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9 IN THE UNITED STATES DISTRICT COURT
10 FOR THE EASTERN DISTRICT OF CALIFORNIA
11 FRESNO DIVISION

12 KAREN SCHELLER,
13 Plaintiff,
14 v.
15 AMERICAN MEDICAL RESPONSE, INC., a
16 foreign corporation, CINDY WOOLSTON, an
individual, and DOES 1-25, inclusive,
17 Defendants.
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Case No.: 1:08-CV-00798-OWW-DLB

**STIPULATION AND ORDER
PERMITTING PARTIES TO PRESENT
TESTIMONY BY VIDEO
TRANSMISSION**

Complaint Filed: February 20, 2008
Trial Date: July 12, 2011

20 Defendant American Medical Response, Inc. (“AMR”) and Plaintiff Karen Scheller
21 (“Scheller”), by and through their counsel, hereby move the Court pursuant to Federal Rules
22 of Civil Procedure 43(a) for an order allowing the parties, if they desire, to take the testimony
23 of Marvin H. Lipton, M.D., Michael Purnell, M.D., Ronald T. Whitmore, M.D., and/or Debra
24 Wilson, RNC, FNP, by contemporaneous video transmission from a different location.

25 This motion is based upon the records, pleadings, and papers on file herein, together
26 with the points and authorities set forth below.

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1 **I. LEGAL AUTHORITIES**

2 Scheller's lawsuit consists of a three related claims in a single cause of action. She
3 alleges discrimination based on disability, failure to accommodate a disability, and failure to
4 engage in the interactive process. Scheller was injured at work on January 20, 2005.
5 Following her injury, she obtained treatment from a number of medical providers, and
6 underwent an Independent Medical Examination in connection with her workers'
7 compensation claim.

8 Scheller obtained treatment from Michael Purnell, M.D. (an orthopedic surgeon, based
9 in Modesto), Ronald T. Whitmore, M.D. (occupational medicine, based in Sacramento), and
10 Debra Wilson, RNC, FNP (registered nurse, certified, and family nurse practitioner, based in
11 Modesto). She was examined by Marvin H. Lipton (an orthopedic surgeon, based in
12 Burlingame), who was acting as an Agreed Medical Examiner. Because these witnesses live
13 and work approximately some distance from the Courthouse (ranging from approximately
14 100 miles to approximately 184 miles), the parties seek the Court's permission to present the
15 testimony of these witnesses by contemporaneous video transmission from the cities where
16 they are located. These witnesses were not deposed during discovery.

17 Federal Rules of Civil Procedure 43(a) provides: "For good cause in compelling
18 circumstances and with appropriate safeguards, the court may permit testimony in open court
19 by contemporaneous transmission from a different location." While the Advisory Committee
20 Notes to the 1996 amendments to the rule which adopted this change may suggest that the
21 party seeking to present testimony in this manner has a high burden, subsequent Ninth Circuit
22 and other case law show that the burden is satisfied in this instance. See, e.g., *Beltran-Tirado*
23 *v. Immigration and Naturalization Service* (9th Cir. 2000) 213 F.3d 1179, 1185-86 (permitting
24 the use of telephonic testimony where witness not present in the jurisdiction and witness was
25 subject to cross-examination); *Alderman v. Securities and Exchange Commission* (9th Cir.
26 1997) 104 F.3d 285, 288 n4 ("Nor do we agree with [plaintiff's] suggestion that the [Conduct
27 Committee's] credibility findings are undermined because O'Hanley testified at the hearing
28 by telephone"); *Official Airline Guides, Inc. v. Churchfield Publications, Inc.* (D.Or. 1990)

1 756 F.Supp. 1393, 1398 n2 (relying on telephonic testimony and noting that the Court had
2 “greater opportunity to evaluate the credibility of the witnesses through telephone testimony
3 than through deposition testimony), aff’d, (9th Cir. 1993) 6 F.3d 1385; see also *Federal Trade*
4 *Commission v. Swedish Match North America, Inc.*, (D. D.C. 2000) 197 F.R.D. 1, 2 (“More
5 importantly, however, the use of live video transmission will not prejudice the defendants
6 because adequate safeguards exist to protect the procedure.”)

7 Cross-examination will be available in this case, and the Court and jury will have the
8 opportunity to evaluate the credibility of the witnesses through video testimony. On the other
9 hand, there would be considerable expense associated with these witnesses having to travel to
10 Fresno to testify at trial, as well as likely disruption to their lives for a full day or longer for
11 the purpose of presenting two hours or less of testimony. The possibility of this motion was
12 mentioned at the Pretrial Conference, and mentioned in the Pretrial Order.

13 **II. CONCLUSION**

14 Based on the foregoing, the parties respectfully request the Court enter an order that
15 they may, if they desire, take the testimony of Marvin H. Lipton, M.D., Michael Purnell,
16 M.D., Ronald T. Whitmore, M.D., and/or Debra Wilson, RNC, FNP, by contemporaneous
17 video transmission from a different location.

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19 DATED: June 23, 2011

FISHER & PHILLIPS LLP

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21 By: /s/ Jennifer K. Achart

Jennifer K. Achart
Attorneys for Defendant
AMERICAN MEDICAL RESPONSE, INC.

22
23 DATED: June 23, 2011

GIANELLI & ASSOCIATES LLP

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25 By: /s/ Brett Dickerson, as authorized 6/23/11

Brett Dickerson
Attorneys for Plaintiff
KAREN SCHELLER

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ORDER

Based upon the stipulation of the Parties and good cause having been shown, it is hereby ORDERED that the parties may, if they desire, take the testimony of Marvin H. Lipton, M.D., Michael Purnell, M.D., Ronald T. Whitmore, M.D., and/or Debra Wilson, RNC, FNP, by contemporaneous video transmission from a different location.

IT IS SO ORDERED.

Dated: June 27, 2011

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE