



AMERICAN
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2020 Southeast Virtual Bankruptcy Workshop

How to Have Your Evidence Admitted

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AMERICAN BANKRUPTCY INSTITUTE

SOUTHEAST VIRTUAL BANKRUPTCY WORKSHOP

JULY 24, 2020

How to Have Your Evidence Admitted

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How to Have Your Evidence Admitted

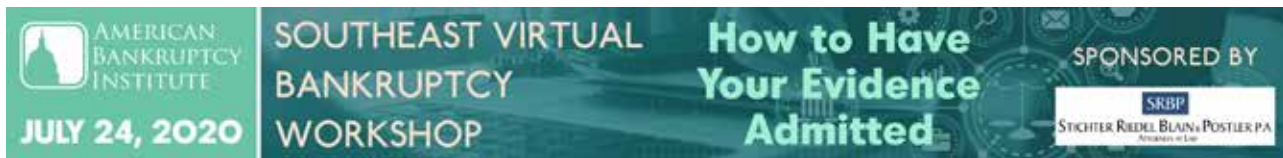
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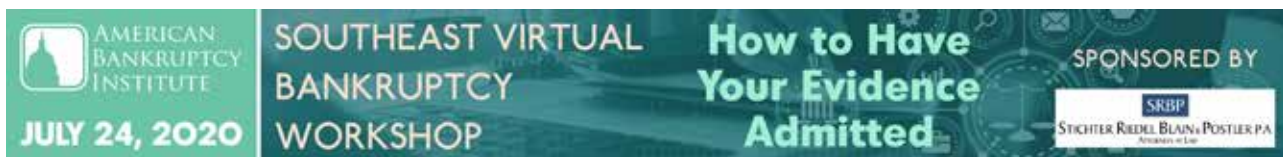
Presented by:

- David L. Gay, Carlton Fields, P.A.
- Hon. Gregory R. Schaaf, U.S. Bankruptcy Court (E.D. Ky.)
- Alexandra CC Schnapp, U.S. Bankruptcy Court (N.D. Ga.)
- Rory D. Whelehan, Whelehan Law Firm, LLC
- Hon. Michael G. Williamson, U.S. Bankruptcy Court (M.D. Fla.)



Topics:

- The ABCs of Documentary Evidence
- The "Do's" and "Don'ts" of Effective Witness Examination
- Tales from the Trenches: Presenting Evidence in a Pandemic



The ABCs of Documentary Evidence

Absent a stipulation nontestimonial evidence can only be admitted if:

- Relevant
- Authentic
- Not subject to a rule of exclusion



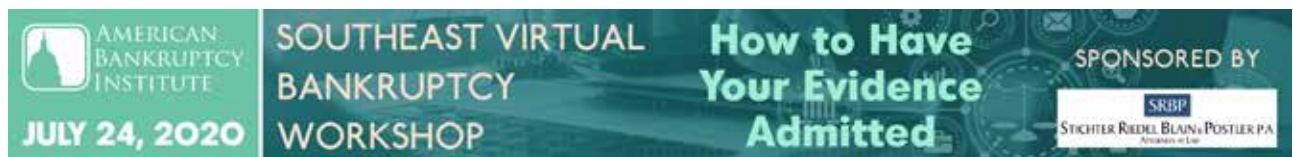
The ABCs of Documentary Evidence

Relevance

- Rule 401
- Also consider Rule 403

Authentication

- Rule 901
- Witness does not have to be author



The ABCs of Documentary Evidence

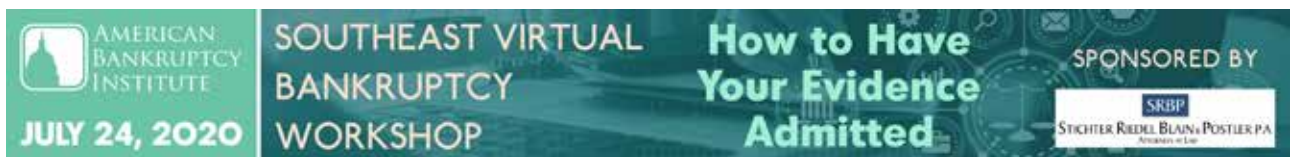
- Writings are hearsay and generally not admissible
- No exception for expert reports
- Business records exception (Rule 803(6))



The ABCs of Documentary Evidence

Business records exception (Rule 803(6))

- * Record
- * Event
- * Made by person with knowledge
- * Made at or near time of event
- * Regularly conducted business activity
- * Regular practice to make record

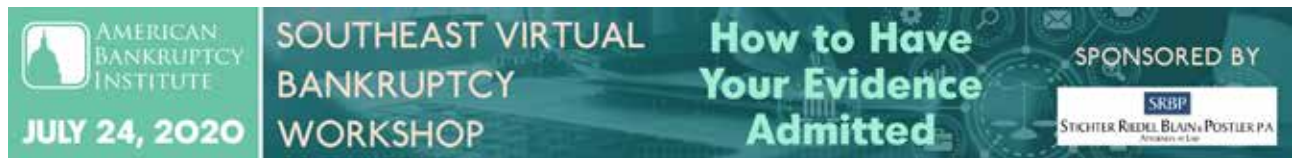


The ABCs of Documentary Evidence

Judicial notice (Rule 201)

- Is of common and general knowledge
- Well established
- Generally known within jurisdiction

* See Robinson v. Liberty Mut. Ins. Co., (11th Cir. 2020)



The ABCs of Documentary Evidence

Practice pointers

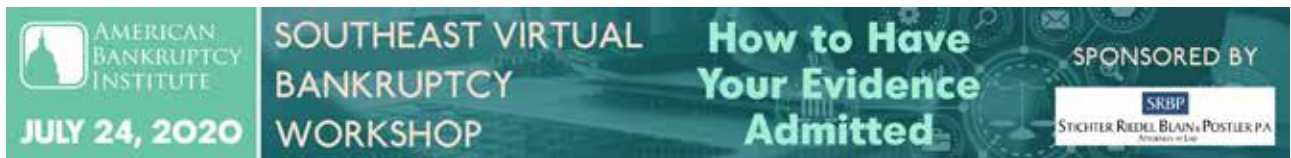
- * Be familiar with BLR!
- * Organize exhibits
- * Think about balance of testimonial/nontestimonial



The “Do’s” and “Don’ts” of Effective Witness Examination

Direct exam

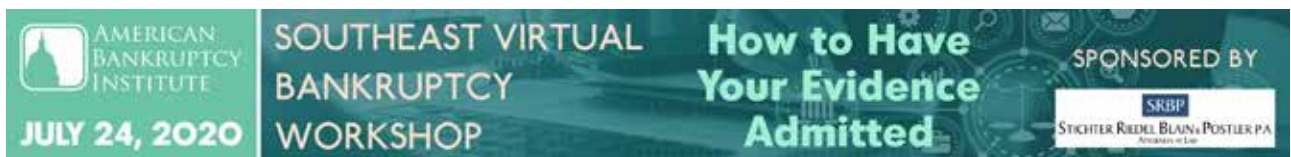
- General rule
- Declarations and proffers
- Hearsay
- Re-direct
- Tip: avoid technical jargon and legalese!



The “Do’s” and “Don’ts” of Effective Witness Examination

Hearsay

- * Permissible uses
- * Admissions of party opponents
- * Rule 802



The “Do’s” and “Don’ts” of Effective Witness Examination

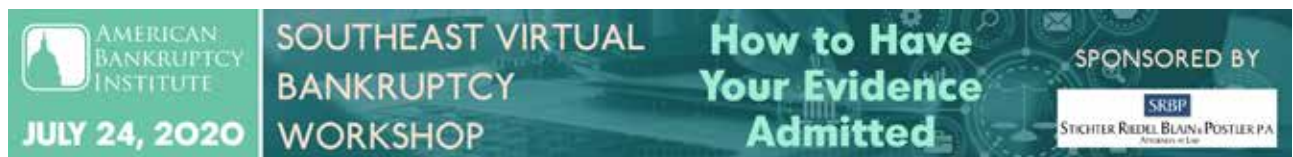
Cross exam

- Scope (Rule 611)
- Ten rules of cross-examination
- Areas of impeachment



Cross Exam: Top 10 Rules

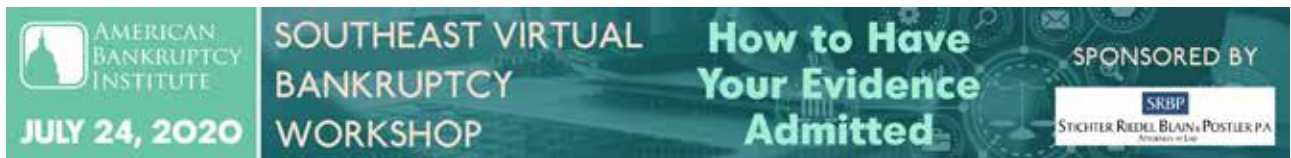
1. *Be brief and succinct*
2. *Use leading questions*
3. *Know answer*
4. *Listen to the answer*
5. *Do not quarrel*
6. *No explanations*
7. *Don't repeat direct*
8. *Stick to safe areas*
9. *Mountain from a molehill*
10. *Don't be a jerk*



The “Do’s” and “Don’ts” of Effective Witness Examination

Objections

- When to object
- How to object
- Appellate preservation



Tales from the Trenches: Things to Avoid

- * Disparaging remarks
- * “With all due respect”
- * “To tell you the truth” or “in all candor”
- * Sidebar with client or co-counsel
- * “my client’s position is...”
- * “we would argue...”
- * Acronyms
- * Pronouns



Tales from the Trenches: Presenting Evidence in a Pandemic

- Kentucky response
- Bankr. E.D. Ky. response
- Phone and video capabilities



Tales from the Trenches: Presenting Evidence in a Pandemic

Specific case examples from Bankr. E.D. Ky.

In re GenGanna Global USA, Inc., Case No. 20-50133

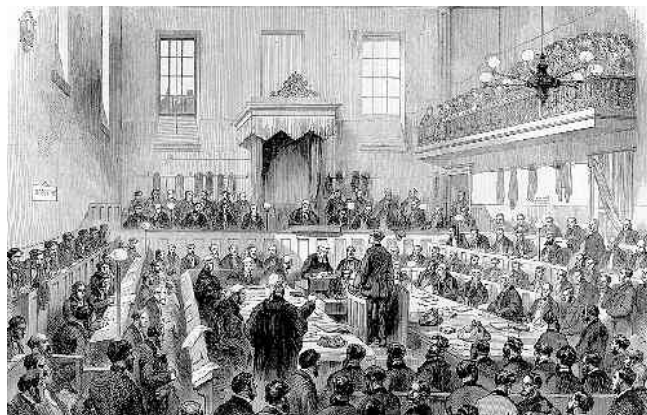
- * Hearing on final DIP order
- * Hearing to approve sale of assets

Jordan v. Walters (In re Walters), AP No. 19-6016

- * Nondischargeability complaint



The End



How to Have Your Evidence Admitted

By Judge Michael G. Williamson¹

I. The “ABC’s” of Documentary Evidence.

A. Basic Requirements.

1. As with all evidence, absent a stipulation, documents can only be admitted if a witness with personal knowledge establishes the predicate that the documents are **relevant**, **authentic**, and not subject to a **rule of exclusion**.

a) **Relevance.** The evidence must be relevant. That is, under **Rule 401** the evidence must have any tendency to make any fact that is of consequence more or less probable.

b) **Personal Knowledge.**

(1) The witness must have personal knowledge about the matters about which the witness is testifying. Under **Rule 602** a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter (with the exception of experts who may rely on inadmissible evidence in forming opinions).

(2) In the case of documentary evidence, there must be evidence sufficient to support a finding that the exhibit in question is what its proponent claims.² Typically, this evidence is in the form of testimony of a witness with personal knowledge that the exhibit is what it is claimed to be.³

c) **Not Subject to Rule of Exclusion.** Finally, the evidence must not be subject to a rule of exclusion. If the evidence is subject to a rule of exclusion, e.g., the hearsay rule, it must fall within an exception to the rule of exclusion, e.g., the business records exception.

B. Best Evidence Rule.

1. While **Rule 1002** provides that an original writing is required, this rule is followed by **Rule 1003** which states that a duplicate is admissible to the same extent as an original unless a question is raised as to the authenticity of the original

¹ This outline is derived from Practical Evidence Manual, by Judge Michael G. Williamson (available at http://www.flmb.uscourts.gov/judges/tampa/williamson/practical_evidence.pdf?id=1).

² FED. R. EVID. 901(a).

³ FED. R. EVID. 901(b)(1).

or circumstances exist under which it would be unfair to admit the duplicate in lieu of the original.

C. Authentication of Documents.

1. The authentication burden is a “light one.”⁴ The proponent only needs to establish a prima facie case that the document is what the proponent claims it is.⁵ The proponent can meet this burden with circumstantial evidence of the authenticity of the underlying documents through the testimony of a witness knowledgeable about them.⁶ Once that prima facie showing of authenticity is made, the question of authenticity is left to the factfinder.⁷

2. If a document is being introduced through a witness’s testimony, it may be authenticated by testimony of a witness with personal knowledge that it is what it purports to be. **Rule 901(b)(1)**.

3. Sample Predicate Questions.

Q: Ms. Smith, I show you what I’ve marked as Movant’s Exhibit 1. Can you identify this document?

A: Yes I can.

Q: What is it?

A: It is the contract between my company and Acme Corporation.

Q: How do you know that?

A: I signed it. (OK)

I negotiated it. (OK)

I found it in the files. (NOT OK)

D. Writings are Hearsay.

⁴ *Curtis v. Perkins (In re International Management Assoc., LLC)*, 781 F.3d 1262, 1268 (11th Cir. 2015)(citing *United States v. Lebowitz*, 676 F.3d 1000, 1009 (11th Cir.2012) (refusing to disturb an authentication decision unless there is “no competent evidence in the record to support it”).

⁵ *United States v. Caldwell*, 776 F.2d 989, 1001–02 (11th Cir.1985) (holding that Rule 901 required only enough evidence that a jury “could have reasonably concluded” that a document was authentic).

⁶ See FED. R. EVID. 901(b)(1); *Caldwell*, 776 F.2d at 1002–03.

⁷ See *Caldwell*, 776 F.2d at 1002.

a) Writings are hearsay and are not admissible under **Rule 802** *unless* they fall within one of the categories set forth in “statements which are not hearsay” as defined in **Rule 801(d)** or within one of the exceptions to hearsay.

