, subject to the same civil procedure rules for witness testimony as any other case filed and tried in Kansas.

That means that the parties must abide by the trial subpoena power limits of Rule 45, and are free at the appropriate time to seek relief under Rule 43(a) to permit remote trial testimony for particular witnesses if needed upon a showing of "good cause in compelling circumstances." But it does not mean that Plaintiffs should be awarded the blanket right, months before anyone knows which witnesses will testify, to call by contemporaneous video any witness—even those outside the Court's subpoena power—for any reason at all.

As discussed more fully below, Plaintiffs' Motion thus should be denied for at least four reasons. ***First***, Plaintiffs' Motion is premature. Plaintiffs' repeated refrain that Defendants plan to strategically refuse to present witnesses at trial, *see, e.g.*, Mot. at 1, 5-6, ECF No. 2249 ("Mot.") is grounded in a baseless, hypothetical concern that some as-yet unidentified witnesses may be unavailable to testify in-person at a trial that has not even been rescheduled. Moreover, Plaintiffs' Motion was filed when an April 2021 trial date, and the pandemic-related challenges associated with proceeding with trial at that time, loomed large. Now, however, trial will be continued until a time when much of the basis for Plaintiffs' Motion hopefully will be moot. ***Second***, Rules 43 and 45 simply do not permit the sort of blanket relief that Plaintiffs seek. Rule 43 permits remote testimony only for witnesses who are within the Court's subpoena power under Rule 45 or have otherwise agreed to testify—a limitation Plaintiffs ignore. Moreover, Rule 43 requires a showing of "good cause in compelling circumstances" for particular witnesses, and Plaintiffs have not even attempted to satisfy this standard. ***Third***, Plaintiffs overstate both the importance and applicability of the five-factor test from *In re Vioxx Prods. Liab. Litig.*, 439 F. Supp. 2d 640, 644 (E.D. La. 2006). *See* Mot. at 2. No court in this Circuit has adopted this test, and only a minority of courts outside of this Circuit have done so, most of

which did so as an accommodation due to the pandemic. In any event, even under the *Vioxx* test, Defendants would prevail. ***Fourth***, while Plaintiffs would suffer no prejudice from the ordinary application of the Federal Rules, Defendants and their witnesses would be prejudiced by the extraordinary relief Plaintiffs seek.

* * *

To be sure, circumstances may arise later in this case in which Rule 43 may properly be invoked to permit a particular witness to testify remotely. But that is not the relief Plaintiffs seek in their Motion. Rather, they ask for something far broader: a blanket order permitting remote testimony for any witness, anywhere, for any reason (or no reason), regardless of whether Rule 43's good cause standard has been met. For all of the reasons explained herein, that is inappropriate, and the Court should deny Plaintiff's Motion and address any requests for remote witness testimony pursuant to Rule 43 on an individual basis at a time closer to trial.

ARGUMENT

I. PLAINTIFFS' MOTION IS PREMATURE.

As a threshold matter, Plaintiffs' Motion should be denied because it is premature. The proper way to address the question of remote witness testimony is not to issue a blanket order before anyone even knows who the witnesses will be or whether they may appear live at trial. Instead, it is for the parties to exchange witness lists, confer about which witnesses each side plans to call, and discuss trial subpoenas, deposition designations, or other means of presenting testimony. If, at that or some later point, either side wishes to call their own witnesses by remote means, or to compel the other side to do so, then they are free to file a motion under Rule 43(a), setting forth why there exists "good cause in compelling circumstances" to allow remote testimony for these particular witnesses.

Here, this process has not even begun—and it won't begin for at least several months. Not only do the parties not know which witnesses will testify at trial, they also do not know which issues, if any, will remain in the case after summary judgment is decided. For example, if

Plaintiffs' "Auvi-Q foreclosure" theory were to be dismissed for some of the same reasons the Court granted summary judgment in the *Sanofi* case, *see* Mem. & Order, ECF No. 2254, then the parties' witness lists would look quite different (and be materially shorter).

