

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 9:20-cv-81205-RAR/Reinhart

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

COMPLETE BUSINESS SOLUTIONS GROUP,
INC. d/b/a PAR FUNDING, *et al.*,

Defendants.

**NON-PARTY JOHN W. PAUCIULO'S
MOTION TO PERMIT TESTIMONY BY LIVE VIDEO TELECONFERENCE**

Non-Party John W. Pauciulo (“Mr. Pauciulo”) files this Motion to Permit Testimony By Live Video Teleconference, and states:

INTRODUCTION AND RELEVANT BACKGROUND

Mr. Pauciulo accepted service of trial subpoenas from Plaintiff, Securities and Exchange Commission (“SEC”), and Defendant Dean Vagnozzi requesting Mr. Pauciulo’s testimony at the upcoming trial in this case, presently set for December of this year and January 2022.

Mr. Pauciulo, who lives in Pennsylvania,¹ requested that counsel for Mr. Vagnozzi and the SEC agree that he may testify via live video teleconference (or, as the case often is in this Court, by Zoom). Both Mr. Vagnozzi and the SEC indicated they would not agree but, instead, that they will require Mr. Pauciulo to appear in person.

¹ Although Mr. Pauciulo is outside the geographic limitations of this Court for service of a trial subpoena pursuant to Federal Rule of Civil Procedure 45, he is subject to service pursuant to Section 22(a) of the Securities and Exchange Act, which provides for nationwide service of trial subpoenas, and, therefore, agreed to accept service of the trial subpoena.

Mr. Pauciulo now requests permission from the Court, pursuant to Federal Rule of Civil Procedure 43(a), to appear and testify by video in order to avoid the need to travel to Miami during the holidays, traditionally one of the most popular destinations during what is already the busiest and most congested time for air travel in the United States.

MEMORANDUM OF LAW

The issue of whether Mr. Pauciulo or any witness should be permitted to appear remotely to testify at trial via live video teleconference is governed by Rule 43(a) of the Federal Rules of Civil Procedure. Rule 43(a) provides:

- (a) In Open Court. At trial, the witnesses' testimony must be taken in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise. For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.

Fed. R. Civ. P. 43(a) (emphasis added).

The Court has discretion under Rule 43(a) to permit witnesses to provide virtual testimony. *See Schleife v. Royal Caribbean Cruises, Ltd.*, No. 19-22776-O'SULLIVAN, 2021 U.S. Dist. LEXIS 84661, at *7-9 (S.D. Fla. May 4, 2021) (citing *Toland v. Phoenix Ins. Co.*, No. 20-12556, 2021 U.S. Dist. LEXIS 40537, 2021 WL 1201737, at *4 (11th Cir. Mar. 30, 2021)). Furthermore, "[t]he Court's discretion on this question is supplemented by its 'wide latitude in determining the manner in which evidence is to be presented' under the Federal Rules of Evidence." *Argonaut Ins. Co. v. Manetta Enters.*, No. 19-CV-00482 (PKC) (RLM), 2020 U.S. Dist. LEXIS 103625, at *3 (E.D.N.Y. June 11, 2020); *In re RFC & ResCap Liquidating Tr. Action ("RFC")*, 444 F. Supp. 3d 967, 2020 U.S. Dist. LEXIS 44607, 2020 WL 1280931, at *2 (D. Minn. Mar. 13, 2020) (quoting *Parkhurst v. Belt*, 567 F.3d 995, 1002 (8th Cir. 2009)).

1. Good Cause and Compelling Circumstances Warrant Permitting Mr. Paucilio To Testify Via Live Video Conference Under Rule 43(a).

Federal courts in this District and throughout the country have not hesitated to find that the COVID-19 pandemic justifies allowing out-of-state witnesses to testify remotely in civil trials. *See, e.g., Schleife, supra* (S.D.Fla.) (finding that good cause exists for allowing a witness to testify virtually at trial in light of the health concerns posed by the global pandemic) (citing *Novello v. Progressive Express Ins. Co.*, No. 8:19-CV-1618-KKM-JSS, 2021 U.S. Dist. LEXIS 78299, 2021 WL 1597937, at *2 (M.D. Fla. Apr. 23, 2021)); *Guardant Health, Inc. v. Foundation Medicine, Inc.*, 2020 U.S. Dist. LEXIS 192477, 2020 WL 6120186, *3 (D. Del. 2020) (“Courts, including this Court, are regularly determining that the ongoing COVID-19 pandemic constitutes good cause for remote testimony.”); *In re RFC & ResCap Liquidating Trust Action*, 444 F. Supp. 3d 967, 971-72 (D. Minn. 2020) (granting motion to allow out-of-state witnesses to testify via video teleconference because “the occurrence of COVID-19—and its impact on the health and safety of the parties and witnesses—is undoubtably an unexpected occurrence that nevertheless still permits witnesses to testify from a different place”); *Cramton v. Grabbagreen Franchising LLC*, No. CV-17-04663-PHX-DWL, 2020 U.S. Dist. LEXIS 212008, at *3-7, 2020 WL 8620346 (D. Ariz. Nov. 13, 2020) (finding that the COVID-19 pandemic provides sufficient good cause and compelling circumstances to permit out-of-state witnesses to testify via video); *ERMC, LLC v Millertown Pavillion, LLC*, No. 19-CV-408-DCP, 2021 U.S. Dist. LEXIS 2452 (E.D. Tenn. Jan. 7, 2021) (same).