2. Self-Serving Letters.

Often a party will offer into evidence a letter or other document written by a witness appearing at the trial. There is a misconception that the fact that the witness is available to be cross examined somehow makes the writing admissible.

a) There is no exception to the hearsay rule for documents simply because they were prepared by a witness who is available to be cross examined.

b) **Rule 801(d)(1)** specifically deals with prior written statements by a witness who testifies at trial. This Rule provides that a statement is not hearsay if the declarant testifies at trial and the statement is *inconsistent* with the declarant’s testimony. Such statements are commonly used for impeachment. This rule provides no basis for receiving into evidence prior consistent statements except in limited instances such as to rebut a charge of recent fabrication.⁸

3. Appraisals and Other Expert Reports.

a) There is a misconception that because a witness is qualified to give the opinion set forth in the expert report, that the expert’s written report is admissible.

(1) The facts or data contained in the expert’s written report need not be admissible in evidence in order for the expert’s opinion testimony to be admissible.⁹ Consequently, the expert’s written report will contain inadmissible evidence.

(2) Written reports prepared by experts fall within the definition of hearsay as written statements offered in evidence to prove the truth of the matter asserted. There is no exception to the hearsay rule for expert reports.

b) Any testimony beyond the areas covered in the expert’s written report should be objected to. The written report must contain a complete statement of all opinions the witness will express, the basis for the reasons for the opinions, and the data or other information considered by the witness in forming them.¹⁰

c) Even though the expert written report should not be admitted into evidence, it is nevertheless useful to have the report marked as an exhibit and received as a demonstrative aid to assist in following the expert’s testimony. In this

⁸ FED. R. EVID. 801(d) (1) (B).

⁹ FED. R. EVID. 703.

¹⁰ FED. R. CIV. P. 26(a)(2)(B).

fashion, the inadmissible evidence contained in the report does not come into evidence.

E. Business Records Exception.

1. Applicable Rule.

Rule 803(6). Exceptions to the Rule Against Hearsay—Regardless of Whether the Declarant is Available as a Witness

(6) Records of a Regularly Conducted Activity. A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by--or from information transmitted by--someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) the opponent does not show that the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.¹¹

2. Historical Basis for Exception.

a) The modern “business record” exception was derived from the common law “shop book rule.”¹² There were many small merchants who kept their own books but, because parties were disqualified as witnesses, such merchants did not have any available evidence to prove sales. Thus, a rule was created to permit a party’s books to be used as evidence of goods sold and services rendered. These are considered trustworthy because they are routine reflections of the day-to-day operations of the business.

b) Accident reports and appraisals must be distinguished. While they may be routinely generated by the businesses, they do not have the same character of trustworthiness as “shop books.”¹³

¹¹ FED. R. EVID. 803(6) (amended 2014) (shifting the burden to the opponent to show a lack of trustworthiness).

¹² *State v. Miller*, 144 P.3d 1052, 1058-60 (Or. App. 2006).

¹³ *Palmer v. Hoffman*, 318 U.S. 109, 113-14, 63 S.Ct. 477 (1943).

c) Thus the “business record exception” is a misnomer. The trustworthiness of this type of documentary evidence does not come from the fact that it is associated with a business. It comes from the fact that the process by which it was created was part of a regularly conducted activity of the business.¹⁴ That is why the title to the exception is “Records of a Regularly Conducted Activity.”

3. Establishing Business Records Exception Applies.

a) The proponent must show 1) that the underlying documents are authentic, and 2) the requirements of **Rule 803(6)** have been met.¹⁵

b) The proponent only needs to establish a prima facie case that the document is what the proponent claims it is.¹⁶ Once that prima facie showing of authenticity is made, the ultimate question of the authenticity of the documents is left to the factfinder.¹⁷

4. Qualified Witness.

a) **Rule 803(6)** requires that the elements necessary to establish the document is a record of a regularly conducted activity be established by “the testimony of the custodian or other qualified witness.” A receiver or bankruptcy trustee qualify as the “records custodians” for purposes of **Rule 803(6)**.¹⁸

b) What constitutes a “qualified witness” other than a custodian is not defined by **Rule 803(6)**. Generally, this requirement is met by establishing that the witness is familiar with the practices of the business in question at the time.¹⁹ But the testifying witness does not need firsthand knowledge of the contents of the records, of their authors, or even of their preparation.²⁰

¹⁴ FED. R. EVID. 801(d) (1) (B); *see also* 28 U.S.C. § 1732.

¹⁵ *United States v. Dreer*, 740 F.2d 18, 19-20 (11th Cir. 1984).

¹⁶ *United States v. Caldwell*, 776 F.2d 989, 1001–02 (11th Cir.1985) (holding that Rule 901 required only enough evidence that a jury “could have reasonably concluded” that a document was authentic).

¹⁷ *See Caldwell*, 776 F.2d at 1002.

¹⁸ *Curtis v. Perkins (In re International Management Assoc., LLC)*, 781 F.3d 1262, 1268 (11th Cir. 2015)(citing *Warfield v. Byron*, 436 F.3d 551, 559 (5th Cir. 2006) (holding that the federally appointed receiver for a Ponzi scheme qualified as the scheme's “record custodian”).

¹⁹ Information in a business record, supplied by a prior business, can be authenticated by the present business holder of the record if the witness testifies to the present business holder’s mechanisms (i.e. as part of the regular practice of business activity) for checking the accuracy of the prior business’s information. *See Holt v. Calchas, LLC*, 155 So. 3d 499 (Fla. Dist. Ct. App. 2015) (explaining that a bank can use a prior bank’s numbers in a business record when the current bank has “procedures in place to check the accuracy of the information that it received from the previous note holder”).

²⁰ *See United States v. Bueno-Sierra*, 99 F.3d 375, 378–79 (11th Cir. 1996); *United States v. Parker*, 749 F.2d 628, 633 (11th Cir. 1984); *United States v. Atchley*, 699 F.2d 1055, 1058–59 (11th Cir. 1983). *See also United States v. Box*, 50 F.3d 345, 356 (5th Cir. 1995) (“A qualified witness is one who can explain the system of record keeping and vouch that the requirements of Rule 803(6) are met....[T]he

c) The witness need not be the person who actually prepared the records so long as other circumstantial evidence and testimony suggests their trustworthiness.²¹ In *International Management Associates*, the Eleventh Circuit held that the bankruptcy court could have reasonably concluded that the underlying documents were a true and authentic record of the debtor's business where the trustee testified that all of the underlying documents were found at the debtor's offices and that the information in those documents substantially matched the records kept by the financial institutions and clients with which the debtor had transacted. "That is all **Rule 901** required."²²

d) A successor custodian, such as a receiver or trustee, can establish that the proffered document are business records with testimony as to:

(1) An investigation into the reliability of the documents.

(2) Interviews with former employees that established that the debtor's office routinely created the documents based on its interactions with financial institutions and other parties.

(3) A reconciliation of the debtor's documents with corresponding files held by third party financial institutions and third parties.

e) Testimony establishing the foundation for the business records exception may be based on hearsay.²³

5. Elements.

a) The exhibit being offered is a business **record**;

b) It is a record of an **event**;

c) The record was **made by**, or from information transmitted by, a person with knowledge of the transaction recorded;

d) The record was **made at or near the time** of the acts or event recorded;

e) The record is kept in the course of a **regularly conducted business activity**; and

witness need not have personal knowledge of the record keeping practice or the circumstances under which the objected to records were kept.”).

²¹ *United States v. Parker*, 749 F.2d 628, 633 (11th Cir. 1984).

²² *Curtis v. Perkins (In re International Management Assoc., LLC)*, 781 F.3d 1262, 1268 (11th Cir. 2015).

²³ *Id.* (citing *United States v. Byrom*, 910 F.2d 725, 734–35 (11th Cir. 1990)).

f) It was the **regular practice of that business activity to make the record**.²⁴

6. Example.

Here's an example in the context of establishing that a check register in a preference action is within this exception:

- a) **Record**: check register.
- b) **Event**: payment of invoice.
- c) **Made by**: accounts payable clerk.
- d) **Made at or near time**: when check is written.
- e) **Regularly conducted business activity**: payment of invoices.
- f) **Regular practice of business to keep records of payments of invoices**: you betcha'!

7. Sample Qualifying Questions.

Q: Ms. Smith, what was your position with company at time of bankruptcy filing?

A: Central office manager.

Q: How long were you so employed?

A: One year.

Q: What were your responsibilities?

A: I oversaw different departments in Acme's headquarters.

Q: Did this include bookkeeping?

A: Yes, it did.

Q: As former manager, what, if any, familiarity do you have with record keeping procedures employed by Acme during year prior to bankruptcy?

²⁴ See generally *In re Vargas*, 396 B.R. 511, 518 (Bankr. C.D. Cal. 2008) (applying the basic elements to records maintained electronically and further detailing an "11-step foundation" for authenticating computer records).

A: It was one of my areas of responsibility so I was very familiar with bookkeeping procedures and would do reviews and spot checks on a routine basis.

Q: Does this include the method used by the company for preparing check registers?

A: Yes.

Witness qualified? Sure. The witness was not the custodian or person who created the record, but the witness was certainly familiar with the process.

Now that we have a qualified witness, let's go through the elements:

Q: Let me show you what I've marked as Trustee's Ex. 1. What is it?

A: These are the check registers for Acme for the year before filing of the bankruptcy.

Q: What information do they reflect?

A: They list the check number, date of the check, invoice number, invoice date, payee, and the amount.

Q: When are they prepared?

A: On the day that the checks are mailed.

Q: Who prepares the check registry?

A: The accounts payable clerk.

Q: Does he or she actually mail the check?

A: No, it's done by a bookkeeper in one of the remote offices. They are the ones who actually prepared and mailed checks.

Q: What are these checks in payment of?

A: They are everyday A/P's owing to vendors.

Q: Was payment of A/P's in this manner a regularly conducted business activity of Acme?

A: Sure, if we wanted to stay in business.

Q: Was it the regular practice of Acme to make these records in this fashion?

A: Absolutely.

8. Pre-Trial Declaration as Alternative to Witness.

a) **Rule 803(6)** provides, as an alternative to introducing the evidence at trial through a “qualified witness,” the filing and serving of a certification that complies with **Rule 902(11)**.

b) Applicable Rule.

Rule 902. Evidence that is Self-Authenticating

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

(11) Certified Domestic Records of a Regularly Conducted Activity. The original or a copy of a domestic record that meets the requirements of Rule 803(6)(A)-(C), as shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record--and must make the record and certification available for inspection--so that the party has a fair opportunity to challenge them.

c) Certain electronic files and copies of electronic data may also be self-authenticated, when certified by a qualified person, under **Rule 902(13)** and **902(14)**.

F. Summaries to Prove Content.

1. Under **Rule 1006** a proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court.

2. The only textual limit placed on the use of summaries by **Rule 1006** is that “[t]he proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place.”²⁵

²⁵ *Curtis v. Perkins (In re International Management Assoc., LLC)*, 781 F.3d 1262, 1268 (11th Cir. 2015)(citing *United States v. Johnson*, 594 F.2d 1253, 1257 (9th Cir. 1979).

3. **Rule 1007** does not require the proponent to introduce the underlying documents into evidence. However, establishing the admissibility of the underlying records is a condition precedent to introduction of the summary into evidence under **Rule 1007**.²⁶

II. Judicial Notice.

A. Defined.

“A court’s acceptance, for purposes of convenience and without requiring a party’s proof, of a well-known and indisputable fact; the court’s power to accept such a fact <the trial court took judicial notice of the fact that water freezes at 32 degrees Fahrenheit>.”²⁷

B. Applicable Rule

Rule 201. Judicial Notice of Adjudicative Facts

(a) Scope. This rule governs judicial notice of an adjudicative fact only, not a legislative fact.

(b) Kinds of Facts That May Be Judicially Noticed. The court may judicially notice a fact that is not subject to reasonable dispute because it:

(1) is generally known within the trial court’s territorial jurisdiction; or

(2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

(c) Taking Notice. The court:

(1) may take judicial notice on its own; or

(2) must take judicial notice if a party requests it and the court is supplied with the necessary information.

(d) Timing. The court may take judicial notice at any stage of the proceeding.

(e) Opportunity to Be Heard. On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

²⁶ *Id.*

²⁷ BLACK’S LAW DICTIONARY 863-64 (8th ed. 2004) (also termed “judicial cognizance” or “judicial knowledge”).

(f) Instructing the Jury. In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.

C. Adjudicative Facts.

1. **Rule 201(a)** governs judicial notice of an adjudicative fact only, not a legislative fact.

2. Adjudicative Facts. Adjudicative facts are ones that are not subject to reasonable dispute because they are either:

- a) Generally known with the territorial jurisdiction of the trial court, or
- b) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.²⁸

3. Legislative Facts. “Legislative facts are established truths, facts or pronouncements that do not change from case to case but apply universally.”²⁹

D. Procedure.

1. Judicial notice may be taken at any stage of a proceeding³⁰ including appeal.³¹

2. However, a party is entitled to be heard with respect to the propriety of taking judicial notice and the nature of the fact to be noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.³² Thus, for example, if a bankruptcy court implicitly took judicial notice, *sua sponte*, in considering the debtor’s schedules in arriving at a ruling, on appeal, the matter may be remanded to allow the disadvantaged party to be afforded notice and opportunity to respond.³³

²⁸ “When a court...finds facts concerning the immediate parties—who did what, where, when, how, and with what motive or intent—the court...is performing an adjudicative function, and the facts so determined are conveniently called adjudicative facts.” Kenneth Culp Davis, *Judicial Notice*, 55 Columbia L. Rev. 945, 952 (1955).

²⁹ *W. Ala. Women’s Ctr. v. Williamson*, 900 F.3d 1310, 1316 (11th Cir. 2018).

³⁰ FED. R. EVID. 201(f).

³¹ *Nantucket Inv. II v. Cal. Fed. Bank (In re Indian Palms Assocs.)*, 61 F.3d 197, 204 (3d Cir. 1995).

³² FED. R. EVID. 201(e).

³³ *Annis v. First State Bank of Joplin*, 96 B.R. 917, 920 (W.D. Mo. 1988).

3. Where judicial notice is taken without prior notice, the burden is on the disadvantaged party to make a request for a hearing to challenge the propriety of taking judicial notice.³⁴

4. Judicial notice is limited to adjudicative facts.

E. Judicial Notice Categories.

1. *Varco v. Lee*³⁵ Category of Facts.³⁶

a) In *Varco v. Lee*, the California Supreme Court took judicial notice for the first time in the case that Mission Street in San Francisco between Twentieth and Twenty-Second Streets was a business district.

b) As explained by the court, this judicial notice of this fact was properly subject to judicial notice because:

(1) The fact was one of “**common** and general **knowledge**”;

(2) The fact was “well established and authoritatively settled, ... practically **indisputable**”; and

(3) “This common, general, and certain **knowledge exists in the particular jurisdiction.**”³⁷

2. Almanac Type Facts.³⁸

a) Almanac type facts are facts that are typically found in almanacs such as calendar, astronomical, and historical facts.

b) A good example of the use of almanac type facts was the cross examination of the key prosecution witness by then defense attorney Abraham Lincoln in the case of *People v. Armstrong*. Through the use of an almanac, young Lincoln was able to show that at the time that the critical prosecution eyewitness saw the shooting “by the light of the moon,” the moon had already set.