Moreover, Plaintiffs' Motion is largely based on the unique circumstances presented by proceeding to trial amid the pandemic. *See* Mot. at 14–15 (describing flexibility necessitated by the COVID-19 pandemic); *id.* at 17–18 (arguing that remote witness testimony "will also allow the trial to proceed as scheduled in the face of the uncertainties posed by the COVID-19 pandemic"). But those arguments hopefully will be moot (or at least be much less of a factor) now that the trial has been continued. Indeed, many of the cases on which Plaintiffs rely are specific to the pandemic context (and at a time prior to a vaccine at that), and thus are largely inapplicable in "ordinary" circumstances. *See* Mot. at 16 (citing *In re RFC & ResCap Liquidating Tr. Action*, 444 F. Supp. 3d 967, 971 (D. Minn. 2020)[2]); *id.* at 17–18 & n.5 (citing cases analyzing Rule 43 motions submitted in response to 2020 pandemic conditions).[3]

Plaintiffs nonetheless suggest that they need blanket relief now because Defendants have "refuse[d] to commit" to bring witnesses to trial for tactical reasons and wish to "avoid truthful testimony from being presented to the jury." *See, e.g.*, Mot. at 5–6, 13. Nothing of the sort has occurred. Make no mistake: Defendants believe strongly in their defenses, maintain that

[2] *In re RFC* is also entirely inapposite because that case involved a *bench trial* that commenced in February 2020 with 11 of 13 scheduled days of trial already completed at the time of the request for remote testimony under Rule 43. 444 F. Supp. 3d 969. This occurred when COVID-19 was only beginning to be understood and the initial wave of travel restrictions and shutdowns were commencing and the moving party was only seeking video testimony from the two remaining witnesses so that the final two days of trial could be completed in light of the emerging pandemic. *Id.* at 969-72. Even then, the court noted that concerns about using videoconference technology "would perhaps be heightened" if the case had been a jury trial. *Id.* at 972.

[3] Because Plaintiffs filed their Motion when the trial was scheduled to commence in April 2021, Defendants contacted Plaintiffs on December 17 to ask whether, in light of the Court's order continuing the trial, Plaintiffs planned to withdraw their Motion and/or refile it at a later date. Plaintiffs responded on December 21 to state: "We do not intend to withdraw the Rule 43 motion."

Plaintiffs' claims are meritless (and should be dismissed on summary judgment), and are fully prepared to prove as much at trial, if necessary. Defendants thus have never suggested what Plaintiffs assert. Rather, what Defendants said during the meet-and-confer process—which occurred before the Court continued the April 2021 trial date—was simply that they could not guarantee at that time that any particular witness would appear in-person at an April 2021 trial because (1) the parties had not even served witness lists, and (2) the uncertainties of the changing pandemic situation counseled against such guarantees.

Defendants of course acknowledge—as they did during the meet and confer process—that individual circumstances may arise that prevent certain witnesses from attending trial in person. And in such circumstances, where "good cause in compelling circumstances" exists as to a particular witness, permitting individual witnesses to testify via "contemporaneous transmission from a different location" may be appropriate.[4] *See* Fed. R. Civ. P. 43. At this juncture, however, Plaintiffs have not even attempted to make this showing—nor could they, given that the parties do not even know which witnesses are at issue.

Thus, Plaintiffs' Motion is premature, and the Court should deny it and apply Rule 43 in the ordinary course—by resolving the question of remote witness testimony on an individualized basis before trial, just as courts always do. *See Hale v. Vietti*, No. 16-4183, 2019 WL 2869441, at *1 (D. Kan. July 3, 2019) (Crabtree, J.) (denying plaintiffs' request to call three witnesses to testify remotely); *Neff v. Desta*, No. C18-1716-RSL, 2020 WL 5899008, at *3 (W.D. Wash. Apr. 29, 2020) (denying motion requesting remote video testimony for "certain out-of-state lay witnesses" without prejudice to permitting the plaintiff to "renew his motion if good cause arises [for individual witnesses] once trial is scheduled.").[5]

[4] The same Rule 43 standard should, of course, apply to Plaintiffs' and Defendants' witnesses, including the named Plaintiffs.

[5] The "protocol" orders Plaintiffs attach to their Motion, Mot. at 19 & n.6, are also premature and irrelevant to the inquiry presently before the Court—namely, whether to permit the blanket relief Plaintiffs seek.

II. RULES 43 AND 45 DO NOT PERMIT THE BLANKET RELIEF THAT PLAINTIFFS SEEK.

A. Plaintiffs Cannot Use Rule 43 As An End-Run Around the Subpoena Power Limits of Rule 45.

Plaintiffs' Motion also should be denied on its merits. To begin with, the Motion seeks to automatically compel witness testimony beyond the Court's subpoena power in direct conflict with Rule 45. Plaintiffs ignore this limitation entirely, but it is dispositive of their request.