Even before the COVID-19 pandemic, Courts routinely held that out-of-state witnesses should be permitted to testify via live video teleconference pursuant to Rule 43(a) rather than incur the burden of travel to another jurisdiction to testify. In *FTC v. Swedish Match N. Am.*, 197 F.R.D. 1, 2 (D.D.C. 2000), the court held that the good cause requirement of Rule 43(a) is satisfied by

“the serious inconvenience that will arise in requiring [the witness], a resident of Oklahoma, to appear as a witness in the hearing in Washington, DC.” (citing *Beltran-Tirado v. INS*, 213 F.3d 1179, 1186 (9th Cir. 2000) (finding Rule 43(a) satisfied and permitting the use of telephonic testimony where witness located in Missouri and hearing held in California)); *see also In Re Rand Int’l Leisure Prods.*, 2010 Bankr. LEXIS 1986 *11; 2010 WL 2507634 (U.S. Bank. Ct, E.D.N.Y. 2010) (applying Rule 43(a) and finding the Rule is satisfied because requiring witnesses to travel to the jurisdiction presents an undue burden and compelling circumstances to permit testimony by video).

At this time, the COVID-19 pandemic remains a serious risk, and there is no indication or reason to believe that the risks associated with the pandemic will be alleviated by December, when trial in this case is scheduled. As the Middle District observed in *Novello*, it is not possible to “predict when the pandemic will end or when [the witnesses’] concerns will be alleviated such that they would be able to testify in person.” 2021 U.S. Dist. LEXIS 78299, 2021 WL 1597937, at *2.

Mr. Pauciulo submits that in light of the fact that he is a non-party witness residing out of state, and in-person testimony would require him to travel by air during the holidays and while COVID-19 still presents serious health risks,² “good cause” and “compelling circumstances” are presented such that he should be permitted to testify remotely at trial via live video teleconference.

2. Live Video Conferencing, Such As Zoom, Provides Appropriate and Adequate Safeguards For Purposes of Rule 43(a).

Rule 43(a) also requires the Court to utilize “appropriate safeguards” when receiving remote witness testimony. In *Crampton, supra*, the District Court in Arizona explained that such safeguards can be met through live video teleconference technology (such as Zoom):

² Moreover, Mr. Pauciulo suffers from asthma and severe allergies, and air travel during such a busy time presents an even greater risk for exposure to health concerns arising from COVID-19, constituting an even more compelling reason to allow him to testify remotely.

The case law defining what constitutes appropriate safeguards is sparse . . . [t]he few cases that do address the issue appear to focus on ensuring that the purposes of Rule 43(a) are met—that the witness is giving live testimony, under oath, which is received in open court when the witness is subject to cross examination. Other important safeguards include taking steps to establish a reliable means of transmission and figuring out a fair and workable process for handling documents or other trial exhibits.

Cramton, 2020 U.S. Dist. LEXIS 212008, at * (citing 1 S. Gensler, Federal Rules of Civil Procedure, Rules and Commentary, Rule 43, at 1158-59 (2018)).

In *Schleife*, *supra*, Magistrate Judge O’Sullivan noted that courts have consistently determined that testifying by video provides sufficient safeguards, citing the Middle District’s *Novello* decision in which the court explained that appropriate safeguards can be utilized for witness testimony when the witnesses testify by video, “which allows the jury to observe and evaluate the witnesses’ demeanors and facial expressions during their testimony” and where “both Plaintiff and Defendant will have the opportunity to examine [the witnesses] using the same video platform, ensuring that the method and opportunity for examination is the same.” *See Schleife*, No. 19-22776-O’SULLIVAN, 2021 U.S. Dist. LEXIS 84661, at *7-9 (quoting *Novello*, 8:19-CV-1618-KKM-JSS, 2021 U.S. Dist. LEXIS 78299, 2021 WL 1597937, at *2).

It is worth noting that numerous witnesses in this case have been deposed remotely by live video conference technology, including Mr. Pauciulo, who has been deposed for three days in this case via remote video conference technology without issue.

Again, this Court and courts throughout the country have been using such safeguards throughout the pandemic, and there is no reason to question that the Court and the parties can use such safeguards here. And because these safeguards are in place, the trier of fact can evaluate the remote witnesses' credibility, which is now more the norm than the exception.

CONCLUSION

For the reasons set forth above, Non-Party John Pauciulo respectfully requests this Court permit him to comply with the trial subpoenas served on him and appear and testify at trial by live video teleconference pursuant to Federal Rule of Civil Procedure 43(a).

CERTIFICATION OF CONFERRAL

Pursuant to Southern District of Florida Local Rule 7.1(a)(3), counsel for Mr. Pauciulo conferred with counsel for the SEC and for Defendant Vagnozzi and is authorized to represent that neither party agrees to the relief requested herein.

Respectfully submitted,
DAMIAN & VALORI LLP | CULMO
TRIAL ATTORNEYS, P.A.
*Counsel for Non-Parties, Eckert Seamans,
Cherin & Mellot, LLC and John Pauciulo*
1000 Brickell Avenue, Suite 1020
Miami, Florida 33131
Telephone: (305) 371-3960
Facsimile: (305) 371-3965

By: /s/Melanie E. Damian
Melanie E. Damian
Florida Bar No. 99392
Email: mdamian@dvlip.com

Jay A. Dubow
Troutman Pepper
3000 Two Logan Square
Philadelphia, PA 19103
215.981.4713
jay.dubow@troutman.com
Admitted Pro Hac Vice

Catherine Recker
Amy Carver
WELSH & RECKER
306 Walnut Street
Philadelphia, PA 19106
abcarver@welshrecker.com
(215) 972-6430 – main
Admitted Pro Hac Vice

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via electronic transmission via this Court's CM/ECF filing system on the 15th day of November, 2021, on all counsel or parties who have appeared in the above-styled action.

/s/Melanie E. Damian
Melanie E. Damian