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6 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
7 **IN AND FOR THE COUNTY OF ALAMEDA**

8 JOE A. CORONADO AND LETICIA

Case No. RG19-047581

9 CORONADO;

10 Plaintiffs

11 v.

12 AMERICAN HONDA MOTOR CO.,
13 INC.,
14 et al.

15 Defendants.

ORDERS DENYING HONDA
DEFENDANTS' OBJECTION TO AND
MOTION TO STAY REMOTE JURY
TRIAL

16 On November 23, 2020 the Honda Defendants filed Objections To and Motion To
17 Stay Remote Jury Trial. Honda objects to the use of a remote jury trial procedure,
18 which courts have used during the COVID-19 pandemic in order to comply with social
19 distance requirements and to proceed with a relatively limited number of civil
20 preference jury trials.

21 Honda argues that remote trials are inconsistent with key aspects of California
22 law, including problems with fairness, voir dire, judicial management and jury
23 deliberations. Honda also argues that a remote jury trial will interfere with obtaining a
24 representative jury pool and that a remote trial will create perils that should be vetted for
25 feasibility before being imposed. Honda points to technological and other problems that
26 have occurred in earlier remote jury trials. On November 30, 2020, pursuant to an
agreed briefing schedule, plaintiffs filed their opposition. On December 18, 2020, the

1 remote jury trial issue was argued. At that time, counsel were advised that they should
2 expect that the case would proceed as a remote jury trial and that the court would issue a
3 formal order denying Honda's objection. This is the promised, more formal order that
4 addresses the issues raised in the parties' papers and arguments and that supplements
5 the preliminary thoughts and reactions expressed and reported at the December 18, 2020
6 hearing.

7 As discussed at the hearing and in the papers, during the COVID-19 pandemic, the
8 Alameda Superior Court has conducted a number of remote jury trials, primarily
9 asbestos preference cases. In advance of a number of these trials, motions have been
10 made – typically, if not entirely, by defendants – objecting to proceeding remotely.
11 Those objections have been denied. In at least two cases in which remote jury trials
12 have been ordered, writs have been filed with the Court of Appeal and those writs have
13 been summarily denied. In *Johnson & Johnson v. Superior Court for the County of*
14 *Alameda* Case No.. RG20-052391, A16035, the Court of Appeal's order stated that
15 "entitlement to a preferential trial date safeguards a substantive right to recover damages
16 for pain, suffering and disfigurement," emphasizing the importance of proceeding with
17 preference jury trials where the plaintiff has a very limited life expectancy. The
18 importance of proceeding with preference cases was further emphasized when, as the
19 parties know, in that same *Reyes v. Johnson & Johnson* case, the trial ended with a
20 mistrial because the plaintiff died of mesothelioma. The plaintiff's right to recover for
21 pain and suffering, of course, died with him – a result that the legislature had sought to
22 avoid when it enacted the preference statute.

23 In March and April 2020, following the spread of the COVID-19 virus and various
24 shelter-in-place and social distancing health orders, the California Governor, the
25 California Chief Justice and the California Judicial Council issued emergency orders as
26 a result of the pandemic. Most notably for these purposes, on April 6, 2020, the Judicial
Council adopted Emergency Rule 3(a), which stated, among other things, that
"Notwithstanding any other law, in order to protect the health and safety of the public
... (1) Courts may require that judicial proceedings and court operations be conducted

1 remotely.” Since then various civil remote jury trials have occurred in Alameda County
2 and throughout the state.

3 There are no reported California appellate decisions that have addressed the use of
4 remote jury trials in civil cases pursuant to the Judicial Council emergency rules.
5 However, last week, on December 28, 2020, the Court of Appeal for the Third
6 Appellate District issued a published opinion that reviewed the emergency rules and
7 held that, in a juvenile delinquency case, the juvenile, like a criminal defendant under
8 Emergency Rule 3(a)(2), must consent to a remote proceeding. *E.P. v. Superior Court*
9 *of Yolo County* (December 28, 2020, Third Appellate District) 2020 WL 7693811.
10 Notably, the Judicial Council’s emergency rules authorizing courts to require remotely
11 proceedings do not require any party’s consent in a civil proceeding.¹