3. Definitions

a) In *Robinson v. Liberty Mut. Ins. Co.*,³⁹ the Eleventh Circuit held the district court properly consulted dictionaries for common definitions. The

³⁴ *Calder v. Job (In re Calder)*, 907 F.2d 953, 955 n.2 (10th Cir. 1990).

³⁵ *Varco v. Lee*, 181 P. 223, 225-26 (Cal. 1919).

³⁶ OLIPHANT, *Younger*, supra note 24, at 5-7.

³⁷ *Varco*, 181 P. at 226 (emphasis added).

³⁸ *Younger*, at 5-6.

³⁹ 958 F.3d 1137 (11th Cir. 2020).

homeowners filed a claim for damage to their home caused by an infestation of brown recluse spiders. The insurance company denied coverage since the policy did not cover insects; in response, the homeowners argued the spiders were technically arachnids and therefore not excluded from coverage. The panel found that, while the spiders were technically classified as arachnids, an ordinary person would adopt dictionary definitions which included spiders as both “insects” and “vermin” excluded from the insurance policy.

4. Scientific Basis of Technical Concepts.⁴⁰

a) When scientific concepts or devices first form the basis for testimony in a courtroom, their scientific basis must be shown by expert testimony.

b) At some point, there may be general agreement that there is a valid scientific basis in the laws of nature supporting the concept or device.

c) Examples: radar,⁴¹ breathalyzer,⁴² and blood grouping.⁴³

5. Courts Records.

a) Generally. Requests for judicial notice of court records typically fall into one of three categories:

(1) Establishing the genuineness of the documents without going through the steps normally needed to authenticate documents. This is the equivalent of a certificate regarding custody by a judge of a court of record of the district in which the record is kept.⁴⁴ The fact the document is genuine does not mean that the court can automatically accept as true the facts contained in such documents. Statements in the documents must be otherwise admissible under the Federal Rules of Evidence, for example, as an evidential admission offered against a party.⁴⁵

(2) Taking as true the recording of the judicial acts contained in the record. Commentators suggest that the better practice is to admit the record under the official records exception to the hearsay rule so that evidence of any inaccuracy in the record may be established.⁴⁶

⁴⁰ *Younger*, at 6-7.

⁴¹ *State v. Graham*, 322 S.W.2d 188, 195-97 (Mo. 1959).

⁴² *McKay v. State*, 235 S.W.2d 173, 175 (Tex. 1950).

⁴³ *State v. Damm*, 266 N.W. 667, 668-69 (S.D. 1936).

⁴⁴ *In re Bestway Prods., Inc.*, 151 B.R. 530, 540 (Bankr. E.D. Cal. 1993).

⁴⁵ *Id.*; FED. R. EVID. 801(d)(2).

⁴⁶ *In re Bestway Products, Inc.*, 151 B.R. at 540 n.33 (citing 21 WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5106 (1992 Supp.)).

(3) The third, “and widely criticized,” use of judicial notice of court records is to take as conclusively established the facts that are set forth in the records.⁴⁷ A previously filed court document will generally not be competent evidence of the truth of the matters asserted therein solely because the court has taken judicial notice of its existence.⁴⁸

(4) There is a crucial distinction between taking judicial notice of the fact that a document was filed in the case, or in a related case, on a given date, i.e., the existence thereof, and the taking of judicial notice of the truth of the contents of the document.⁴⁹ Accordingly, while a bankruptcy court may take judicial notice of its own records, it may not “infer the truth of facts contained in documents, unfettered by rules of evidence or logic, simply because such documents were filed with the court.”⁵⁰

b) Examples:

(1) Plan Votes. To establish whether the plan has received the votes needed to confirm the court may take judicial notice of the proofs of claim and the presence in the schedules of amounts due to other claimants who have not filed proofs of claim.⁵¹

(2) Omissions from Schedules. The court may take judicial notice of the debtor’s statement of affairs and schedules as not listing certain assets alleged not to be disclosed in an action under Bankruptcy Code § 727(a)(4).⁵²

(3) Absence of Pending Adversary. The court may take judicial notice of the failure of a Chapter 7 trustee to have filed an action to set aside a fraudulent conveyance.⁵³

(4) Docket Sheets. The court may take judicial notice of the docket sheets in an adversary proceeding and the debtor’s main case.⁵⁴

⁴⁷ *In re Bestway Products, Inc.*, 151 B.R. at 540 n.33.

⁴⁸ *Nantucket Inv. II v. Cal. Fed. Bank (In re Indian Palms Assocs.)*, 61 F.3d 197, 204 (3d Cir. 1995).

⁴⁹ *In re Earl*, 140 B.R. 728, 731 n.2 (Bankr. N.D. Ind. 1992).

⁵⁰ *Staten Island Sav. Bank v. Scarpinito (In re Scarpinito)*, 196 B.R. 257, 267 (Bankr. E.D.N.Y. 1996) (citing BARRY RUSSELL, BANKRUPTCY EVIDENCE MANUAL § 201.5 (1995)).

⁵¹ *In re Am. Solar King Corp.*, 90 B.R. 808, 829 n.41 (Bankr. W.D. Tex. 1988) (citing BARRY RUSSELL, BANKRUPTCY EVIDENCE MANUAL, § 201. 5 (2007) (“Whether the information contained in the schedules is true is immaterial to this inquiry.”)).

⁵² *Calder v. Job (In re Calder)*, 907 F.2d 953, 955 n.2 (10th Cir. 1990) (“In this case, the bankruptcy court, consistent with Rule 201(b)(2), simply took judicial notice of the contents of . . . [the debtor’s] Statement of Affairs and Schedule B-1 and not the truthfulness of the assertions therein.”).

⁵³ *Pruitt v. Gramatan Inv. Corp. (In re Pruitt)*, 72 B.R. 436, 440 (Bankr. E.D.N.Y. 1987).

⁵⁴ *Muzquiz v. Weissfisch*, 122 B.R. 56, 58 (Bankr. S.D. Tex. 1990).

(5) Debtor's Insolvency. Several opinions have held that a court may take judicial notice of the debtor's schedules in order to determine if the debtor was insolvent on the date of an alleged preferential transfer.⁵⁵ The better view, however, is that the contents of the schedules when used against a third party are hearsay and inadmissible to prove the truth of the matters asserted therein. In addition, the schedules may not be used for that purpose since the schedules are reflective of the debtor's financial condition on the date of the petition and not on the date of the transfers.⁵⁶

⁵⁵ See, e.g., *In re Trans Air, Inc.*, 103 B.R. 322, 325 (Bankr. S.D. Fla. 1988); *In re Claxton*, 32 B.R. 219, 222 (Bankr. E.D. Va. 1983); *In re Blue Point Carpet, Inc.*, 102 B.R. 311, 320 (Bankr. E.D.N.Y. 1989).

⁵⁶ *In re Strickland*, 230 B.R. 276, 282 (Bankr. E.D. Va. 1999) (citing BARRY RUSSELL, BANKRUPTCY EVIDENCE MANUAL § 201.8 (1988)).

2020 ABI SOUTHEAST VIRTUAL BANKRUPTCY WORKSHOP

**UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF KENTUCKY OPERATIONS DURING THE
COVID-19 PANDEMIC (To Date)**

By: Gregory R. Schaaf, Chief Judge
July 9, 2020

1. The Commonwealth of Kentucky Response to the COVID-19 Pandemic.

The United States Department of Health and Human Services declared a public health emergency on January 27, 2020, due to the health risks caused by the novel coronavirus referred to as “COVID-19.” The Commonwealth of Kentucky followed with a declaration of a State of Emergency on March 6, 2020, and shut down all non-life sustaining businesses on March 26, 2020. See Attachment 1 and Attachment 2.

The Kentucky state courts shut down on March 16, 2020, and hearings on most matters were continued pending further orders. See Attachment 3. The federal courts and employees are generally considered immune from such orders when working, but the participants – lawyers and parties – must abide by the restrictions (absent some intervention). Regardless of any federal and state separation issues, the health and safety of parties that appear in the federal courts was and is a significant concern.

2. The Eastern District of Kentucky Bankruptcy Court Response to the COVID-19 Pandemic.

The United States Bankruptcy Court for the Eastern District of Kentucky has two judges based in Lexington: Judge Gregory R. Schaaf and Judge Tracey N. Wise. The Lexington chambers and courtrooms are in a commercial bank building with a handful of commercial tenants and the Office of the United States Trustee, Probation Services, and the chambers of a Sixth Circuit judge. Two dockets, London and Covington, are heard in person at the Eastern District of Kentucky courthouses in those locations. The Pikeville and Ashland dockets are usually held remotely by video, with parties appearing in the local District Court buildings.

Judge Schaaf, Judge Wise, and Nathan Lee, the Clerk of Court, continuously monitored the ever-shifting recommendations and restrictions to formulate the response of the Bankruptcy Court. The Bankruptcy Court has significant flexibility regarding Clerk functions because it is not based in the Lexington federal courthouse. But the courtrooms in the remote locations are subject to District Court control.

On March 12, the Bankruptcy Court published a notice that welcomed requests for telephonic participation and suggested voluntary continuances. The next day, it was apparent more was required. Judge Schaaf continued all chapters 7, 12, and 13 matters scheduled for his March motion days. Judge Wise had already conducted her March motion hours, so she continued her April hearings for one month. This gave practitioners, debtors, and creditors a one-month breathing spell to adapt to the health crisis and related restrictions.

Non-evidentiary hearings in all divisions were and will be conducted telephonically in April, May, June, and July. In person hearings for non-evidentiary matters restart in August, although the Bankruptcy Court must monitor all guidelines that might limit or prevent attendance by practitioners and the public. Evidentiary hearings are also affected by the travel and other restrictions. The conduct of hearings in two matters describe some of the issues addressed by the Bankruptcy Court.

3. Phone and Video Capabilities.

AT&T teleconferencing services are used and available at any time without prior scheduling. Each judge has a reserved toll-free number and access code that is available on the Bankruptcy Court's website. Up to 500 participants are supported by the AT&T teleconference system.

The Bankruptcy Court has conducted remote hearings in Ashland and Pikeville by video for years using the National Video Teleconferencing Service (NVTCS) supported by the Department of Technology Services at the Administrative Office of the Court. Earlier this year, the Bankruptcy Court started using the related Video Teleconferencing Guest Services, which is an extension of the NVTCS. The added technology creates a bridge that allows external participants (e.g., attorneys/parties/witnesses) to connect without the need for the same video conferencing systems. The bridge requires a reservation for a particular date, time, and duration, and an estimated number of video participants.

The parties are invited to attend by an email from the courtroom deputy. The external participants are initially prompted to install Jabber Guest, a Cisco software product, on their computer or mobile device (e.g., a smart phone or tablet). The participants then click on a web link for bridge access and enter the conference ID number provided by the courtroom deputy.¹ The courtroom deputy may also assign a password to limit video participation if that is a concern.

The video system functions best with fewer than 20 video participants, so only parties examining witnesses are allowed to participate on video. Also, other courts use the system nationally, so overuse could result in connection problems for participants.

4. In re GenCanna Global USA, Inc., Case no. 20-50133 (Bankr. E.D. Ky.).

a. March 23, 2020, Hearing on a Final DIP Order.

GenCanna is an administratively consolidated case with three debtors involved in the hemp industry. An involuntary was filed against one entity in late January 2020. That debtor converted to a voluntary chapter 11, and two related debtors filed chapter 11 petitions, in early February 2020.

As in most chapter 11 cases, the Debtors needed funds and sought approval for DIP financing with their first day motions. Interim orders were entered, but eventually an evidentiary hearing was required before a final order could issue. The final hearing scheduled for March 16, 2020, became a status conference. *See Attachment 4.* Other matters set for March 16 were continued by the Bankruptcy Court to March 19, 2020, a date that was available because the monthly motion hour was moved one month. *See Attachment 5.*

¹ A participant using Jabber Guest is not required to have an account, create a password, or otherwise authenticate if they have the video conferencing web link and conference ID.

The continued evidentiary hearing was set for March 23, 2020, and the parties were directed to present direct testimony by affidavit on or before March 18, 2020. *See Attachment 6.* Responsive affidavits were due by March 20, 2020. *Id.* Another order was entered that required “a short, concise statement or list of the facts the party believes are provided by the testimony.” *See Attachment 7.* This order also asked for the issues a party wanted to address on cross examination. *Id.*

The scheduling order contemplated a telephonic evidentiary hearing because counsel for the relevant parties were not local and the prior hearings resulted in a packed courtroom that did not allow for social distancing. Despite this, the parties decided to try to present testimony by video. As indicated, fewer than 20 video participants is best, so only parties examining witnesses participated on video. Other interested parties attended through the phone connection.

Unfortunately, the phone participants could not hear the parties on the video. Therefore, the video was terminated and testimony was accepted by phone as originally planned. Argument and presentation of evidence took one-half day.

The basis for conduct of the hearing without in person testimony was stated on the record at the March 23 hearing:

A telephonic evidentiary hearing is necessitated by public health considerations surrounding the COVID-19 public health crisis. Consistent with government recommendations and common sense, this Court has taken precautions to reduce the possibility of exposure to the virus and slow the spread of the disease to the extent practical. Limiting in-person hearings and resolving matters outside the courtroom are obvious steps that all federal and state courts are implementing. *See for example In re Court Operations Related to COVID-19, General Order 20-2, (E.D. Ky., March 13, 2020); and In re Court Operations Related to COVID-19, General Order 20-2, (W.D. Ky., March 13, 2020).*

The referenced Eastern District of Kentucky General Order is Attachment 8. The Western District order is substantially the same, so it is not included.

b. May 6-7, 2020, Hearing to Approve Sale of Assets.

The travel and other restrictions caused by the COVID-19 pandemic had not eased by the time of a sale hearing that was originally requested in late April. The parties expressed a desire to structure presentation of evidence in a manner similar to the DIP financing hearing. Direct testimony was required in advance and parties that wished to cross examine witnesses had to make their intentions known. A status conference was held on the afternoon before the hearing to consider substantive or technical issues.

The IT department worked out the audio issue from the earlier hearing by bridging the audio and video systems. The parties examining or defending witnesses appeared by video and other interested parties appeared by phone.

Attachment 9 is a copy of the Judge’s notes in anticipation of an oral statement regarding the basis and authority for the video testimony. *See supra* at Part 4.a (quote from transcript of

hearing). The Attachment also includes a preliminary statement from the Judge to each witness and the oath. The primary responsibility for confirmation of the identity of the witness was placed on the attorney presenting the testimony. Some courts have entered an order containing this information in advance of a hearing. *See, e.g., Attachment 10.*

The testimony had very few problems. The video feed for one witness was lost for a period of time, but he continued to testify by phone. (The problem was likely too many users in unrelated cases.) Feedback occurred when a video participant did not mute the audio on the video. Also, a few phone participants had trouble mastering *6 to unmute their phones. Overall, though, the process was a reasonable and effective response to the limitations forced on the Bankruptcy Court and the parties by the COVID-19 pandemic.