Before the Court even gets to the step of evaluating whether Rule 43 is satisfied as to a particular witness, it must determine whether that witness is subject to the Court's subpoena power under Rule 45 or otherwise willing to testify at trial.[6] If the answer to that question is "no," the Court can stop there. That is because, as this Court has recognized, Rule 43 is subject to the limitations of Rule 45, meaning that before a witness may be compelled to testify at trial—either in person or remotely—the witness must be subject to a valid trial subpoena under Rule 45(c)(1). *See Hale*, 2019 WL 2869441, at *1 (noting that the three witnesses plaintiff sought to call remotely "live more than 100 miles from the trial in Topeka, Kansas," such that "plaintiff cannot compel these witnesses' attendance by trial subpoena under Federal Rule of Civil Procedure 45(c)"); *Roundtree v. Chase Bank USA, N.A.*, No. 13-239 MJP, 2014 WL 2480259, at *2 (W.D. Wash. June 3, 2014) ("Plaintiff attempts to avoid the geographic limits of FRCP 45(c) by arguing that trial testimony via live video link moves a trial to the physical location of the testifying person . . . Plaintiff provides no legal authority or compelling reason for this interpretation of Rule 45(c) and the Court declines to adopt it."). Indeed, "[t]here is nothing in the language of Rule 43(a) that permits this court to compel the testimony of an individual who is indisputably outside the reach of its subpoena power." *Lea v. Wyeth LLC*, No. 1:03-CV-1339,

[6] Rule 45 enforces precise limits on the subpoena power, including at trial. *See* Fed. R. Civ. P. 45(c)(1) ("A subpoena may command a person to attend a trial, hearing, or deposition only as follows: (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person (i) is a party or a party's officer; or (ii) is commanded to attend a trial and would not incur substantial expense.").

2011 WL 13195950, at *1 (E.D. Tex. Nov. 22, 2011). Thus, if a witness is beyond the Rule 45(c)(1) subpoena power, then there is no basis to compel his or her testimony, and no basis to invoke Rule 43. *Id.*

Plaintiffs are silent on this issue, requesting instead a blanket order that would require witnesses to testify by video from anywhere in the country because this case is proceeding as an MDL. *See* Mot. at 3.[7] But courts may not discount the Federal Rules "in favor of enhancing the efficiency of [an] MDL[.]" *In re Nat'l Prescription Opiate Litig.*, 956 F.3d at 844. To the contrary, the Federal Rules are not "merely hortatory in MDL" cases, nor are MDLs "some kind of judicial border country, where the rules are few and the law rarely makes an appearance." *Id.* Thus, even if Plaintiffs are correct that a more lenient Rule 45 standard would be an attractive alternative in complex MDL proceedings, the Federal Rules foreclose such deviation from the norm.

That conclusion should apply with particular force given the unique circumstances of this MDL. Many of the cases Plaintiffs cite in their Motion are products liability MDLs involving bellwether trials and situations where thousands of lawsuits were initially filed all over the country and then consolidated in a forum that most plaintiffs did not choose. *See, e.g.*, Mot. at 2–4, 12–13, 16 (citing *In re Vioxx Prods. Liab. Litig.*, 439 F. Supp. 2d at 643; *In re DePuy Orthopaedics, Inc. Pinnacle Hip Implant Prods. Liab. Litig.*, No. 3:11-MD-2244-K, 2016 WL 9776572, at *1 (N.D. Tex. Sept. 20, 2016) (observing that the case was "the third bellwether trial in this MDL" and served "over 8,000 cases [that had] been filed or consolidated to this district for pretrial proceedings"); *Mullins v. Ethicon, Inc.*, No. 2:12-CV-02952, 2015 WL 8275744, at *2 (S.D.W. Va. Dec. 7, 2015) (noting that this "consolidated case may impact hundreds and thousands of cases in this MDL"); *In re Actos (Pioglitazone) Prods. Liab. Litig.*, No. 12-CV-

[7] More specifically, Plaintiffs propose allowing subpoenas that would require remote witnesses to testify at a "location" that is "within 100 miles[] of where each such witness lives or works." Mot. at 20. But that is not what Rule 45 says. The Rule permits a court to compel trial testimony of a witness who resides "within 100 miles" of the trial. Fed. R. Civ. P. 45.