12 As to whether the court should exercise the authority to conduct a remote trial in
13 this case, it is significant that Judge Lee on July 23, 2020 granted plaintiffs’ motion for
14 a preference trial under Code of Civil Procedure section 36 based on a professional
15 medical opinion that due to Mr. Coronado’s mesothelioma diagnosis “there is
16 substantial medical doubt that [Mr. Coronado] will survive more than six months
17 beyond the date of this [June 25, 2020] declaration.” At the time of Judge Lee’s July
18 23, 2020 order granting preference, it was clear that a court decision that the plaintiff in
19 this case was entitled to a preferential trial setting meant that the trial would be
20 conducted remotely. *See, e.g.*, Defendant Hennessy’s Opposition to Plaintiff’s Motion
21 (“If Plaintiff’s motion is granted, it is very likely that a preference trial via remote
22 technology could be the only viable option.”) Despite Judge Lee’s July 23, 2020 order
23 and the necessary implications of that order, Honda now objects to conducting the trial

24 ¹ The distinction between criminal cases and civil cases and the requirement that
25 criminal defendants consent to proceeding remotely is rooted in the Sixth Amendment’s
26 confrontation clause which provides that “in all criminal prosecutions, the accused shall
enjoy the right ... to be confronted with the witnesses against him.” The Seventh
Amendment, which guarantees the right to a jury trial in civil cases, contains no similar
requirement.

1 remotely. But no motion for reconsideration of Judge Lee’s order has been made.
2 Moreover, no motion for reconsideration could be made within the constraints set out in
3 Code of Civil Procedure section 1008 – since, among other things, there are no new
4 facts. To the extent that Honda’s objection to a remote trial is a request for a
5 continuance or stay of the trial until the pandemic has subsided, it is denied as an
6 ineffective and improper motion to reconsider Judge Lee’s July 23, 2020 order.²

7 Honda also points to problems or technical glitches that it hyperbolically describes
8 as “insuperable problems” with remote jury trials. Honda cites, among others, two
9 examples of problems – interruptions from parties in unrelated matters and a loss of
10 electric laptop battery power – that, as discussed at the hearing, sometimes occur and
11 cause minor delays during in-person trials, similar to the delays they can cause in
12 remote trials. Honda argues that, due to potential technical problems, any remote
13 options should be vetted for feasibility. Honda ignores the fact that court staff at this
14 point has gained substantial experience with the use of remote technology and that the
15 court has taken measures to assure that court staffing is appropriate and experienced so
16 as to minimize problems and to alleviate Honda’ expressed concern that it is too much
17 for a judge to manage a trial while supervising the technology. Moreover, as also
18 discussed at the hearing, it is expected that all counsel, parties and court staff will call to
19 the court’s attention any problem with juror inattentiveness or juror technical issues. If
20 Honda continues to have concerns about the ability to monitor juror attentiveness, it can
do what Metalclad apparently did in the *Wilgenbusch* trial – assign a paralegal or other

21 ² Honda’s argument that the preference trial that was ordered in this case could be
22 repeatedly continued so that the trial could be conducted after the pandemic has ended is
23 rejected. Multiple, unlimited continuances of preference trials are not permitted unless
24 there is a showing that no courtrooms are available due to criminal trials subject to the
25 speedy trial requirements of Penal Code section 1382 or due to conflicts with other civil
26 preference trials. *Sprowl v. Superior Court* (1990) 219 Cal.App.3d 777, 779-781 (stating
that there was no evidence that trial departments were unavailable due to criminal cases
or other civil preference trials). Here, of course, this case is in line with other Alameda
civil preference cases to proceed as a remote jury trial consistent with the capacity
restrictions of Alameda’s civil trial departments.

1 team member to observe juror attentiveness on the Zoom computer displays. *See*,
2 Honda Ex. H, Jubelier Declaration ¶ 5. Juror attentiveness issues, of course, also occur
3 in in-person jury trial. In the court’s view, the best way for counsel to address any juror
4 attentiveness concerns is to present their case in a manner that captures and holds the
5 jurors’ attention throughout the trial.