5. *Jordan v. Walters (In re Walters)*, AP No. 19-6016 (Bankr. E.D. Ky.).

Jordan involved a non-dischargability complaint and counterclaim in a chapter 7 proceeding. The trial was originally scheduled during the COVID-19 months at the London courthouse. The trial was continued to mid-June and an order was entered directing testimony by video. This order was met by an objection from the Defendant Debtor, who argued video testimony violated her constitutional rights and prevented credibility determinations.

The legal basis for the arguments had no support, as discussed in the Order at [Attachment 11](#). But the Defendant still got her wish because the anticipated number of witnesses and easing of state-wide restrictions suggested it was time for live testimony. Also, the Eastern District of Kentucky judges sitting in London had set up procedures for conducting hearings in criminal and other matters. A copy of the District Court order was appended to the order at [Attachment 11](#).

Prior to the hearing, a simple order was entered that required masks and compliance with the instructions from court personnel. *See Attachment 12*. Newly installed plexiglass barriers separated court personnel, lawyers, and the witness box. Multiple witness rooms were available and the Defendant's witness waited in his vehicle because he would not testify until after the lunch break. Also, the participants were allowed to remove their masks while socially distant and the lawyers asked questions from their seats.

ATTACHMENT 1

(Commonwealth of Kentucky Emergency Order)

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ANDY BESHEAR
GOVERNOR

EXECUTIVE ORDER

Secretary of State
Frankfort
Kentucky

2020-215
March 6, 2020

STATE OF EMERGENCY

WHEREAS, On January 31, 2020, the United States Department of Health and Human Services Secretary Alex Azar declared a public health emergency for the novel coronavirus (COVID-19), beginning on January 27, 2020; and

WHEREAS, there are numerous confirmed lab cases of COVID-19 throughout the United States; and

WHEREAS, COVID-19, a respiratory disease that can result in serious illness or death, is caused by the SARS-CoV-2 virus, which is a new strain of coronavirus that had not been previously identified in humans and can easily spread from person to person; and

WHEREAS, the CDC identifies the potential public health threat posed by COVID-19 both globally and in the United States as "high", and has advised that person-to-person spread of COVID-19 will continue to occur globally, including within the United States; and

WHEREAS, the World Health Organization currently indicates there are 98,192 confirmed cases of COVID-19 worldwide, and the CDC currently indicates that 164 of those cases are in the United States; and

WHEREAS, the planning and preparedness of all state and local agencies for a COVID-19 public health emergency in the Commonwealth is a concern to all Kentuckians; and

WHEREAS, the Kentucky Department of Emergency Management has special personnel and equipment resources to assist the state and local authorities in the protection of life, public health and safety, to promote the public welfare, to prevent undue loss and suffering, and to mitigate the effects of such an event; and



ANDY BESHEAR
GOVERNOR

EXECUTIVE ORDER

Secretary of State
Frankfort
Kentucky

NOW, THEREFORE, I, Andy Beshear, Governor of the Commonwealth of Kentucky, by virtue of the authority vested in me by Chapter 39A of the Kentucky Revised Statutes, declare that a State of Emergency exists in the Commonwealth of Kentucky and do hereby order and direct the issuance of appropriate state active duty orders for the necessary officers, troops, personnel, equipment, including the resources of the Kentucky National Guard and other logistical support necessary for an immediate response to the novel coronavirus (COVID-19) emergency in the Commonwealth. I further order and direct as follows:

1. The Division of Emergency Management within the Department of Military Affairs and the Kentucky Department of Public Health shall coordinate the response and relief activities of all state agencies and private relief organizations in response to the COVID-19 emergency described herein.
2. The Division of Emergency Management within the Department of Military Affairs shall execute the Kentucky Emergency Operations Plan and, from the Kentucky Emergency Operations Center, shall coordinate the relief and response activities of all state agencies and private relief organizations in response to this emergency.
3. The Adjutant General is authorized to issue active duty orders for the mobilization of such National Guard personnel and equipment as he may determine to protect life and safety, to continue essential public services, and to prevent undue loss and suffering.
4. The Division of Emergency Management is authorized to request assistance, federal, state, local, private sector, volunteer, and donated resources as may be available to minimize human suffering and to restore essential services to the general population and to assist state and local governments and individuals impacted by this emergency.
5. The Finance and Administration Cabinet is directed to provide assistance with incident resource management, procurements, and contracting and to fund the urgent operational and/or response of the Division of Emergency Management and the unbudgeted expenditures and obligations of other state agencies that are incurred in response and recovery from this emergency incident and in executing the provisions of this Executive Order.
6. The Kentucky Department of Public Health and all other state agencies shall provide sufficient personnel required for the staffing of the Kentucky Emergency Operations

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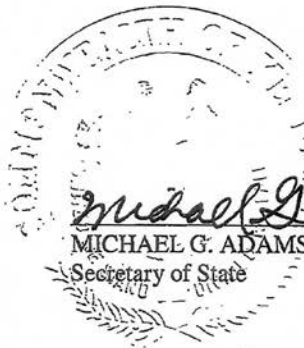
ANDY BESHEAR
GOVERNOR

EXECUTIVE ORDER

Secretary of State
Frankfort
Kentucky

7. The Kentucky Office of Homeland Security ("KOHS") shall provide information to individuals and private organizations, including volunteer and religious organizations, regarding how they can best prepare for and respond to the COVID-19 emergency described herein and whom to contact to volunteer help or services. Further, the KOHS shall specifically identify and encourage private organizations to commit to provide food, shelter, personnel, equipment, materials, consultation, and advice, or other services needed to respond to the COVID-19 emergency. Additionally, the KOHS shall coordinate its efforts with the federal Department of Homeland Security, as necessary, and administer the Kentucky Intelligence Fusion Center to facilitate information sharing about COVID-19 among public safety and public service agencies at the federal, state, and local levels, as well as the private sector.

This order is effective March 6, 2020.



Michael G. Adams
MICHAEL G. ADAMS
Secretary of State

Andy Beshear
ANDY BESHEAR, Governor
Commonwealth of Kentucky

ATTACHMENT 2

(Commonwealth of Kentucky Closure Order)

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ANDY BESHEAR
GOVERNOR

EXECUTIVE ORDER

Secretary of State
Frankfort
Kentucky

2020-257
March 25, 2020

STATE OF EMERGENCY

Background

The novel coronavirus (COVID-19) is a respiratory disease causing illness that can range from very mild to severe, including illness resulting in death, and many cases of COVID-19 have been confirmed in the Commonwealth.

To help protect our community from the spread of COVID-19, Kentuckians are encouraged to remain Healthy at Home. By staying home and limiting your in-person contact, you can stop the spread of COVID-19, which endangers public health and safety. If we do not work together to contain the disease, COVID-19 threatens to overwhelm the Commonwealth's healthcare resources.

The Centers for Disease Control and Prevention (CDC) and the Kentucky Department of Public Health have recommended that everyone practice social distancing, meaning staying home when possible and otherwise maintaining six feet of distance from other individuals, to minimize the spread of the disease. Where people congregate unnecessarily, or fail to follow adequate social distancing practices, they are spreading the disease, creating scenes of an emergency.

The Kentucky Constitution and Kentucky Revised Statutes, including KRS Chapter 39A, empower me to exercise all powers necessary to promote and secure the safety and protection of the civilian population, including the power to suspend state statutes and regulations, and to command individuals to disperse from the scene of an emergency. Under those powers, I declared by Executive Order 2020-215 on March 6, 2020, that a State of Emergency exists in the Commonwealth.

I am now issuing this Order to take additional steps to encourage Kentuckians to remain Healthy at Home, and to do everything in their power to stop the spread of the



ANDY BESHEAR
GOVERNOR

EXECUTIVE ORDER

Secretary of State
Frankfort
Kentucky

2020-257
March 25, 2020

disease. This Order should be construed broadly to prohibit in-person work that is not necessary to protect or sustain life.

Order

I, Andy Beshear, Governor of the Commonwealth of Kentucky, by virtue of authority vested in me pursuant to the Constitution of Kentucky and by KRS Chapter 39A, do hereby Order and Direct as follows:

1. **Only Life-Sustaining Businesses May Remain Open.** All businesses that are not life-sustaining shall cease operations effective Thursday, March 26, 2020, at 8:00 p.m., except as needed to conduct Minimum Basic Operations, as defined in this Order. For the purposes of this Order, Life-Sustaining Businesses are all businesses that allow Kentuckians to remain Healthy at Home, including:
 - a. **CISA List.** All businesses operating in the federal critical infrastructure sectors, as outlined at <https://www.cisa.gov/identifying-critical-infrastructure-during-covid-19>.
 - b. **Life-sustaining Retail.** In-person retail businesses that provide life-sustaining goods, consistent with Executive Order 2020-246, as well as businesses that supply life-sustaining retail and their administrative support operations. In addition, the following additional categories of retail are designated as life-sustaining under this Order:
 - i. hardware stores and businesses that sell electrical, plumbing, and heating material;
 - ii. agricultural supply and equipment stores;
 - iii. medical product supply and equipment stores; and
 - iv. stores that supply first responders and other critical government and healthcare workers.

The life-sustaining retail stores listed above shall, to the fullest extent possible, permit customers to use delivery or curbside service.

- c. **Food, beverage, and agriculture.** Food and beverage manufacturing, production, processing, and cultivation, including farming, livestock, fishing, baking, and other production agriculture, including cultivation, marketing, production, and distribution of animals and goods for consumption; and businesses that provide food, shelter, and other necessities of life for animals, including animal shelters, rescues, shelters, kennels, and adoption facilities.

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GOVERNOR

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Frankfort
Kentucky

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March 25, 2020

- d. **Organizations that provide charitable and social services.** Businesses and religious and secular nonprofit organizations, including food banks, when providing food, shelter, and social services, and other necessities of life for economically disadvantaged or special populations, individuals who need assistance as a result of this emergency, and people with disabilities. These organizations have a special responsibility to implement social distancing to the fullest extent possible, and to take all necessary actions to stop the spread of disease, including by stopping in-person retail operations.
- e. **Media.** Newspapers, television, radio, and other media services.
- f. **Gas stations and businesses needed for transportation.** Gas stations and auto-supply, auto-repair, farm equipment, construction equipment, boat repair, and related facilities; bicycle repair shops and related facilities; and motorcycle repair shops.
- g. **Financial Services.** Depository institutions, including but not limited to banks and credit unions; Non-depository institutions, including but not limited to consumer, industrial and mortgage loan companies, mortgage loan brokers, originators and processors, deferred deposit, check cashers, and payday lending companies, title pledge lenders, and money transmitters; securities institutions, including but not limited to brokers, agents, advisers and issuers; appraisers, financial markets, bond issuers, or institutions selling financial products to the extent they are providing financial services; and pawnbrokers, to the extent they are providing check-cashing or similar financial services, or to the extent they are selling firearms and ammunition pursuant to Paragraph 9 of this Order.
- h. **Housing, Buildings and Construction.** To ensure Kentuckians can remain Healthy at Home, businesses providing construction or maintenance of residential, commercial, or governmental structures, including but not limited to plumbers, electricians, exterminators, cleaning and janitorial staff, security staff, operating engineers, HVAC, painting, landscaping, moving and relocation services, necessary for sustaining the safety, sanitation and operation of structures.
- i. **Mail, post, shipping, logistics, delivery, and pick-up services.** Post offices and other businesses that provide shipping and delivery services, and businesses that ship or deliver groceries, food, beverages, goods or services to end users or through commercial channels.
- j. **Laundry services.** Laundromats, dry cleaners, industrial laundry services, and laundry service providers.



ANDY BESHEAR
GOVERNOR

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Frankfort
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- k. **Restaurants for consumption off-premises.** Carry-out, delivery, and drive-through food and beverage sales may continue, consistent with the March 16, 2020 Order of the Cabinet for Health and Family Services and the Department of Public Health and the March 19, 2020 Order of the Public Protection Cabinet.
- l. **Supplies for Life-Sustaining Businesses.** Businesses that sell, manufacture, or supply other Life-Sustaining Businesses with the support or materials necessary to operate, including computers, audio and video electronics, household appliances; IT and telecommunication equipment; hardware, paint, flat glass; electrical, plumbing and heating material; sanitary equipment; personal hygiene products; food, food additives, ingredients and components; medical and orthopedic equipment; optics and photography equipment; diagnostics, food and beverages, chemicals, soaps and detergent; and firearm and ammunition suppliers and retailers for purposes of safety and security.
- m. **Transportation.** Airlines, taxis, transportation network providers (such as Uber and Lyft), vehicle rental services, paratransit, and other private, public, and commercial transportation and logistics providers necessary for Kentuckians to safely remain Healthy at Home, and to access Life-Sustaining Businesses.
- n. **Home-based care and services.** Home-based care for adults, seniors, children, and/or people with developmental disabilities, intellectual disabilities, substance use disorders, and/or mental illness, and other in-home services including meal delivery.
- o. **Professional services.** Professional services, such as legal services, accounting services, insurance services, real estate services (including appraisal and title services). Professional services firms must implement telecommuting and remote work to the fullest extent possible, and should only use in-person interaction to support Minimum Basic Operations or where telecommuting is impossible.
- p. **Manufacture, distribution, and supply chain for critical products and industries.** Manufacturing companies, distributors, and supply chain companies producing and supplying critical products and services in and for industries such as pharmaceutical, technology, biotechnology, healthcare, chemicals and sanitization, waste pickup and disposal, agriculture, food and beverage, transportation, energy, steel and steel products, petroleum and fuel, mining, mineral extraction, construction, national defense, communications, as well as products used by other Life-Sustaining Businesses, or products that can be used to treat or prevent COVID-19.

