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June 16, 2020

**VIA CM/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, New York 10007-1312

**Re: Ferring Pharm. Inc., et al. v. Serenity Pharm. LLC, et al.**  
**Case No. 17-cv-9922 (CM) (SDA)**

Dear Chief Judge McMahon:

This firm, along with Womble Bond Dickinson (US) LLP, represents the Ferring Plaintiffs (“Ferring”) in the above-referenced matter. We write jointly with counsel for Counterclaimants further to the Court’s May 27, 2020 order regarding trial procedures.

The parties have met and conferred, and Counterclaimants have confirmed that they do not believe it is safe to travel to New York City at this time. Thus, given Your Honor’s statement that you “will not have just one side’s lawyers in the courtroom” (D.I. 690 at 2), the entire trial will be handled remotely and no party will appear in person. The parties have arranged with TrialGraphix to have personnel physically be present in the Courtroom with Your Honor for the duration of trial to address any issues that may arise.

As part of the meet and confers, the parties have identified several topics where the parties would benefit from the Court’s guidance, which are discussed more fully below. To address these issues and to test the remote setup, the parties respectfully request a pretrial conference on June 25 or June 26, 2020, or at the Court’s convenience.

The parties have identified the following issues that would benefit from the Court’s guidance, either before or during the pretrial conference:

**1. Trial start time**

The parties respectfully request that the start time for the first day of trial be set for 10:00 am EDT, with the Court to set the start time for subsequent days at the close of testimony on the day prior.

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## **2. Remote trial equipment setup**

The parties have arranged for TrialGraphix to provide Your Honor with a configured computer. We propose shipping the computer to arrive on Monday, June 22, 2020, which will allow time to ensure that everything is working properly before trial and the requested pretrial conference. In order to do so, TrialGraphix will need a contact person at the Court to direct the laptop to; ideally, this individual would also be able to assist in the initial setup of the computer for Your Honor to ensure that everything is working properly.

Our understanding is that TrialGraphix is also coordinating hardwiring of Your Honor's Courtroom with Courtroom Connect to ensure that the Court has the most stable connection possible for the remote trial.

## **3. Witness order**

The parties have met and conferred and have agreed to exchange proposed witness order and preferred shipping addresses for witnesses at 4:00 pm on Friday, June 19, 2020. The parties hope that this will allow the parties to coordinate shipment of cross-examination materials (exhibits and demonstratives) so that they will arrive prior to the date the witness is anticipated to testify at trial. At this time, the parties do not anticipate needing to call any witness out of order, with the exception of Dr. Fein who will, as directed by the Court, testify only once, during Counterclaimants' case-in-chief. Otherwise, the parties expect that the order of proof will proceed as set forth in paragraph 46 of the Joint Pretrial Order (D.I. 637). Should the Court wish, once these lists have been exchanged, the parties can provide the proposed witness order to the Court.

## **4. Trial exhibits**

The parties believe that there are no longer any objections to any of the pre-marked and submitted exhibits on the parties' joint and respective trial exhibit lists. To assist with examination of the witnesses, the parties request that the Court pre-admit these exhibits.

With respect to exhibits to be used for cross-examination, the parties propose to pre-mark those cross-examination exhibits that are not on either parties' exhibit list using the next in line number and based on the exchanged witness order. For example, Ferring's first "new" cross-examination exhibit would be pre-marked as DX-101; Counterclaimants' first "new" cross-examination exhibit would be pre-marked as PX-101.

The parties will follow the method proposed in Ferring's May 19, 2020 letter to the Court (D.I. 685) for cross-examination binders.

The parties respectfully request the Court's guidance on if and how the Court would like to receive these binders. Both parties have previously provided the Court with binders of all JX, PX, and DX exhibits. Would the Court prefer to also have direct witness binders for each witness with all

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exhibits referenced in that witness's direct testimony? For the cross-examination materials, does the Court prefer to have a full set of materials (i.e., all materials that will be used in the cross-examination, even if they are pre-admitted exhibits or cited in the direct testimony) or only those materials that have not previously been delivered to the Court?

## **5. Closing arguments**

The parties are mindful of the Court's indication that it would prefer "a real bench trial closing argument." (D.I. 690 at 2.) The parties' respective positions are set forth below.

### **a. Ferring's Position**

Ferring requests that the closing arguments be in person and subject to the Court's schedule.

### **b. Counterclaimants' position**

Counterclaimants request that the parties and the Court address the timing and location of closing arguments near the end of trial when everyone will have more current information regarding the state of the pandemic and its impact on travel safety.

## **6. Timing of trial**

Counterclaimants have proposed that the Court impose time limits on the parties for the trial. The parties' respective positions are set forth below:

### **a. Ferring's position**

Ferring's position is that time limits are unnecessary. Ferring is mindful of the Court's prior guidance that trial in the remote format will likely involve interruptions and hence move more slowly than an in-person trial and believes that attempting to impose time limits on the parties before trial even begins is impractical and unnecessary.

### **b. Counterclaimants' position**

Counterclaimants believe time limits will be an effective way to proceed most efficiently with this remote bench trial, and propose 20 hours per side (including openings, closings, live testimony, and, if necessary, depending on the Court's preference on deposition designations, designated deposition and prior court testimony). Time limits are commonly used in federal patent trials because they allow for greater fairness and efficiency – absent time limits, one party will almost certainly end up with a disproportionate amount of time on the record. That excess time, should it occur here, will likely cause the trial to extend past the 8 days for which it is currently scheduled.

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**7. Deposition designations**

The parties set forth their respective positions on deposition designations below:

**a. Ferring's position**

Ferring's position is that deposition designations should be read into the record or played into the record. The parties have each designated various deposition testimony, and Ferring's experience has been that much of these designations will ultimately not be used at trial. Submission to the Court prior to trial as Counterclaimants suggest provides no encouragement to the parties to limit deposition designations to those only essential to the proofs.

**b. Counterclaimants' position**

With respect to deposition/prior court testimony designations, Counterclaimants propose that the Court provide its preference for dealing with this testimony. Counterclaimants believe there are four possible options:

- Each party plays its own designated videotaped testimony (along with counter-designations) during its case-in-chief;
- Each party reads its own designated testimony (along with counter-designations) into the record during its case-in-chief;
- The parties provide highlighted transcripts of the designated testimony (including counter-designations) at the start of trial for Your Honor to consider on your own time; or
- Each party provides videotapes of its designated testimony (along with counter-designations) at the start of trial for Your Honor to consider on your own time.

Respectfully submitted,

s/ William P. Deni, Jr.  
William P. Deni, Jr.

cc: All counsel of record (via ECF)