6 Honda raises an issue as to whether the court can obtain a representative cross-
7 section jury pool due to the “digital divide” and the unavailability of computers to some
8 portions of the community. While the court agrees that a representative cross-section
9 of the community is critically important, Alameda Superior Court has had significant
10 experience and feedback with this and other remote jury trials issues. Based on
11 numerous earlier remote trials, the experience has been that the juror response rate
12 during the pandemic has been higher than normal and the vast majority of prospective
13 jurors, which the court believes is in excess of 80-90%, already has computer access
14 that will allow remote participation. During jury selection, those relatively few
15 prospective jurors who do not have computer access will be required to come to the
16 courthouse just as they would be required to appear at the courthouse in non-pandemic
17 times and will be able to use court-provided computers in a manner that preserves social
18 distancing. After the jury is selected and sworn, the parties have agreed to provide
19 Chromebooks and WiFi hot spots to all seated jurors and alternates. That process in the
20 court’s view arguably is superior to an in-person jury trial where each juror sees witness
21 testimony and demonstrative exhibits from a slightly different perspective. In a remote
22 trial each juror is seeing testimony and exhibits from exactly the same perspective over
23 exactly the same types of equipment.

24 Honda argues that there is some loss of ability to interact, to assess credibility and
25 to pick up non-verbal cues during jury selection, witness testimony and jury
26 deliberations. The court rejects the merits of that objection.

First, jurors today are accustomed to viewing people on movie screens, television
screens and computer monitors, as well as smart phones that display facial images on
Skype and Facetime and in streaming videos. Jurors are accustomed to following what

1 is said and in gauging the various non-verbal cues of those who appear on a screen.

2 Second, most non-verbal communication in the court's experience comes in the
3 form of facial expressions, which are easily seen – probably, more easily seen on Zoom
4 – with relatively close-up images of the face and upper body.³ Poker players – at least
5 those who play in-person – focus on non-verbal “tells,” and nearly all “tells” are related
6 to the face and upper body, rather than the lower portion of the body, which is typically
7 blocked by the poker table. Even an authority cited by Honda focuses on non-verbal
8 facial cues. *See*, Honda Objection 4:22-24 (“DeWitt, *Detecting Deception During Voir*
9 *Dire* (2015) vol. 39, issue 1, American J. of Trial Advocacy 25, 39 [“The face is an
10 amazing source of information about human behaviour, as it displays emotion, pain, and
11 divulges brain function and pathology”].)”)

12 Third, although Honda argues that it is difficult to assess credibility if a witness is
13 not testifying in person, parties have used video-recorded depositions to present
14 testimony at trials for years.⁴ In recognition of the widespread use, acceptability and
15 ease of video-recorded depositions, the legislature recently made the policy decision
16 that video-recorded depositions could be taken remotely at the election of either the
17 deponent or the deposing party. *See*, Code Civ. Proc. §2025.310. No consent of any
18 other party is required, and that statutory change, effective on September 11, 2020, is
19 not an interim change to address the relatively short-term consequences of the
20 pandemic, but rather is a permanent legislative change.

21 Although Honda has chosen to focus on what it perceives to be the disadvantages
22 of remote trials, there appear to be some distinct advantages to a remote trial.

23 ³ Arguments that lower portions of the body cannot be seen in a Zoom trial ring hollow
24 since in an in-person trial the jury box and witness box typically block much of the lower
25 portions of the bodies of jurors or witnesses.

26 ⁴ In fact, deposition testimony of unavailable witnesses can and often is presented to the
jury by reading excerpts from the deposition transcript of the unavailable witness. In
those cases, there are no non-verbal cues available to the jury, which nonetheless makes
credibility determinations from the “cold transcript.”

1 First, as mentioned above, at least some jurors who have served on both in-person
2 juries and remote juries have reported that they prefer remote jury service because they
3 can more easily see witnesses testify because they see a relatively close-up image that is
4 head-on with the face of the witness, as opposed to seeing the witness from an angle
5 dictated by the location of the jury box relative to the witness stand.