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GOVERNOR

EXECUTIVE ORDER

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2020-257
March 25, 2020

- q. **Critical labor union functions.** Labor Union critical activities including the administration of health and welfare funds and personnel checking on the well-being and safety of members providing services in Life-Sustaining Businesses, provided that these checks should be done by telephone or remotely where possible.
 - r. **Hotels and motels.** Hotels and motels, to the extent used for lodging and delivery or carry-out food services.
 - s. **Funeral services.** Funeral, mortuary, cremation, burial, cemetery, and related services, subject to restrictions on mass gathering and appropriate social distancing.
2. **Telework Permitted.** The prohibition does not apply to virtual or telework operations.
3. **Social Distancing and Hygiene Required.** All businesses permitted to operate, including Life-Sustaining Businesses and businesses conducting Minimum Basic Operations, must follow, to the fullest extent practicable, social distancing and hygiene guidance from the CDC and the Kentucky Department of Public Health. Failure to do so is a violation of this Order, and could subject said business to closure or additional penalties as authorized by law. Social distancing and hygiene guidance includes:
 - a. ensuring physical separation of employees and customers by at least six feet when possible;
 - b. ensuring employees practice appropriate hygiene measures, including regular, thorough handwashing or access to hand sanitizer;
 - c. regularly cleaning and disinfecting frequently touched objects and surfaces;
 - d. permitting employees to work from home when feasible; and
 - e. identifying any sick employees and asking them to leave the premises. Employers are strongly encouraged to offer these employees paid leave.
4. **Minimum Basic Operations.** Minimum Basic Operations are the minimum necessary activities to maintain the value of the business's inventory, preserve the condition of the business's physical plant and equipment, ensure security, process payroll and employee benefits, facilitate telecommuting, and other related functions.
5. **Evictions Suspended.** Pursuant to the authority vested in me by KRS Chapter 39A, evictions within the Commonwealth are suspended, and all state, county, and local law enforcement officers in the Commonwealth are directed to cease



ANDY BESHEAR
GOVERNOR

EXECUTIVE ORDER

Secretary of State
Frankfort
Kentucky

2020-257
March 25, 2020

enforcement of orders of eviction for residential premises for the duration of the State of Emergency under Executive Order 2020-215. No provision contained within this Order shall be construed as relieving any individual of the obligation to pay rent, to make mortgage payments, or to comply with any other obligation that an individual may have under tenancy or mortgage.

6. **Additional Orders.** The following designees may provide guidance, clarification or modification of this Order to industries or businesses, and may otherwise issue orders necessary to the operation of government during the State of Emergency: the Governor's Executive Cabinet, as set forth in KRS 11.065; the Commissioner of Public Health; the Director of the Division of Emergency Management; and the Director of the Kentucky Office of Homeland Security. Local health departments may take all necessary measures to implement this Order.
7. **In-Person Government Services.** All in-person government activities at the state, county, and local level that are not necessary to sustain or protect life, or to supporting Life-Sustaining Businesses, are suspended.
 - a. For purposes of this Order, necessary government activities include activities performed by critical infrastructure workers, including workers in law enforcement, public safety, and first responders. Such activities also include, but are not limited to, public transit, trash pick-up and disposal, activities necessary to manage and oversee elections, operations necessary to enable transactions that support the work of a business's or operation's critical infrastructure workers, and the maintenance of safe and sanitary public parks so as to allow for outdoor recreation.
 - b. Any in-person government services that continue must operate consistent with social distancing, as set forth in Paragraph 3 of this Order.
 - c. Any statutory deadlines that conflict with the suspension of in-person government activities are hereby suspended during the pendency of this Order.
 - d. Nothing in this Order should be interpreted to interfere with or infringe on the powers of the legislative and judicial branches to perform their constitutional duties or exercise their authority.
8. **Prior Orders Remain In Effect.** All prior Executive Orders, and Orders issued by Cabinets pursuant to Executive Order 2020-215, remain in full force and effect, except to the extent they conflict with this Order. For the avoidance of doubt, mass gatherings remain prohibited pursuant to the March 19, 2020 Order of the Cabinet for Health and Family Services and the Department of Public Health. Non-life sustaining retail operations may continue to provide local delivery and curbside service of online or telephone

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ANDY BESHEAR
GOVERNOR

EXECUTIVE ORDER


Secretary of State
Frankfort
Kentucky

2020-257
March 25, 2020

orders, consistent with Executive Order 2020-246. Violations of these and other Orders issued pursuant to Executive Order 2020-215 are punishable as provided in KRS Chapter 39A.

9. **Firearms.** Consistent with KRS 39A.100(1)(h) and (3), nothing in this Order should be construed to interfere with the lawful sale of firearms and ammunition. Any businesses engaged in the lawful sale of firearms and ammunition must follow social distancing and hygiene guidance from the CDC and the Kentucky Department of Public Health, including: ensuring physical separation of employees and customers by at least six feet when possible; ensuring employees practice appropriate hygiene measures, including regular, thorough handwashing; regularly cleaning and disinfecting frequently touched objects and surfaces; and ordering sick individuals to leave the premises. Failure to do so is a violation of this Order, and could subject said business to closure.

This Order shall be in effect for the duration of the State of Emergency herein referenced, or until this Executive Order is rescinded by further order or by operation of law.


ANDY BESHEAR, Governor
Commonwealth of Kentucky

MICHAEL G. ADAMS
Secretary of State

ATTACHMENT 3

(Supreme Court of Kentucky Operations Order)

Supreme Court of Kentucky

2020-10

AMENDED ORDER

**IN RE: KENTUCKY COURT OF JUSTICE RESPONSE TO
COVID-19 EMERGENCY**

On March 6, 2020, Governor Beshear entered Executive Order 2020-215 and declared a State of Emergency in response to the novel coronavirus (COVID-19) emergency in the Commonwealth. In light of this measure and to protect the health and safety of court employees, elected officials, and the general public, and under Section 116 of the Constitution and Supreme Court Rule 1.010, the Supreme Court hereby ORDERS the following measures to be implemented from Monday, March 16, to Friday, April 10, 2020:

1. With the exception of emergency and time-sensitive matters, including but not limited to, domestic violence hearings, emergency custody hearings, evidentiary hearings in criminal cases, in-custody arraignments, in-custody preliminary hearings under RCr 3.10, in-custody bond motions, and in-custody probation violation hearings, all in-person appearances for civil and criminal dockets shall be canceled. Judges must use available telephonic and video technology for all necessary hearings, including but not limited to, arraignments and mental-health hearings.
2. All civil trials, hearings, and motions shall be postponed and rescheduled for a later date. Any civil trial or hearing currently in progress shall be continued or completed at the discretion of the presiding judge.
3. Reasonable attempts shall be made to reschedule all criminal trials, subject to a defendant's right to a speedy trial.
4. With the exception of emergency matters and hearings statutorily required to be held, small claims, eviction, juvenile, probate, traffic, and guardianship cases shall be continued.

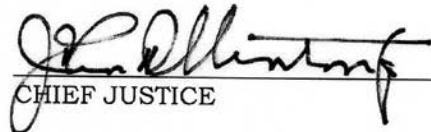
5. Courtroom attendance shall be limited to attorneys, parties, necessary witnesses, and domestic violence advocates. No more than 20 people may be in the courtroom at any time unless the judge in his or her discretion deems it necessary and makes every effort to enforce appropriate distances between individuals.
6. A case involving an attorney or party who is ill or in a high-risk category shall be rescheduled.
7. Judges shall issue summonses in lieu of bench warrants or notices of failure to appear.
8. All show cause dockets for payment of fines and court costs scheduled within this timeframe shall be continued for 60 days.
9. The 20-day preliminary hearing requirement for out-of-custody defendants under RCr 3.10 is waived during the effective dates of this Order.
10. Jurors who are ill, caring for someone who is ill, or in a high-risk category shall have their jury service postponed to a later date.
11. New juror orientations shall be suspended unless an exception is granted by the Chief Justice.
12. Existing jury panels may be extended at the discretion of the court.
13. The circuit court is authorized to extend the 60-day period in RCr 5.22(3) for a period not to exceed 45 days for good cause shown. The Commonwealth's Attorney shall request an extension by separate motion as to each defendant and shall give prompt notice of the motion to defense counsel. The circuit court shall allow both the Commonwealth's Attorney and defense counsel to be heard prior to entering any order extending the period in RCr 5.22(3).
14. Attorneys are encouraged to use e-Filing.
15. Drop boxes should be used for conventionally filed documents if available.

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16. Signage shall be posted at all public entry points advising individuals not to enter the building if they have:
 - a. In the previous 14 days, visited China, Iran, South Korea, any European countries, or any other high-risk countries identified by the CDC;
 - b. Resided with or been in close contact with someone who has been in any of those countries within the previous 14 days;
 - c. Traveled domestically within the United States where COVID-19 has sustained widespread community transmission;
 - d. Been asked to self-quarantine by any doctor, hospital, or health agency;
 - e. Been diagnosed with or have had contact with anyone who has been diagnosed with COVID-19; or
 - f. A fever, cough or shortness of breath.
17. Individuals attempting to enter in violation of these protocols shall be denied entrance by a bailiff or court security officer.
18. Bailiffs shall discourage congregating outside courtroom doors and encourage social distancing inside the courtroom.
19. Individuals with legitimate court business who are ill, caring for someone who is ill or in a high-risk category are advised to stay home and request a continuance by calling the local Office of Circuit Court Clerk.

Nothing in this Order shall preclude the chief district and chief circuit judges from implementing additional local restrictions as needed; however, under no circumstances may a courthouse be closed without prior authorization from the Chief Justice. This Order shall be effective from March 16, 2020, to April 10, 2020, or until further Order of this Court.

Entered this 17th day of March 2020.


CHIEF JUSTICE

All sitting; all concur.

ATTACHMENT 4

(GenCanna Order for Status Hearing)

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**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON DIVISION**

IN RE

**GENCANNA GLOBAL USA, INC., ET
AL.¹**

CASE NO. 20-50133

DEBTORS

ORDER

It is ORDERED that this matter shall come before the Court for a telephonic status hearing at **10:00 a.m. on Monday, March 16, 2020**. Parties shall call in approximately 10 minutes prior to the start of the hearing using the following information: Toll Free Call In Number: 1-888-363-4749; Access Code: 9735709; Security Code: 39632.

Parties shall further email Sheila Sutphin at sheila_sutphin@kyeb.uscourts.gov or Ruth Heil at ruth_heil@kyeb.uscourts.gov if parties wish to participate in the call.

¹The Debtors in these chapter 11 bankruptcy cases are (with the last four digits of their federal tax identification numbers in parentheses): GenCanna Global USA, Inc. (0251); GenCanna Global, Inc. (N.A.); and Hemp Kentucky, LLC (2600).

The affixing of this Court's electronic seal below is proof this document has been signed by the Judge and electronically entered by the Clerk in the official record of this case.



Signed By:
Gregory R. Schaaf
Bankruptcy Judge
Dated: Friday, March 13, 2020
(grs)

ATTACHMENT 5

(GenCanna Order Continuing Hearing on Other Matters)

AMERICAN BANKRUPTCY INSTITUTE

Case 20-50133-grs Doc 360 Filed 03/13/20 Entered 03/13/20 14:04:19 Desc Main Document Page 1 of 2

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON DIVISION**

IN RE

**GENCANNA GLOBAL USA, INC., ET
AL.¹**

CASE NO. 20-50133

DEBTORS

ORDER

Out of an abundance of caution and due to the health risks created by those exposed to the COVID-19 virus, it is ORDERED that

- (1) Debtors' Motion for Entry of Interim and Final Orders (I) Authorizing the Debtors to (A) Obtain Post-petition Financing and (B) Utilize Cash Collateral, (II) Granting Liens and Superpriority Administrative Expense Claims, (III) Granting Adequate Protection, (IV) Modifying the Automatic Stay, (V) Scheduling a Final Hearing, and (VI) Granting Related Relief [ECF No. 55];
- (2) Emergency Motion of the Debtors and Debtors in Possession to Enforce the Automatic Stay, Compel Turnover and For Sanctions [ECF No. 297] and related Motion to Shorten Time [ECF No. 298];
- (3) Supplemental Brief in Support of Objection of Bragg Farms & Co. in Opposition to Debtors' Motion for Entry of Final Order Approving Debtor in Possession Financing and Motion for Evidentiary Hearing on Adequate Protection and to Shorten Time [ECF No. 320];
- (4) Combined Objection to Debtors' Motion to Enforce the Automatic Stay, Compel Turnover, and For Sanctions and Cross-Motion for Adequate Protection [ECF No. 330] and related Motion to Shorten Time [ECF No. 331] filed by Arrow Farms, LLC;
- (5) Motion to File Amendments to Growing Contract Under Seal, To Deem Them Non-Confidential Upon Review and to Shorten Notice of the Hearing [ECF No. 337] filed by Bragg Farming Company; and

¹The Debtors in these chapter 11 bankruptcy cases are (with the last four digits of their federal tax identification numbers in parentheses): GenCanna Global USA, Inc. (0251); GenCanna Global, Inc. (N.A.); and Hemp Kentucky, LLC (2600).

2020 SOUTHEAST VIRTUAL BANKRUPTCY WORKSHOP

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(6) Motion to Admit Affidavit of John T. McGarvey into Evidence as Expert Testimony and Motion to Shorten Notice of Hearing [ECF No. 347]

scheduled for hearing on Monday, March 16, 2020, are **CONTINUED to 10:00 a.m. on March 19, 2020, in the United States Bankruptcy Court, Second Floor Courtroom, 100 E. Vine Street, Lexington, Kentucky.**

It is further ORDERED that the Interim DIP Order [ECF No. 207] remains in full force and effect pending further orders of the Court.

The affixing of this Court's electronic seal below is proof this document has been signed by the Judge and electronically entered by the Clerk in the official record of this case.



Signed By:
Gregory R. Schaaf
Bankruptcy Judge
Dated: Friday, March 13, 2020
(grs)

ATTACHMENT 6

(GenCanna Order Requiring Affidavit Testimony)

2020 SOUTHEAST VIRTUAL BANKRUPTCY WORKSHOP

Case 20-50133-grs Doc 398 Filed 03/16/20 Entered 03/17/20 09:45:24 Desc Main Document Page 1 of 1

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON DIVISION**

IN RE

**GENCANNA GLOBAL USA, INC., ET
AL.¹**

CASE NO. 20-50133

DEBTORS

ORDER

This matter is before the Court on the Debtors' Motion for Entry of Interim and Final Orders (I) Authorizing the Debtors to (A) Obtain Post-petition Financing and (B) Utilize Cash Collateral, (II) Granting Liens and Superpriority Administrative Expense Claims, (III) Granting Adequate Protection, (IV) Modifying the Automatic Stay, (V) Scheduling a Final Hearing, and (VI) Granting Related Relief [ECF No. 55] and related objections. A hearing was held on March 16, 2020. Based on the comments made on the record,

It is ORDERED the Debtors shall file any affidavits in support of the requested relief on or before 12:00 p.m. (noon) on March 18, 2020. Any responsive affidavits may be filed on or before 12:00 p.m. (noon) on March 20, 2020.

It is further ORDERED an evidentiary hearing on the Debtors' Motion shall be conducted at 9:00 a.m. on March 23, 2020. The evidentiary hearing will be conducted telephonically. Parties shall call in approximately 10 minutes prior to the start of the hearing using the following: Toll free: 1-888-363-4749; Access Code: 9735709; Security Code: 25942.

¹The Debtors in these chapter 11 bankruptcy cases are (with the last four digits of their federal tax identification numbers in parentheses): GenCanna Global USA, Inc. (0251); GenCanna Global, Inc. (N.A.); and Hemp Kentucky, LLC (2600).