00064, 2014 WL 107153, at *1, *2 (W.D. La. Jan. 8, 2014) (noting that the trial was "the bellwether case" for "some 2,800 cases originating from across the United States"). Here, however, nearly all the named Plaintiffs *chose* to bring suit in this District. There is no bellwether trial. And the five Plaintiffs who did not originally file their complaints in this Court have since voluntarily waived their *Lexecon* rights, thereby accepting all of the procedural consequences that flow from that decision.[8]

Plaintiffs should not be permitted to have it both ways. If Plaintiffs wanted to guarantee that Defendants' witnesses would be available at trial, they could have filed their lawsuit in one of Defendants' home jurisdictions. That is a well-trodden path by class-action plaintiffs. But now, having successfully litigated for a Kansas forum and waived their *Lexecon* rights, Plaintiffs should be subject to the usual consequences of that decision, MDL or not. A blanket order compelling witnesses across the U.S. to testify is simply not allowed by Rule 45.

B. Rule 43 Is Meant To Apply To Individual Witnesses, Based On Individual Circumstances, and Plaintiffs Have Not Met This Test.

Plaintiffs' Motion also should be denied because Plaintiffs have not met the standard required by Rule 43. Assuming that an individual witness is within the subpoena power or otherwise willing to testify at trial, Rule 43(a) generally applies when such a witness cannot appear in person at trial "for unexpected reasons, such as accident or illness." *Hale*, 2019 WL 2869441, at *1; *see also Eller v. Trans Union, LLC*, 739 F.3d 467, 478 (10th Cir. 2013) ("[T]he rule is intended to permit remote testimony when a witness's inability to attend trial is the result of 'unexpected reasons, such as accident or illness[.]'") (quoting Fed. R. Civ. P. 43(a) advisory committee's note to 1996 amendment). "In contrast, other reasons 'must be approached cautiously.'" *Hale*, 2019 WL 2869441, at *1 (quoting Fed. R. Civ. P. 43(a) advisory

[8] Three of these five named Plaintiffs originally filed suit in the District of New Jersey, where, for example, Defendant Pfizer has operations. To the extent they wished to avoid issues presented by Rule 45's limitations on the subpoena power, they could simply have exercised their *Lexecon* rights and tried their cases in New Jersey.

committee's note to 1996 amendment). Thus, by its plain terms, Rule 43 requires a party seeking to present remote witness testimony to demonstrate "good cause in compelling circumstances" on an individualized basis. Fed. R. Civ. P. 43(a).[9] But this is not the standard Plaintiffs set out in their Motion, nor the relief Plaintiffs seek. Rather, Plaintiffs ask the Court to issue a blanket order permitting remote testimony, *see* Mot. at 1-2, regardless of whether "good cause" or "compelling circumstances" exists as to any particular witness.

Neither Rule 43 nor the case law (nor any other Rule) permits such sweeping relief. Contrary to Plaintiffs' characterization, most courts have approached requests to permit remote witness testimony under Rule 43 on a witness-by-witness basis. *See, e.g.*, *Eller*, 739 F.3d at 477–78 (addressing Rule 43 dispute with respect to two witnesses based on particularized circumstances); *Hayes v. SkyWest Airlines, Inc.*, No. 15-CV-02015-REB-NYW, 2017 WL 11546040, at *1–2 (D. Colo. Sept. 6, 2017) (same, for one witness); *Hicks v. Les Schwab Tire Ctrs. of Portland, Inc.*, No. 2:17-CV-00118-SB, 2019 WL 2245007, at *3 (D. Or. May 24, 2019) (same, for two witnesses); *Nat'l Graphics, Inc. v. Brax Ltd.*, No. 12-C-1119, 2016 WL 8214294, at *1 (E.D. Wis. Mar. 18, 2016) (same, for one witness). *See also generally Valerino v. Holder*, No. 08-035, 2014 WL 4198501, at *1 (D.V.I. Aug. 25, 2014) (denying Rule 43 motion for failure to satisfy good cause standard and noting that while "[t]here are a number of decisions that have allowed contemporaneous transmission from a different location based on the compelling circumstances presented . . . [i]n each case, the court had before it the specific circumstances" unique to particular witnesses "on which it could make its judgment").