6 Second, in-person trials require travel by jurors, counsel and witnesses.
7 Sometimes that travel to in-person trials involves great distances and is difficult to
8 schedule. Many in-person trials encounter minor or significant delays when a juror,
9 counsel or witness is late to court due to heavy traffic or an accident. Sometimes,
10 despite warnings from the court, witnesses are not lined up outside the courtroom so as
11 to assure continuous, uninterrupted testimony. Travel delays in an in-person trial can
12 cause substantial disruption and they sometimes result in having the jurors dismissed
13 early before the completion of a full trial day. Remote trials, in contrast, do not require
14 travel and, thus, eliminate travel-related delays. It is not necessary to have witnesses
15 waiting outside the courtroom to assure continuous testimony, and there almost never
16 would be the need to break early for the day because the next witness is unavailable. In
17 a remote trial, nearly all witnesses testify from their home or office, and, thus, can be
18 “on deck” nearly continuously. As such, remote trials can avoid some of the disruptive
19 delays to in-person trials and can better assure juror participation without disruption.

20 Moreover, while a remote trial is different,⁵ there is no evidence that a remote
21 trial adversely affects defendants more than plaintiffs. While it invariably has been a

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23 ⁵ The manner in which trial are conducted changes with the times. There was a time
24 when jurors were routinely sequestered in high-profile criminal cases, as jurors were in
25 *Twelve Angry Men*. Jury sequestration almost never occurs today even in high-profile
26 criminal cases, because parties, counsel and the courts trust that jurors will abide by court
directions to avoid media reports and because sequestration tends to limit jury
participation. Here, a remote trial tends to enhance jury participation, particularly when
pandemic health orders make in-person trials nearly impossible..

1 defendant that has objected to having a trial proceed remotely, it seems to the court that
2 if there were an asymmetrical effect to a remote trial, it is more likely that a remote trial
3 might disadvantage the plaintiff. A plaintiff who has been diagnosed with terminal
4 mesothelioma is more likely to connect on a personal level with jurors if he or she
5 testifies and appears in-person in the same courtroom, as opposed to appearing and
6 testifying remotely on a screen. Moreover, as parties and counsel know, at least one of
7 the asbestos preference trials that reached a verdict in this county, *Ocampo v.*
8 *Honeywell*, was a defense verdict. See, “First Virtual Asbestos Trial Ends in Defense
9 Verdict,” The Recorder, September 3, 2020 [https://www.law.com/therecorder/
10 2020/09/03/first-virtual-asbestos-trial-ends-in-defense-verdict/](https://www.law.com/therecorder/2020/09/03/first-virtual-asbestos-trial-ends-in-defense-verdict/) There is no evidence or
11 reason to believe that the defense is disparately disadvantaged by having this case
12 proceed as a remote trial.


13 During a once-in-a-century pandemic with social distance requirements and
14 courtrooms designed for normal, relatively close, in-person proceedings, a remote trial
15 is the only feasible option.⁶ In a preference case, where the plaintiff has a very limited
16 life expectancy, the choice is to proceed with a remote trial, with all of the associated
17 advantages and – in this court’s view the relatively slight – disadvantages, or to deny
18 forever Mr. Coronado’s constitutional right to have his day in court. In balancing Mr.
19 Coronado’s constitutional right to have his case tried to a jury and the concerns the

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21 ⁶ At the hearing Honda’s counsel expressed concern about the ability to observe jurors
22 remotely during trial to gauge their reactions and asked how criminal trials were
23 proceeding. As previously reported, if a defendant does not consent, criminal trials in
24 this county are being conducted in person, but due to social distancing requirements only
25 3 of the 12 jurors are within easy eyesight of counsel and seated in the jury box. Nine of
26 the 12 jurors and alternates are seated in the courtroom behind counsel. Given Honda’s
counsel concern about the ability to observe jurors, this is almost certainly a worse
situation than conducting the trial remotely over Zoom, where all jurors will be easily
visible on the computer monitors.

1 Honda's defendants have raised about proceeding with a remote trial, the court
2 concludes that proceeding with a remote trial under the circumstances created by the
3 pandemic best balances those rights and best protects the parties' constitutional rights.

4 For all of the reasons described above, the Court DENIES Honda' objection to and
5 motion to stay the remote jury trial in this action.

6 DATED: January 3, 2021

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9 Richard Seabolt, Judge