The affixing of this Court's electronic seal below is proof this document has been signed by the Judge and electronically entered by the Clerk in the official record of this case.



Signed By:
Gregory R. Schaaf
Bankruptcy Judge
Dated: Monday, March 16, 2020
(grs)

ATTACHMENT 7

(GenCanna Order for Statement of Intended Argument)

2020 SOUTHEAST VIRTUAL BANKRUPTCY WORKSHOP

Case 20-50133-grs Doc 436 Filed 03/20/20 Entered 03/20/20 15:45:54 Desc Main Document Page 1 of 1

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON DIVISION

IN RE

GENCANNA GLOBAL USA, INC., ET
AL.¹

CASE NO. 20-50133

DEBTORS

ORDER

It is ORDERED that each party that has submitted an affidavit of direct testimony related to the hearing [ECF No. 398] on the Debtors' Motion for Entry of Interim and Final Orders (I) Authorizing the Debtors to (A) Obtain Post-petition Financing and (B) Utilize Cash Collateral, (II) Granting Liens and Superpriority Administrative Expense Claims, (III) Granting Adequate Protection, (IV) Modifying the Automatic Stay, (V) Scheduling a Final Hearing, and (VI) Granting Related Relief [ECF No. 55] shall file a short, concise statement or list of the facts the party believes are provided by the testimony. Further, any party that intends to cross examine said witnesses shall also file a short, concise statement of the issues that the party contests. These filings are due within 48 hours of entry of this Order. Any party that does not comply shall be deemed to waive the right to cross examine a witness.

¹The Debtors in these chapter 11 bankruptcy cases are (with the last four digits of their federal tax identification numbers in parentheses): GenCanna Global USA, Inc. (0251); GenCanna Global, Inc. (N.A.); and Hemp Kentucky, LLC (2600).

The affixing of this Court's electronic seal below is proof this document has been signed by the Judge and electronically entered by the Clerk in the official record of this case.



Signed By:
Gregory R. Schaaf
Bankruptcy Judge
Dated: Friday, March 20, 2020
(grs)

ATTACHMENT 8

(Eastern District of Kentucky Initial COVID-19 Response Order)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

Eastern District of Kentucky

FILED

Mar - 13 2020

Robert R. Carr
Clerk, U.S. District Court

In Re:

**COURT OPERATIONS RELATED
TO COVID-19**

**GENERAL ORDER
No. 20-02**

*** **

This Order is issued in response to the discovery of, and increases in, confirmed COVID-19 cases within the Commonwealth of Kentucky. With respect to health risks created by those exposed to COVID-19, the Court also acknowledges state and local guidance regarding the need to limit large gatherings of persons. More specifically, the Court seeks to take immediate and necessary precautions to reduce the possibility of exposure to the virus and slow the spread of the disease, to the extent practical.

In support of the actions outlined below, the Court takes judicial notice of the following facts. On January 31, 2020, the United States Department of Health and Human Services Secretary Alex Azar declared a public health emergency for the novel coronavirus ("COVID-19"). Thereafter, a state of emergency was declared by Andy Beshear, the Governor of the Commonwealth of Kentucky, *via* Executive Order 2020-215, in response to the spread of COVID-19. As noted in Executive Order 2020-215, the United States Center for Disease Control ("CDC") has identified the potential health threat posed by COVID-19 both globally and within the United States as "high", and has advised that person-to-person spread of COVID-19 will continue to occur globally, including within the United States. Finally, on March 12, 2020, John Minton, Chief Justice of the Supreme Court of Kentucky, entered Order

No. 2020-08 captioned, “In Re: Kentucky Court of Justice Response to COVID-19 Emergency”. Through this order, nearly all civil and criminal proceedings pending in the state justice system and which require in-person appearances have been canceled or continued generally.

Therefore, consistent with actions taken by numerous federal, state and local entities, it is hereby

ORDERED as follows:

1. All courthouses in the district remain open for business. However, subject to the specific exceptions outlined in paragraph 2 below, civil and criminal trials scheduled to begin March 16, 2020, through April 17, 2020, before any district or magistrate judge in the Eastern District of Kentucky, are **CONTINUED FOR A MINIMUM PERIOD OF THIRTY (30) DAYS**, subject to further orders of the Court. Trials previously scheduled during this period shall be rescheduled by separate order of the district or magistrate judge assigned to the matter.

All trials currently in progress shall be completed at the discretion of the presiding judge.

2. Criminal matters scheduled before magistrate judges, such as initial appearances, arraignments, detention hearings, and the issuance of warrants, shall continue to take place in the ordinary course of business. Likewise, hearings scheduled before district judges during the period identified in paragraph 1 shall proceed as scheduled, subject to intervening orders of the judge assigned to the matter.

3. Any matter involving an attorney or party who is ill or in a high-risk category may be rescheduled by the presiding judge. However, counsel shall be responsible for advising

the presiding judge of such illness or high-risk by filing an appropriate notice or motion containing sufficient information to allow the presiding judge to make an informed decision regarding any cancellation or continuance.

4. Subject to intervening orders, Grand Juries shall continue to meet as currently scheduled.

5. Regarding criminal trials set during the period identified in paragraph 1, based on public health recommendations and the severity of risk posed to the public¹ the time period of the continuance caused by this General Order shall be excluded under the Speedy Trial Act, as the Court specifically finds that the ends of justice served by ordering the continuance outweigh the best interests of the public and the defendant's right to a more speedy trial. 18 U.S.C. § 3161(h)(7)(A). Subject to intervening orders, the period of exclusion shall be from March 16, 2020 to April 17, 2020. The district judge assigned to the matter may extend this period if circumstances warrant.

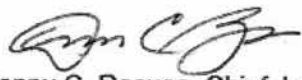
The Court recognizes the right of criminal defendants to a speedy and public trial under the Sixth Amendment to the United States Constitution, and the particular application of that right in cases involving defendants who are detained pending trial. Therefore, in the event any affected party disagrees with the Court's analysis regarding the time excluded under the Speedy Trial Act, he or she may move for reconsideration in the individual case. Likewise, the government may seek reconsideration. Any motion for reconsideration shall be directed to the district judge assigned to the matter.

¹ *Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 (COVID-19), February 2020, <http://www.cdc.gov/coronavirus2019-ncov/specific-groups/guidance-business-response.html> (last updated February 26, 2020).*

6. As noted in paragraph 1 above, the office of the Clerk of the Court shall remain open for business. Likewise, the United States Probation Office, and all other court services shall remain open, subject to intervening orders of the Court. The United States Bankruptcy Court for the Eastern District of Kentucky may impose such restrictions on hearings, meetings, and other matters as that court unit determines to be necessary and appropriate.

Dated: March 13, 2020.




Danny C. Reeves, Chief Judge
United States District Court
Eastern District of Kentucky

ATTACHMENT 9

(Judge Schaaf's Notes for Video or Telephone Testimony)

**JUDGE'S NOTES FOR STATEMENT BEFORE VIDEO OR TELEPHONIC
TESTIMONY PLUS OATH FOR WITNESS**

A. General statement to parties re witnesses outside court:

- In person testimony is preferred.
 - Credibility and truthfulness are often gauged through observation of a witness's demeanor on the stand.
 - That is limited for video testimony and more limited for testimony by phone.
- But testimony outside the presence of the court is allowed.
 - See Federal Rule of Civil Procedure 43(a) (made applicable by Federal Rule of Bankruptcy Procedure 9017).
 - [See *Jordan v. Walters (In re Walters)*, AP No. 19-6016 (Bankr. E.D. Ky. May 29, 2020), ECF No. 94.
- Compelling circumstances require video and telephonic testimony and argument in this case.
 - Because of the health crises in this country and federal and local limitations on travel that are not expected to change in the near future.
 - And because the relief requested is required now and cannot wait until the crisis is resolved to a point that would allow in person testimony.

B. Exhibits: Parties should do their best to anticipate the need for exhibits.

- Exhibits shall be filed in the record and transmitted to a witness in advance of testimony.
- These actions are not a waiver of the right to object and do not mean the exhibit is admitted.
- Rebuttal exhibits, if any, shall be transmitted to the courtroom deputy by email and then sent to the witness via email if questioning is allowed.
 - A witness must have access to email for this purpose prior to providing testimony
 - An admitted exhibit must be electronically filed in the record immediately after the close of testimony on the date admitted.

C. Jurisdiction.

- I may require the witness's presence in person to affirm testimony or address other matters.
- If the party does not appear when required, then any testimony will be stricken.
- All sanction authority remains as if the lawyers or witnesses were in the courtroom.

D. Verification of identity.

- I accept the offer of a witness as the representation of the lawyer presenting the testimony that the witness is who he or she claims.
- Any reasonably discoverable objections to identity must be raised before testimony or the objection is deemed waived.

E. Objections.

- a. Parties should raise an objection by speaking loudly and doing your best to get my attention
- b. Witness and counsel should stop immediately when an objection is lodged.

F. Witnesses:

- a. Each witness should be alone in a room.
- b. No party may have contact with a witness during testimony.
- c. A party may not refer to any notes or other information without court approval.
- d. If a party requests separation of witnesses, all witnesses except the testifying witness must stay off the phone until contacted by counsel to join the hearing.
- e. The party presenting the witness must provide all dial in and other administrative instructions to the witness.

G. Preliminary statement to each witness:

- The failure to tell the truth may result in denial of any relief requested, monetary or other punitive sanctions, including incarceration, and many other forms of relief.
- No other person may be in the room with you.
- You may only consult the exhibits provided to you and cannot review other resources at your disposal unless specifically described and authorized by the court.
- You must speak loudly and clearly so the audio recording will pick up your statements.

H. Oath: [Please raise your right hand.] Bearing these admonitions in mind, do you solemnly swear that the testimony today will be yours and yours alone, without resort to undisclosed resources, and that you will tell the absolute truth?

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**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF KENTUCKY
LONDON DIVISION**

IN RE

**AMERICORE HOLDINGS, LLC¹
DEBTORS**

**CASE NO. 19-61608
JOINTLY ADMINISTERED**

ORDER

The matters listed on Attachment 1 are scheduled for hearings on July 29, 2020. [ECF No. 691.] Compelling circumstances caused by the COVID-19 public health crisis require a telephonic and video hearing for these matters. *See* FED. R. CIV. PROC. 43(a) (made applicable by FED. R. BANKR. PROC. 9017). Consistent with government recommendations and common sense, this Court has taken precautions to minimize the possibility of exposure to the virus and slow the spread of the disease to the extent practical. All current reports indicate the number of cases related to COVID-19 continues to rise across the country. Imposing limits on in-person hearings and accepting testimony through telephonic or other virtual means are obvious steps that all federal and state courts are implementing.

It is therefore ORDERED that the hearings on for these matters on July 29, 2020, shall be held by telephone and videoconference. The following procedures shall apply generally, and other requirements may apply as circumstances require. This Order supplements any scheduling order already entered for any of the matters on for a hearing. [*See* ECF Nos. 549, 554, 691.]

1. Witnesses and the parties that present or cross examine witnesses related to the hearings on ECF Nos. 647 and 744 shall appear by video. Video slots are limited to

¹ The Debtors in these Chapter 11 cases are (with the last four digits of their federal tax identification numbers in parentheses): Americore Holdings, LLC (0115); Americore Health, LLC (6554); Americore Health Enterprises, LLC (3887); Ellwood Medical Center, LLC (1900); Ellwood Medical Center Real Estate, LLC (8799); Ellwood Medical Center Operations, LLC (5283); Pineville Medical Center, LLC (9435); IZard County Medical Center, LLC (3388); Success Healthcare 2, LLC (8861); St. Alexius Properties, LLC (4610); and St. Alexius Hospital Corporation #1 (2766).

fewer than 20 participants at one time, so each person that intends to present or examine a witness must file a notice that references the matter(s) on Attachment 1 and indicates the number of video slots requested **on or before July 22, 2020**. Each video participant must attend pre-hearing training conducted by Court staff **on July 27, 2020, at 11:00 a.m.** (EPS training is not required for video presentation of evidence).

2. Exhibits.

- a. An exhibit list and copies of all exhibits shall be placed in evidence in accordance with the Court's Administrative Procedures Manual **on or before July 24, 2020**.
- b. The exhibits shall be marked with exhibit numbers and the pages of each shall be numbered.
- c. Written objections to the authenticity and/or admissibility of each exhibit are due **by 1:00 p.m. on July 27, 2020**. If no objections are timely filed, the exhibit is deemed authentic and is admissible as evidence on request of the party at the hearing.
- d. Any party may file or supplement an exhibit list and exhibits for facts and issues that arise after the original submission date **on or before 1:00 p.m. on July 28, 2020**.
- e. Otherwise, in the absence of good cause, no exhibit may be offered in evidence except upon compliance with the conditions contained in this order.

- f. The party presenting or cross-examining a witness must provide copies of all exhibits in advance of testimony in a format that allows quick access by the witness.

3. Rebuttal Exhibits.

- a. Parties shall do their best to anticipate the need for rebuttal evidence and file exhibits in advance of the hearing.
- b. Otherwise, rebuttal exhibits shall be transmitted to the Courtroom Deputy by email and then sent to the witness via email if questioning is allowed. The party presenting the exhibit must file it in the record immediately after the close of testimony on the date admitted.

4. Witness Testimony.

- a. All parties who wish to present witnesses shall file a statement generally describing the matter at issue and the anticipated testimony **on or before July 24, 2020**, and any additional witness information related to facts and issues that arise after the original submission date **on or before 1:00 p.m. on July 28, 2020**.
- b. The offer of a witness is the representation of the lawyer presenting the testimony that the witness is who he or she claims. Any reasonably discoverable objections to identity must be raised before testimony or the objection is deemed waived.
- c. Each witness shall present video testimony in a room separate from any other person. A party may not refer to any notes or other information without court approval.

2020 SOUTHEAST VIRTUAL BANKRUPTCY WORKSHOP

- d. A witness must have access to email for the purpose of receiving any exhibits not already provided.
5. The Courtroom Deputy shall provide instructions for access to all attorneys that will appear by video and these parties are responsible for conveying the information to their witnesses.
6. All other parties shall call-in for the teleconference regarding these and other matters scheduled for hearing on July 29. **Parties are required to call in 10 minutes prior to the start of the hearing by using Teleconference #: 888-363-4749; Access code: 9735709#.**
7. Any party participating by phone may request permission to cross-examine a witness.
8. A status conference is set for **9:00 a.m. on July 28, 2020**, to consider objections to witnesses and exhibits and any other matter that will facilitate conduct of the July 29 hearings. Parties that will appear at the July 29 hearings by video shall appear by video at the status conference and all other parties shall use the call-in instructions set out above.

4

The affixing of this Court's electronic seal below is proof this document has been signed by the Judge and electronically entered by the Clerk in the official record of this case.