Plaintiffs' suggestion that courts routinely issue blanket orders is wrong. *See* Mot. at 3, 18. Most of the cases they cite are specific to the earlier days of the pandemic and all were decided prior to the approval of any vaccine, and thus are not on point now that the trial date has been continued precisely for the purpose of pushing it *beyond* the exigencies of the global health

[9] Plaintiffs urge the Court to analyze their Motion according to the five-factor test used in *In re Vioxx Prods. Liab. Litig.*, 439 F. Supp. 2d 640, 643 (E.D. La. 2006), which Defendants discuss below at Section C.

crisis. *See* Mot. at 17-18 & n.5. Still other cases Plaintiffs cite involve the more conventional posture of a party asking the court to permit that party's own witness to testify remotely, not a motion to compel the remote trial testimony of an opposing party's witnesses. *See*, *e.g.*, Mot. at 18 n.5 (citing *Sentry Select Ins. Co. v. Maybank Law Firm, LLC*, No. 5:15-CV-04984-JMC, 2020 WL 5441305, at *1 (D.S.C. Sept. 10, 2020)). And in the only non-pandemic-era case that Plaintiffs cite where a court granted anything even close to the sort of order that Plaintiffs seek here, *In re Actos (Pioglitazone) Prods. Liab. Litig.*, 2014 WL 107153, the court relied heavily on the fact that the trial at issue was a bellwether trial in an MDL consolidated in a forum that most of the plaintiffs had not chosen, *see id*. at *5-*6.[10] That is the exact *opposite* of the situation here: this is a consolidated complaint, not a bellwether, and Plaintiffs voluntarily and specifically chose this forum for trial. Thus, as a matter of law, Rule 43(a) does not allow the relief that Plaintiffs seek.

Nor have Plaintiffs even attempted to satisfy Rule 43(a) as to any particular witness. In their Motion, Plaintiffs identify (for the first time) thirteen potential witnesses that they apparently intend to call at trial, hypothesizing that "Defendants *may seek* tactical advantage" by refusing to bring certain of these witnesses to trial. *See* Mot. at 5-12 (emphasis added). The basis for this assertion is a mystery; the parties have never even discussed these witnesses or their availability for trial. In any event, Plaintiffs make no attempt to identify the kind of "good cause" or "unexpected" circumstances that would justify remote testimony for these witnesses—at a trial that will not commence until at least late summer or fall—much less why such

[10] This was not the only peculiarity animating the decision in *Actos*. There, the court relied heavily on the parties' agreement to produce as many witnesses as possible for trial. *See In re Xarelto (Rivaroxaban) Prods. Liab. Litig.*, No. 15-3708, 2017 WL 2311719, at *2 (E.D. La. May 26, 2017) ("*Actos* placed great weight on the Scheduling Order which required 'both parties to assist trial preparation by bringing as many witnesses to trial as possible, rather than relying on depositions.' . . . That is not the case here."). Moreover, Defendants in that case only disclosed which witnesses would not appear a few weeks before the trial, leaving insufficient time for the court to consider deposition designations and objections. *Actos*, 2014 WL 107153, at *7. And in *Actos*, not all trial witnesses had been deposed. *Id.*

circumstances are "compelling." *See* Fed. R. Civ. P. 43(a); *Hale*, 2019 WL 2869441, at *1. These omissions are dispositive, and Plaintiffs' Motion should be denied on this basis alone. *See Valerino*, 2014 WL 4198501, at *2 (denying Rule 43 motion where plaintiff did not explain why witnesses at issue would not be available to testify in person or provide other information to satisfy Rule 43's "stringent" "good cause in compelling circumstances" requirement).

For this reason, and because any discussion of particular witnesses is necessarily premature for the reasons explained above in Section I, Defendants have not endeavored to respond to Plaintiffs' narrative about each of these potential witnesses. For now, suffice it to say that Plaintiffs' rhetoric about Defendants' witnesses cannot be squared with the summary judgment record.[11] For example, Plaintiffs state that Ivona Kopanja "testified about the meeting with Pfizer and Mylan in which Pfizer approved the elimination of the single pack." *See* Mot. at 6. Actually, Ms. Kopanja testified that she did not recall such a meeting. *See* Ex. A (I. Kopanja Dep. Tr.) at 44:12-19. Likewise, Plaintiffs claim that Robert Coury "instructed the contracting team while he was CEO to 'pre-empt any new market entry' and 'block competition,'" Mot. at 9, but the document they quote for this proposition is an email from a Mylan marketing executive, Joe Loftus. *See id*. (citing Pls.' MSJ Opp. at 32, Ex. 186, ECF No. 2190). Mr. Coury was not even on the e-mail chain. *Id.* Whatever significance these inaccurate statements might hold for Plaintiffs, their brief sketches about potential trial witnesses are premature and irrelevant to the Rule 43 standard.

C. Even Under Plaintiffs' Proposed Multi-Factor Test, Defendants Prevail.

Perhaps because they cannot satisfy the plain text of Rule 43 itself, Plaintiffs contend the Court should decide this Motion pursuant to the five-factor test employed by one court in the

[11] *See* Mylan Defendants' Memorandum of Law in Support of Mot. for Summary Judgment, ECF No. 2142-1; Pfizer Defendants' Memorandum of Law in Support of Mot. for Summary Judgment, ECF No. 2149-1; Mylan Defendants' Reply in Support of Mot. for Summary Judgment, ECF No. 2226-1; Pfizer Defendants' Reply in Support of Mot. for Summary Judgment, ECF No. 2222-1.

Eastern District of Louisiana in *In re Vioxx Prods. Liab. Litig.*, 439 F. Supp. 2d at 640. *See* Mot. at 2. As an initial matter, *Vioxx* did not address—let alone sanction—the sort of blanket order Plaintiffs seek here. Rather, it pertained to whether a single witness satisfied Rule 43's good cause standard and thus could testify remotely at a bellwether products liability trial. *See In re Vioxx Prods. Liab. Litig.*, 439 F. Supp. 2d at 641. Nor is *Vioxx* a "widely used" test, as Plaintiffs contend. *See* Mot. at 2. While several courts outside of this Circuit have applied it in deciding whether to permit individual witnesses to testify remotely, no court in this Circuit has ever done so. And for good reason: the plain language of Rules 43 and 45 dictate the circumstances under which remote testimony is allowed, so courts in this Circuit—including this Court—simply apply these rules by their terms. *See, e.g.*, *Hale*, 2019 WL 2869441, at *2; *Avalanche Equip., LLC v. Williams-S. Co., LLC*, No. 13-CV-2827-BNB-MJW, 2014 WL 12676225, at *1 (D. Colo. Oct. 28, 2014). Moreover, *In re Vioxx* was decided before Rule 45 was amended in 2013 to clarify that witnesses located more than 100 miles from the place of trial could not be compelled to testify in person.

In any event, the result would be the same even under *Vioxx*: A blanket order permitting remote testimony is inappropriate, and the Court should determine whether Rule 43 is satisfied on a witness-by-witness basis. Indeed, walking through the *Vioxx* factors actually underscores that Plaintiffs' Motion is premature and that the relief they seek is inappropriate.[12]

Control. The first factor, the "control exerted over the witness by the defendant[,]" requires an individualized inquiry as to the particular witness at or near the time of trial. *In re Vioxx Prods. Liab. Litig.*, 439 F. Supp. 2d at 643. Because the parties have not even assembled witness lists at this stage—and will not do so for at least several months—discussion of this factor is premature. Moreover, it would be improper to simply assume that Defendants have

[12] The five factors at issue still must be analyzed in the context of the testimony of a specific witness. *See In re Vioxx Prods. Liab. Litig.*, 439 F. Supp. 2d at 643. Indeed, the only two of the five factors that refer directly to witness testimony both use the singular noun form, "the witness." *Id.*

"control" over every former employee Plaintiffs may call at trial. Many of these former employees were represented by their own independent counsel during discovery and at depositions, which, if anything, suggests the opposite of "control" for this purpose. Consistent with Rule 43, Plaintiffs thus would need to make individualized showings about control as to particular witnesses, which they have not done.

Complexity of the litigation. As for the second factor, relating to the complexity of the litigation, the fact that this case is proceeding as an MDL alone is not enough to warrant Rule 43 relief, let alone the kind of blanket order Plaintiffs seek. *See supra* Section II.A.

Tactical advantage. Like the first *Vioxx* factor, the third factor, "the apparent tactical advantage, as opposed to any real inconvenience to the witness, that the defendant is seeking by not producing the witness voluntarily[,]" *id.*, similarly requires a witness-specific analysis and cannot be appropriately addressed at this juncture. Additionally, as noted above, Defendants have never "refuse[d] to commit" to bringing particular witnesses to trial to supposedly "avoid truthful testimony from being presented to the jury." *See, e.g.*, Mot. at 5–6, 13. Indeed, Defendants recognize that application of the Rules may restrict their own ability to call witnesses who fall outside the subpoena power of the court, including named plaintiffs. Thus, this is not about seeking some untoward "tactical advantage," Mot. at 1; it is about proper adherence to the rules that govern a federal trial.[13] If anything smacks of gamesmanship, it is attempting to use Rule 43 as an end-run around Rule 45.

