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28UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE HIV ANTITRUST LITIGATION.

Case No. 19-cv-02573-EMC

**ORDER RE MAY 23, 2023,
CONFERENCE**

This order memorializes rulings made during the conference held on May 23, 2023. It also provides additional rulings, as necessary.

A. Opening Statements – Objections to Demonstratives and Exhibits

As an initial matter, the Court notes that the parties have not started matters off on the right foot by lodging at the eleventh hour numerous objections (most without merit) to demonstratives and/or exhibits to be used during opening statements. If this portends what is to come in this trial, the Court forewarns the parties that it will charge trial time against the losing party(ies) in resolving objections to evidence. Although the Court's main concern, as previously articulated, was meritless objections based on authenticity and foundation, *see* Docket No. 1842, it emphasizes that *any* objections may be subject to the charging of trial time. This includes, *e.g.*, objections based on relevance, Rule 403, and hearsay.

1. Plaintiffs' Objections to Defendants' Slides

All objections are overruled, except as to Gilead 61. Gilead 61, as it currently stands, is misleading, including, *e.g.*, drugs from well outside the relevant time period and which have no obvious relevance to this case. Gilead indicated that it will modify the slide and present it to

United States District Court
Northern District of California

1 Plaintiffs.

2 The Court also notes that, although it has largely overruled objections based on Rule 403,
3 it expects that Defendants shall not dwell on matters such as industry background or general
4 incentives to innovate. *See, e.g.*, Gilead 18-19 (slides addressing HIV treatments “Saving Lives”
5 and “Improving Lives”). If they do, the Court will entertain objections

6 Finally, the Court notes that it is giving the parties some leeway regarding “legal” matters
7 (*e.g.*, regarding patent law) given the complexity of this case – so long as the law is accurately
8 reflected and not prone to mislead the jury.

9 2. Plaintiffs’ Objections to Defendants’ Use of Exhibits

10 Plaintiffs’ objections to Defendants’ use of exhibits are also overruled. The Court notes
11 that it has not yet adjudicated the admissibility of the exhibits. However, it is more than likely that
12 the exhibits shall be admitted. For example, given that many of the exhibits are internal Gilead or
13 internal Teva emails, the business record exception to hearsay shall likely apply. Also, the Court
14 has already ruled that Teva’s subjective beliefs during the relevant time are admissible, even if the
15 ultimate test is an objective one – and this is true even if it is Gilead relying on the evidence.
16 Finally, the Court is skeptical that Rule 403 will be a bar to admissibility.

17 3. Defendants’ Objections to Plaintiffs’ Slides

18 All objections are overruled except as to the following:

- 19 • EPP 25. The Rule 403 objection is sustained in part. Plaintiffs shall be allowed to
20 use the slide so long as they remove from the background the picture of the
21 pleading (the draft joint pretrial conference statement). Plaintiffs shall also modify
22 the slide so that it does not “draw” upon the draft joint pretrial conference
23 statement. Plaintiffs may modify the slide to reflect that Teva’s forfeiture is a
24 stipulated fact (as reflected in the jury instructions).
- 25 • EPP 30, 69, 71, 85, and 86. The verdict form has been changed, and therefore
26 these demonstratives may not be used. However, the Court shall allow Plaintiffs to
27 substitute new slides so long as they track the verdict form.
- 28 • EPP 52. The Rule 403 and Rule 106 objections are sustained. Plaintiffs shall

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submit a new slide that provides an accurate quote/context – *i.e.*, a Q&A.


B. Stipulation re Trial Logistics (Docket No. 1876)

The Court clarified for the parties the following:

- Sequestration of witnesses extends to opening statements, particularly as both parties intend to refer to exhibits during the statements.
- Demonstratives for closing arguments shall be filed and submitted to the Court by 4:00 p.m. the day before closing. If closing is on a Monday, then demonstratives shall be filed and submitted by 4:00 p.m. Friday.
- The parties shall modify ¶ 5 of the stipulation so that it aligns with ¶ 5(f) – *i.e.*, the Court shall get 24 hours’ advance notice of an issue that needs to be resolved.
- Notice to the Court is counted by court day, even if the undersigned is not available on a given court day. Saturdays, Sundays, and holidays are **not** court days.
- Once a witness takes the stand, the witness may not consult or communicate off the record with the attorney who represents (1) the witness, (2) the entity(ies) for whom the witness is testifying, and/or (3) the entity(ies) with whom the witness is aligned or affiliated.

IT IS SO ORDERED.

Dated: May 23, 2023


EDWARD M. CHEN
United States District Judge