Signed By:
Gregory R. Schaaf
Bankruptcy Judge
Dated: Thursday, July 16, 2020
(grs)

ATTACHMENT 1

<u>ECF No.</u>	<u>Matter</u>
115	Motion for Relief from Stay, filed by Cigna Health and Life Insurance Company No noted objections
176	Motion for Relief from Stay and Notice of hearing filed by Penn Med, LLC Objections: 224 Official Committee of Unsecured Creditors 231 Pelorus Equity Group, Inc. 234 Americore Holdings, LLC (when represented by counsel)
626	Notice of Potential Assumption and Assignment of Executory Contracts or Unexpired Leases and Cure Amounts (St Alexius) filed by TR Carol L. Fox Objections: 638 Gibbs Technology Leasing, LLC 667 Allied Benefit Systems, Inc. 678 Cigna HealthCare of St Louis, Inc. 753 DaVita, Inc.
647	Motion to (1) Conditionally Approve Disclosure Statement and (2) Combine Final hearing on Approval of Disclosure Statement with Hearing on Confirmation of Plan, filed by Third Friday Total Return Fund, LP Objections: 682 Pension Benefit Guaranty Corporation 695 Official Committee of Unsecured Creditors 718 Commonwealth of Pennsylvania 722 U.S. Trustee
744	Chapter 11 Trustee's Amended Motion for Entry of an Order: (Authorizing the Sale of Substantially All of the Debtors' Assets (St. Alexius) in Accordance with Approved Bid Procedures, as Modified; (B) Authorizing the Assumption and Assignment of Executory Contracts and Unexpired Leases in Accordance with the Bid Procedures, etc., filed by TR Carol L. Fox No noted objections (at this time)

ATTACHMENT 10

(In re Murray Energy Procedures for Video or Telephonic Hearings)

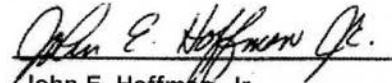
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This document has been electronically entered in the records of the United States Bankruptcy Court for the Southern District of Ohio.

IT IS SO ORDERED.

Dated: April 9, 2020




John E. Hoffman, Jr.
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

In re:)	Chapter 11
MURRAY ENERGY HOLDINGS CO., <i>et al.</i> , ¹)	Case No. 19-56885 (JEH)
)	Judge John E. Hoffman, Jr.
Debtors.)	(Jointly Administered)

AGREED ORDER ESTABLISHING PROCEDURES FOR TELEPHONIC AND/OR
VIRTUAL HEARING SCHEDULED FOR APRIL 14, 2020, AS A RESULT OF THE
COVID-19 PANDEMIC

The above-captioned debtors and debtors in possession (collectively, the "Debtors"), Andy
R. Vara, the United States Trustee for Region 9 ("U.S. Trustee"), the Official Committee of

¹ Due to the large number of Debtors in these chapter 11 cases, a complete list of the Debtors and the last four digits of their federal tax identification numbers is not provided herein. Such information may be obtained on the website of the Debtors' claims and noticing agent at <https://cases.primeclerk.com/MurrayEnergy>. The location of Debtor Murray Energy Holdings Co.'s principal place of business and the Debtors' service address in these chapter 11 cases is 46226 National Road, St. Clairsville, Ohio 43950.

Unsecured Creditors (the “UCC”), CONSOL Energy Inc., and various affiliated entities (collectively, “CONSOL”), the Ad Hoc Group of Superpriority Lenders (the “DIP Lenders”), the United Mine Workers of America (the “UMWA”), and The UMWA 1974 Pension Plan and Trust, UMWA 1992 Benefit Plan, UMWA 1993 Benefit Plan, and UMWA 1988 Cash Deferred Saving (collectively, the “Funds”, and collectively with the Debtors, the U.S. Trustee, the UCC, CONSOL, the DIP Lenders and the UMWA, the “Parties”, or, each individually, a “Party”), each by and through counsel, having agreed that pursuant to Federal Rule of Civil Procedure 43(a) (made applicable by Federal Rule of Bankruptcy Procedure 9017), the current COVID-19 pandemic provides for good cause and constitutes compelling circumstances, and as a result thereof, the Parties having further agreed to certain telephonic and virtual hearing procedures which shall provide appropriate safeguards in relation to the hearing on the following pending matters: (i) *Debtors’ Motion for Interim Relief Under Sections 1113 and 1114 of the Bankruptcy Code* [Docket No. 1110] (the “1113 and 1114 Motion”), (ii) *CONSOL Energy Inc. and Affiliates’ Limited Objection to Debtors’ Motion for Entry of Interim Relief Under Sections 1113(e) and 1114(h) of the Bankruptcy Code* [Docket No. 1159] (the “CONSOL Objection”) (iii) *UMWA 1993 Plan’s Limited Objection to Debtors’ Motion for Interim Relief Under Sections 1113 and 1114 of the Bankruptcy Code* [Docket No. 1166] (“Funds Objection”), and the Court having reviewed the record and being fully advised,

IT IS HEREBY AGREED AND ORDERED that:

1. **Telephonic and Video Conferencing Solutions.** The hearing scheduled for Tuesday, April 14, 2020 at 10:00 a.m. prevailing Eastern Time shall take place virtually. The Court will be utilizing both CourtSolutions (for audio purposes) and Skype (for video purposes). CourtSolutions can be accessed by calling (917) 746-7476 or visiting the website www.court-

solutions.com and the Skype link shall be provided to those Parties who have submitted a notice of intent to participate via Skype to the Court in accordance with Section 3 below. All counsel and witnesses shall conduct a pre-hearing test of Skype and, if possible, CourtSolutions, using the same equipment that they will be using during the hearing.

2. **Limit on Video Conferencing.** Due to video conferencing limitations, the optimal number of Skype participants is ten (10), as opposed to CourtSolutions, which allows for unlimited participants. In an effort not to overburden the Skype platform, video conference participants shall be limited to the witnesses, those parties that anticipate questioning or cross-examining witnesses and, when possible, should be limited to one attorney per firm. Parties participating via Skype who wish to address a witness shall simultaneously be connected to CourtSolutions for audio purposes. Parties attending via Skype shall utilize the Skype link only during the matter for which they wish to be heard. Upon the conclusion of such matter, the party shall disconnect from the Skype link and may continue participation in the hearing through CourtSolutions. Similarly, witnesses shall utilize the Skype link only during the matters on which they are called to testify. Upon completion of their testimony and all cross-examination, the witness shall disconnect from the Skype link and may continue participation in the hearing through CourtSolutions. In order to limit the number of Skype participants to ten persons, if necessary, the Court will take a recess between matters in order to add or subtract individuals participating via Skype.

3. **Prior Notice of Intent to Skype.** All Parties wishing to attend the hearing via Skype shall provide notice to Hoffman282@ohsb.uscourts.gov via electronic mail no later than 4:00 p.m. prevailing Eastern Time on Friday, April 10, 2020. The Court will circulate the Skype link to all Parties participating via Skype prior to the hearing.

4. **Submission of Exhibits to Court.** Parties submitting exhibits related to the 1113 and 1114 Motion, the CONSOL Objection, and/or the Funds Objection shall send all exhibits to Hoffman282@ohsb.uscourts.gov via electronic mail in .pdf format no later than three-business days prior to the scheduled hearing. Such information shall be submitted to the Court separately from (and in addition to) the Exhibit Lists required to be filed with the court three-business days prior to the hearing pursuant to Section 52 of that certain *Second Amended Order Implementing Certain Notice and Case Management Procedures* [Docket No. 1103] (the “Case Management Order”).

5. **Form of Exhibits.** Each Party shall combine all of its exhibits into one .pdf document and each individual exhibit shall be bookmarked for easy review by the Court. All parties shall submit their exhibits to the Court separately.

6. **Filing and Service of Exhibits.** Parties submitting exhibits are excused from (i) filing exhibits on the court docket, and (ii) serving the exhibits on the Master Service List. Parties submitting exhibits need only email the exhibits to the other Parties to this Order and the Court.

7. **Remote Witness Testimony.** In accordance with Federal Rule of Civil Procedure 43(a) (made applicable by Federal Rule of Bankruptcy Procedure 9017), for good cause and in compelling circumstances a witness may be permitted to testify by contemporaneous transmission from a location other than the courtroom. Based on the foregoing, any witness called to testify or subject to cross-examination in relation to the 1113 and 1114 Motion, CONSOL Objection, and/or Funds Objection shall be permitted to testify by contemporaneous transmission from a different location (“Remote Witness”).

8. **Requirements for Allowance of Remote Testimony; Additional Information.**
As additional safeguards for the allowance of a Remote Witness, the Party sponsoring said Remote

Witness shall file with the Court, no later than two-business days prior to the scheduled hearing, a document containing the following information:

- a. The name and title of the Remote Witness.
- b. The matter on which the Remote Witness will provide testimony.
- c. The location of the Remote Witness (city, state, country).
- d. The place from which the Remote Witness will testify (e.g. home, office – *no addresses are required*).
- e. Whether anyone will be in the room with the Remote Witness during the testimony, and if so, who (name, title, relationship to the Remote Witness), and for what purpose.
- f. Whether the Remote Witness will have access to any documents other than exhibits that have been emailed to the Court and the parties, and if so, what documents.

Such information may be filed with the Court separately from (or incorporated within) the Witness Lists required to be filed with the Court three-business days prior to the hearing pursuant to Section 51 of the Case Management Order.

9. **Swearing In of Remote Witnesses.** All Remote Witnesses shall be sworn in over the telephone, Skype, or other video conferencing solution, as applicable, and such testimony will have the same effect and be binding upon the Remote Witness in the same manner as if such Remote Witness was sworn in by the Court deputy in person in open court. To the extent there is an error or malfunction with Skype or other video conferencing solution, the Remote Witness may be sworn in and testify via telephone only.

10. **Responsibility for Remote Witnesses.** The Party sponsoring the witness shall be responsible for ensuring that the CourtSolutions dial-in, Skype link, and all exhibits are supplied

to the Remote Witness prior to the hearing and that the Remote Witness has been registered with CourtSolutions and Skype, as applicable.

SO ORDERED.

Copies to Default List.

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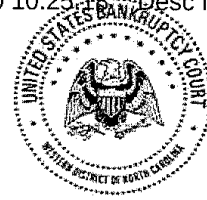
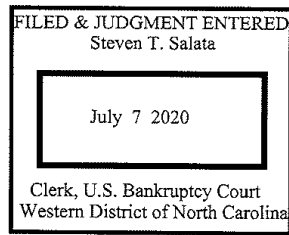
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Case 16-31602 Doc 2356 Filed 07/07/20 Entered 07/07/20 10:25:18 Desc Main Document Page 1 of 4




J. Craig Whitley
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

In re	:	Chapter 11
KAISER GYPSUM COMPANY, INC., <i>et al.</i> , ¹	:	Case No. 16-31602 (JCW)
Debtors.	:	(Jointly Administered)

**ORDER ESTABLISHING PROCEDURES FOR REMOTE HEARING ON
CONFIRMATION OF JOINT PLAN OF REORGANIZATION
AND RELATED PROCEEDINGS**

The Court having determined that good and sufficient cause exist to hold the Confirmation Hearing remotely;

IT IS HEREBY AGREED AND ORDERED that:

1. Video Conferencing Solution. The Confirmation Hearing scheduled to commence on July 20, 2020 will take place virtually. The Court will utilize Zoomgov.com for audio and video purposes. All counsel and witnesses shall conduct a pre-hearing test of Zoomgov.com using the same equipment that they will be using during the hearing. The pre-hearing test will occur on July 13, 2020 at 2:00 p.m. prevailing Eastern Time. Parties who wish to participate in the pre-hearing test shall notify Ursula Hamilton via electronic mail at Ursula_C_Hamilton@ncwb.uscourts.gov no later than July 6, 2020.
2. Limit on Video Conferencing. In order to avoid overburdening the video conference platform, video participation will be limited to (a) testifying witnesses, (b) those Parties that anticipate questioning or cross-examining witnesses (c) attorneys who anticipate potentially

¹ The Debtors are the following entities (the last four digits of their respective taxpayer identification numbers follow in parentheses): Kaiser Gypsum Company, Inc. (0188) and Hanson Permanente Cement, Inc. (7313). The Debtors' address is 300 E. John Carpenter Freeway, Irving, Texas 75062.

needing to address the Court during the hearing, provided, however, each of the following parties shall designate one attorney who will be on the video feed for the duration of the proceedings: (i) the Debtors; (ii) the Official Committee of Asbestos Personal Injury Claimants; (iii) the Future Claimants' Representative; (iv) The Official Committee of Unsecured Creditors; and (v) Truck Insurance Exchange, and all other attorneys who may wish to participate in the hearing may be linked via video feed but shall keep their video feed turned off until they have notified the Court that they wish to speak and the Court has permitted them to do so. Except for the five (5) attorneys who will participate in the entire hearing through the Zoomgov.com video feed as set forth above (the "Primary Attorneys"), Parties shall utilize the video feed only during the issues for which they wish to be heard. Upon the conclusion of such issues, the party shall disconnect their video feed from Zoomgov.com. Similarly, witnesses shall utilize a video feed only during the matters on which they are called to testify. Upon completion of their testimony and all cross-examination, the witness shall disconnect their video feed. In order to limit the number of participants, if necessary, the Court will take a recess in order to add or subtract individuals participating via video feed.

3. Notice of Intent to Participate via Video. All Parties wishing to attend the hearing via Zoomgov.com shall provide notice to Ursula_C_Hamilton@ncwb.uscourts.gov via electronic mail no later than July 13, 2020.
4. Procedure When Disconnected. Should a party participating in the Confirmation Hearing either through the video or audio feed of Zoomgov.com become disconnected while the Confirmation Hearing is proceeding, and such party is unable to reconnect through the video or audio feed, as applicable, then such party shall immediately notify the Court via electronic mail at each of Timothy_Lamb@ncwb.uscourts.gov and Ursula_C_Hamilton@ncwb.uscourts.gov. Unless otherwise ordered by the Court, the Confirmation Hearing will continue during the period any party is disconnected, with such party's co-counsel acting on the applicable party's behalf during such period, provided, however, the Court reserves the right to pause the Confirmation Hearing while still on the record, take a recess or order a continuance of the Confirmation Hearing, in its sole discretion, in the event a party becomes disconnected and is unable to reconnect in a timely manner or the party that becomes disconnected is a witness, an attorney examining a witness, or one of the Primary Attorneys.
5. Submission of Exhibit Lists and Demonstratives. Parties shall exchange exhibit lists no later than July 1, 2020. The Debtors will combine all proposed exhibits into one master electronic file that will be utilized by all Parties (the "Exhibit Binder"). The Court and each witness who will testify live will be provided a complete copy of the Exhibit Binder. The Exhibit Binder will also contain all demonstrative exhibits that will be utilized during the Confirmation Hearing, and all Parties seeking to utilize demonstrative exhibits shall submit them to the Debtors for inclusion in the Exhibit Binder no later than July 14, 2020. In the event a Party determines it requires additional demonstrative exhibits during the Confirmation Hearing, such Party will work with the Debtors to provide adequate time for such additional exhibits to be distributed to all Parties prior to use at the Confirmation Hearing.