Prejudice. The fourth factor, the degree to which Defendants would suffer prejudice by the use of remote witness testimony at trial, cuts in Defendants' favor. *See infra* Section III.

Flexibility. Finally, though the fifth *Vioxx* factor regarding the "flexibility" needed to manage this litigation might carry some weight in terms of permitting remote testimony on an individual witness basis, it does not permit Plaintiffs to circumvent the text or limitations

[13] Plaintiffs also posit that Defendants are likely to over-designate deposition testimony in light of the uncertainty caused by the pandemic, Mot. at 15, but this concern is now moot in light of the continuance of the trial date.

imposed by Rules 43 or 45. *See generally In re Nat'l Prescription Opiate Litig.*, 956 F.3d at 844. The need for flexibility also carries much less weight now that the trial has been continued and should take place when pandemic-specific considerations are less prevalent. *See supra* Section I.

III. GRANTING PLAINTIFFS' PREMATURE MOTION WOULD NOT HARM PLAINTIFFS BUT WOULD PREJUDICE DEFENDANTS.

Since the revised Rule 43 debuted in 1996, courts generally have used its narrow grant of authority permitting remote witness testimony in exceptional, fact-bound situations. That is, no doubt, in large part because the Federal Rules evince a clear preference for in-person—not remote—witness testimony at trial. *Hale*, 2019 WL 2869441, at *2 ("[T]he importance of presenting live testimony in court cannot be forgotten . . . [R]emote testimony is 'not a favored solution[.]'") (citation omitted). To be sure, there may be circumstances that warrant departing from this preference; that is precisely why Rule 43 exists. But overriding this preference requires more than an interest in promoting "flexibility" in an MDL proceeding, *see* Mot. at 15, especially when such a departure would prejudice Defendants' witnesses by forcing them to testify at a trial taking place in a forum that does not have subpoena power over them—requiring them to choose between traveling to Kansas to testify or traveling to a courthouse within 100 miles from their home to do so, even though the Federal Rules made the determination that witnesses should not be so burdened—and without any showing of good cause.

Plaintiffs, on the other hand, will suffer no prejudice if the Court applies the ordinary Rules of Civil Procedure. Courts have granted requests for remote trial testimony outside the pandemic context only when presented with a factually supported, individualized showing of "good cause in compelling circumstances and with appropriate safeguards" within the bounds of Fed. R. Civ. P. 43(a). If Plaintiffs are able to make the required showing as to specific witnesses, they have no reason to fear this Court will not grant them such relief at the proper time.

Indeed, what Plaintiffs are trying to accomplish through this Motion is akin to forum shopping, and an end-run around the requirements of Rules 43 and 45. Granting Plaintiffs'

Motion would upend the JPML process, subjecting MDL defendants and their employees and witnesses to the burdens of trial in foreign jurisdictions without regard to the Federal Rules. The purpose of centralizing an MDL in a single jurisdiction is to achieve the benefits of efficiency and coordination for pretrial efforts. *See, e.g.*, *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 40 (1998); *In re Activated Carbon-Based Hunting Clothing Mktg. & Sales Pracs. Litig.*, 840 F. Supp. 2d 1193, 1198 (D. Minn. 2012). The MDL process was never designed to override Rules 43 and 45, or to automatically transform the limited subpoena powers of the assigned District into nationwide jurisdiction, thereby prejudicing defendants and subjecting them to additional burdens that they would not face if the case were not an MDL.

Having chosen to try this case in Kansas, Plaintiffs should not now also get the benefits that they would have had by filing somewhere else. If the parties have particular reasons why certain witnesses should be allowed to testify by remote means, then they are free to file motions under Rule 43(a) at a later date. But the blanket relief that Plaintiffs seek now is premature, unjustified, and foreclosed as a matter of law. The Motion should be denied.

CONCLUSION

For all of the reasons stated herein, Defendants respectfully request that the Court deny Plaintiffs' Motion.

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Respectfully submitted,

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