6. Remote Witness Testimony. In accordance with Federal Rule of Civil Procedure 43(a) (made applicable by Federal Rule of Bankruptcy Procedure 9017), for good cause and in compelling circumstances a witness may be permitted to testify by contemporaneous transmission from a location other than the courtroom. Based on the foregoing, any witness called to testify or subject to cross-examination in relation to the Confirmation Hearing shall be permitted to testify by contemporaneous transmission from a different location ("Remote Witness"). If requested by a Party, a Remote Witness shall be sequestered and not have access to the Zoomgov.com feed prior to his or her testimony; provided however, that a witness who is also a designated representative of a Party shall not be subject to sequester.
7. Requirements for Allowance of Remote Testimony; Additional Information. As additional safeguards for the allowance of a Remote Witness, the Party sponsoring said Remote Witness shall file with the Court, no later than two-business days prior to the scheduled hearing, a document containing the following information:
 - a. The name and title of the Remote Witness.
 - b. The location of the Remote Witness (city, state, country).
 - c. The place from which the Remote Witness will testify (e.g. home, office – no addresses are required).
 - d. Whether anyone will be in the room with the Remote Witness during the testimony, and if so, who (name, title, relationship to the Remote Witness), and for what purpose. Furthermore, to avoid the potential for coaching witnesses, if anyone other than the Remote Witness is in the room while the Remote Witness is testifying, that person shall be visible on the video screen at all times while the Remote Witness is testifying.
 - e. Whether the Remote Witness will have access to any documents other than the Exhibit Binder, and if so, what documents.
 - f. Whether the Remote Witness will have access to or will utilize any communication devices other than Zoomgov.com during their testimony.
8. Swearing In of Remote Witnesses. All Remote Witnesses shall be sworn in over Zoomgov.com and such testimony will have the same effect and be binding upon the Remote Witness in the same manner as if such Remote Witness was sworn in by the Court deputy in person in open court.
9. Responsibility for Remote Witnesses. The Party sponsoring the witness shall be responsible for ensuring that the Zoomgov.com link and all exhibits and deposition transcripts are supplied to the Remote Witness prior to the hearing. Remote Witnesses shall also use their best efforts to frame themselves during testimony to allow camera framing that shows the Remote Witnesses' face and upper body.

2020 SOUTHEAST VIRTUAL BANKRUPTCY WORKSHOP

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10. Submission of Declarations and Designations in Lieu of Cross-Examination. Affirmative witness testimony will be presented through declaration, which will be filed on the docket no later than July 1, 2020. The Parties may agree that cross-examination of certain witnesses is unnecessary. For such witnesses, the Parties may submit deposition designations in lieu of live cross examination. If no agreement can be reached, however, the witness will be made available for live cross-examination, re-direct and re-cross as a Remote Witness. Any Party wishing to use deposition designations in lieu of live cross-examination must disclose to the other Parties the designations by July 6. Parties shall disclose to the parties any counter-designations by July 8. Parties shall exchange objections to designations and counter-designations by July 10. The Parties shall work together to resolve or narrow all objections with respect to the designations. Any objections to the deposition designations or counter-designations shall be submitted to the court by July 14.
11. Objections to Written Exhibits. The Parties shall work together to resolve or narrow all objections with respect to the proposed exhibits, and the Parties shall exchange written objections to written exhibits no later than July 8. Parties shall submit any unresolved objections to the court by July 14. The Parties agree that the documents and other exhibits included in the Exhibit Binder to which there is no objection may be introduced into evidence without the necessity of further proof of admissibility or authenticity through a witness or otherwise. This is without prejudice to motions in limine that have previously been filed.
12. Objections to Witness Testimony. Objections, other than privilege objections, will be made at the conclusion of the testimony of a Remote Witness. Objections on the basis of privilege may be made during the testimony of a Remote Witness, and the Parties will identify an attorney who will be responsible for making privilege objections.
13. Courtroom Formalities. Although conducted using telephonic and videoconferencing technologies, the evidentiary hearing constitutes a court proceeding. No person shall record—from any location or by any means—the audio or video of the hearing. The audio recording created and maintained by the Court shall constitute the official record of the hearing. Further, the formalities of a courtroom shall be observed. Counsel and witnesses shall dress appropriately, exercise civility, and otherwise conduct themselves in a manner consistent with the dignity of the Court and its proceedings.
14. No Limits on Audio Access. While the Court may place limits on access to the video feed, no limit will be placed on the number of participants that may access the hearing via the Zoomgov.com audio feed, provided, however, that the total users of the Zoomgov.com audio and video feeds, including Court personnel, may not exceed 350 users.

This Order has been signed electronically.
The judge's signature and the court's seal
appear at the top of the order.

United States Bankruptcy Court

{00338727 v 1 } NAI-1513173152v2

ATTACHMENT 11

(Jordan Order Regarding Video Testimony)

2020 SOUTHEAST VIRTUAL BANKRUPTCY WORKSHOP

Case 19-06016-grs Doc 94 Filed 05/29/20 Entered 05/29/20 11:18:01 Desc Main Document Page 1 of 7

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF KENTUCKY
LONDON DIVISION**

IN RE

JODIE NICOLE WALTERS

CASE NO. 19-60350

DEBTOR

MIKE JORDAN

PLAINTIFF

V.

ADV. NO. 19-6016

JODIE NICOLE WALTERS

DEFENDANT

ORDER

The trial in this matter is set for June 17, 2020. [ECF No. 88.] The trial will be conducted by video under the current schedule. The Defendant Jodie Nicole Walters objects, criticizing the ability to evaluate witness testimony and claiming a video trial would impair constitutional rights. [ECF Nos. 90 and 93.] The Defendant's arguments are baseless.

The Federal Rules of Civil Procedure specifically contemplate contemporaneous testimony from a remote location in compelling circumstances. FED. R. CIV. PROC. 43(a) (incorporated by FED. R. BANKR. P. 9017). The national health crisis caused by the COVID-19 pandemic goes beyond compelling to mandate adjustment to customary procedures. All federal and state courts have taken steps to minimize health risks to parties-in-interest. National, state and local travel restrictions and limitations place an extra burden on legal counsel, parties, and witnesses.

Courts have found that this type of testimony does not violate the Fifth Amendment or Sixth Amendment to the United States Constitution even before the current pandemic. *See, e.g.,*

Maryland v. Craig, 497 U.S. 836, 849 (1990) (a preference for face-to-face confrontation at trial must on occasion give way to public policy and the necessities of the case); *Wilkins v. Timmerman-Cooper*, 512 F.3d 768, 776 (6th Cir. 2008) (finding “videoconferencing, when used in a manner that allows the defendant to confront and hear his accusers in real time” does not violate the Fifth Amendment). In fact, the right to confront accusers in criminal matters has not stopped the courts in the Eastern District of Kentucky from using electronic means to carry out their obligations, constitutional and statutory. *See, e.g., Doe v. Transylvania Univ.*, No. CV 5:20-145-DCR, 2020 WL 1860696, at *9 n.2 (E.D. Ky. Apr. 13, 2020) (noting that the Eastern District of Kentucky completed a multi-week criminal trial involving witnesses unable to travel who are testifying via video conferencing from California).

The Defendant’s concerns with the ability to evaluate witness demeanor also has no support. “Indisputably, demeanor can be assessed by the trier of fact without physical presence, especially when facilitated by modern technology.” *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 406 (6th Cir. 2017). This Court has conducted a half-day evidentiary hearing by phone and a two-day trial by video in the last two months without problems or objections.

A video trial balances the interests of all parties and preserves a party’s right to due process. The Defendant will, however, get her wish. The anticipated number of witnesses is easier to handle in person. Travel restrictions are easing and more is known about the risks of, and defenses to, the virus. Further, the Eastern District of Kentucky judges that routinely sit in the Southern Division have devised hearing guidelines that allow them to conduct proceedings in a manner that protects parties-in-interest to the greatest extent possible. A copy is attached.

2020 SOUTHEAST VIRTUAL BANKRUPTCY WORKSHOP

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These factors justify a trial in the courtroom, with appropriate restrictions. But this adjustment will require a brief delay before the trial is held to consider all issues and any individual limitations.

Therefore, it is ORDERED:

1. The trial on this matter is continued to **9:30 a.m. on July 7, 2020, in the U.S.**

Bankruptcy Court, U.S. District Courtroom C, 310 S. Main Street, London, Kentucky.

2. This matter will come before the Court for a telephonic status hearing at **10:00 a.m. on June 17, 2020. Parties shall call in 10 minutes prior to the hearing using the following numbers: Teleconference number: (888) 363-4749; Access Code 9735709#.**

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The affixing of this Court's electronic seal below is proof this document has been signed by the Judge and electronically entered by the Clerk in the official record of this case.



Signed By:
Gregory R. Schaaf
Bankruptcy Judge
Dated: Friday, May 29, 2020
(grs)

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION

Eastern District of Kentucky

FILED

May - 07 2020

Robert R. Carr
Clerk, U.S. District Court

In re: Southern Division Criminal Hearings)
)
)
)

HEARING GUIDELINES

*** **

The Court is committed to conducting all proceedings in a manner that protects participants and duly respects the latest public health guidance, the rights of all case stakeholders, the need to guard vulnerable populations, and the public's interest in reasonable access to criminal hearings. To that end, the Court issues the following general guidelines applicable to criminal proceedings for Judges Boom and Wier (and Southern Division Magistrate Judges in their cases) in the Southern Division.¹ The guidelines apply until lifted and unless modified by a particular judge. Every judge in the Division may vary these guidelines by Order, and case participants may seek relief from the guidelines by motion:

1. The Court has evaluated the available courtroom seating and devised an arrangement to account for applicable social distancing guidelines. Accordingly, all parties should consult with and sit as court personnel designate. Proper social distancing is a requirement for all participants and persons in attendance.
2. Given the spacing required under current public-health guidelines, the arrangements for case participants leave limited space for public attendance.

¹ This does not apply to trials. Each judge conducting a trial shall set specific rules for that trial.

Accordingly, in-court seating for family and other members of the general public will be restricted to no more than five persons.

3. For London hearings, the Court has made general arrangements for remote access to proceedings at an alternative site in the London courthouse. This availability will accommodate other members of the public up to the limits allowed by social distancing principles in the designated space. The Court will continue to evaluate solutions for Pikeville.
4. To minimize hand-to-hand contact and reduce paper handling, all parties shall, as much as practicable, electronically submit any anticipated documentary submissions to the Chambers of the involved judge, via e-mail,² at least 24 hours in advance of any hearing. [If pre-hearing electronic submission is impracticable, counsel may utilize the ELMO document camera for exhibit display or may tender the document from a laptop in Court.]
5. The Court will clear and seal the courtroom for any matter that ordinarily would require a sealed bench conference. The conference will occur with the parties in place. Once such matters conclude, the Court will reopen the courtroom.
6. The parties shall present from their locations at counsel tables. The Court will not permit roaming the well, migration around the room, or podium use.
7. The Court has arranged mechanisms to permit confidential client consultation while maintaining appropriate social distance. Defense counsel should consult with court personnel pre-hearing regarding specific mechanics and options. The Court will assure the chance to confer privately as needed.

² Parties may contact Chambers telephonically to request e-mail specifics.

8. Any party anticipating witness testimony or victim participation must notify Chambers, via e-mail, at least at least 5 business days in advance of the subject proceeding. Court personnel will give guidance on witness placement and participation mechanics. If the anticipated witness is in custody, the party must also notify Chambers, subject to the same deadline, of the particular detention facility housing such witness. The Court, for protection of detention facility staff and inmates, is allowing detainees into the courthouse from only one jail on a given day.

a. In the event an anticipated witness is housed at a facility different from a detained Defendant, video presentation of the witness may be necessary to avoid cross-facility contact. The parties must confer regarding the housing of a Defendant and any detained witness. The parties should, if consenting to remote presentation, file a notice in the record substantiating that agreement.

9. Each participant and person in attendance shall wear a mask or appropriate cloth covering the nose and mouth.

10. In this challenging period, the Court seeks to make progress in matters on the docket while treating safety for all involved as a primary value. If, as a specific hearing approaches, any participant experiences COVID-19 symptoms, counsel shall promptly alert the Court and the Marshal assigned to the relevant courthouse.

The Court **ORDERS** the Clerk to docket these guidelines in every criminal case, assigned to Judge Boom or Judge Wier, with a hearing scheduled in the Southern Division.

2020 SOUTHEAST VIRTUAL BANKRUPTCY WORKSHOP

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This the 7th day of May, 2020.



Claria Horn Boom

CLARIA HORN BOOM,
UNITED STATES DISTRICT COURT JUDGE
EASTERN AND WESTERN DISTRICTS OF
KENTUCKY

Claria H. Boom
United States District Judge



Signed By:

Robert E. Wier *REW*

United States District Judge

ATTACHMENT 12

(Jordan Supplemental Order re Live Testimony)

2020 SOUTHEAST VIRTUAL BANKRUPTCY WORKSHOP

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**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF KENTUCKY
LONDON DIVISION**

IN RE

JODIE NICOLE WALTERS

CASE NO. 19-60350

DEBTOR

MIKE JORDAN

PLAINTIFF

V.

ADV. NO. 19-6016

JODIE NICOLE WALTERS

DEFENDANT

ORDER

The current health crisis requires the following supplement to the prior orders scheduling the trial in this matter. [ECF Nos. 4, 33, 58, 68, 76, 88 and 94.]

1. Exhibits: Parties should do their best to anticipate the need for exhibits.
 - a. Exhibits shall be filed in the record in advance of testimony.
 - b. Rebuttal exhibits, if any, shall be transmitted to the courtroom deputy by email.
 - i. The parties should have laptop computers available at trial and present any exhibit that is not already in the record using the courtroom's evidence presentation technology.
 - ii. An admitted exhibit must be electronically filed in the record immediately after the close of testimony on the date admitted.
2. Witness Testimony. The parties are encouraged to present testimony from any party other than the plaintiff and defendant through affidavit testimony. An example is to use the same negotiating practice for stipulations.
3. General Guidelines.

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- a. Follow the instructions of court personnel regarding entering and seating in the courtroom.
- b. Wear a mask at all times unless otherwise instructed.
- c. Follow the general recommendations of the federal and state guidelines and speak up if you suggest a course of conduct that will increase the health and safety of any person.

The affixing of this Court's electronic seal below is proof this document has been signed by the Judge and electronically entered by the Clerk in the official record of this case.



Signed By:
Gregory R. Schaaf
Bankruptcy Judge
Dated: Tuesday, June 30, 2020
(grs)