

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF WEST VIRGINIA**

**CHARLESTON DIVISION**

**ANNA RAAB, Individually, and  
TERRY RAAB, Individually,  
and as Husband and Wife,**

**Plaintiffs,**

**v.**

**CASE NO. 2:14-CV-30279  
(Judge Thomas E. Johnston)**

**SMITH & NEPHEW, INC.,  
a Tennessee Corporation,**

**Defendant.**

**PROTECTIVE ORDER**

Pursuant to motion of the Defendant, to which Plaintiffs have no objection, it is hereby

**ORDERED** as follows:

**I. DISCOVERY PHASE**

- A. If a party or an attorney for a party has a good faith belief that certain documents or other materials (including digital information) subject to disclosure pursuant to a discovery or other request, are confidential and should not be disclosed other than in connection with this action and pursuant to this Protective Order, the party or attorney shall mark each such document or other material as “**CONFIDENTIAL.**”
- B. If a party or an attorney for a party disputes whether a document or other material should be marked “**CONFIDENTIAL,**” the parties and/or attorneys shall attempt to resolve the dispute between themselves. If they are unsuccessful,

the party or attorney challenging the “**CONFIDENTIAL**” designation shall do so by filing an appropriate motion.

- C. No party or attorney or other person subject to this Protective Order shall distribute, transmit, or otherwise divulge any document or other material which is marked “**CONFIDENTIAL,**” or the contents thereof, except in accordance with this Protective Order. Court personnel are not subject to this Protective Order while engaged in the performance of their official duties.
  
- D. Any document or other material which is marked “**CONFIDENTIAL,**” or the contents thereof, may be used by a party, or a party’s attorney, expert witness, consultant, or other person to whom disclosure is made, only for the purpose of this action. Nothing contained in this Protective Order shall prevent the use of any document or other material which is marked “**CONFIDENTIAL,**” or the contents thereof, at any discovery deposition taken in this action. If “**CONFIDENTIAL**” material is used at a deposition, the transcript of the deposition and exhibits shall be treated as if designated “**CONFIDENTIAL**” for a period of thirty (30) days after the transcript is available from the court reporter. Counsel for any party may designate pursuant to the criteria set forth in this Order, either during the deposition or during the thirty day period after the transcript is available from the court reporter, any portion of the transcript as “**CONFIDENTIAL**” by page and line and by exhibit. Such designation shall be communicated to all parties. Transcript portions and exhibits designated in accordance with this paragraph shall be disclosed only in accordance with this

Order. A party may challenge the “**CONFIDENTIAL**” designation or portions thereof in accordance with the provisions of paragraph I.B. above.

E. Subject to the provisions set forth in paragraph F. below if applicable, if a party or attorney wishes to disclose any document or other material which is marked “**CONFIDENTIAL**,” or the contents thereof, to any person actively engaged in working on this action (e.g., expert witness, paralegal, associate, consultant), the person making the disclosure shall do the following:

1. Provide a copy of this Protective Order to the person to whom disclosure is made;
2. Inform the person to whom disclosure is made that s/he is bound by this Protective Order;
3. Require the person to whom disclosure is made to sign an acknowledgment and receipt of this Protective Order;
4. Instruct the person to whom disclosure is made to return any document or other material which is marked “**CONFIDENTIAL**,” at the conclusion of the case, including notes or memoranda made from “**CONFIDENTIAL**” material;
5. Maintain a list of persons to whom disclosure was made and the “**CONFIDENTIAL**” materials which were disclosed to that person; and
6. At the conclusion of the action, gather the “**CONFIDENTIAL**” materials, copies thereof, and related notes and memoranda, and return them to the party or attorney who originally disclosed them, with a certificate of compliance with the terms of this Protective Order.

F. Prior to disclosure, plaintiffs will inform the producing party of their intent to disclose “**CONFIDENTIAL**” material of a proprietary nature to anyone who is a current employee of or who has a continuous, regular, ongoing or current consulting arrangement with any entity involved in the design and/or manufacture of hip implant systems in the manner set forth below:

1. Give at least ten (10) days' notice in writing to counsel for the party who designated such information as "**CONFIDENTIAL**" of the intent to so disclose that information, although the disclosing party is not required to identify the intended recipient of such materials.
2. Within ten (10) days thereafter, counsel for the parties shall attempt to resolve any disputes between them regarding the production of the "**CONFIDENTIAL**" material to the intended individual.
3. If the parties are unable to resolve any dispute regarding such production, within an additional seven (7) days, the party who designated the information in question as "**CONFIDENTIAL**" shall file a motion objecting to the proposed disclosure. In making such motion, it shall be the producing party's burden to demonstrate good cause for preventing the disclosure.
4. If the Court permits disclosure of the material at issue which is designated as "**CONFIDENTIAL**" the information remains designated as "**CONFIDENTIAL**" and the individual receiving such information shall be bound by the requirements of paragraph I.E.

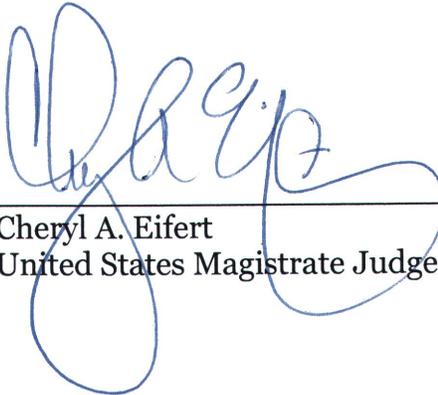
"**CONFIDENTIAL**" material of a proprietary nature is that material which the Defendant believes in good faith would, if disclosed, cause substantial economic harm to the competitive position of the Defendant because it is "**CONFIDENTIAL**" research and development material on a new product that has not been approved or cleared by the FDA or a similar regulatory body or reflects the Defendants' price competitiveness in the market or marketing business strategies of the Defendant concerning a current or new product.

## **II. POST-DISCOVERY PHASE**

If any party or attorney wishes to file, or use as an exhibit or as evidence at a hearing or trial, any "**CONFIDENTIAL**" document or material, s/he must provide reasonable notice to the party that produced the document or material. The parties and/or attorneys shall then attempt to resolve the matter of continued confidentiality by either (a) removing the

“**CONFIDENTIAL**” marking, or (b) creating a mutually acceptable redacted version that suffices for purposes of the case. If an amicable resolution proves unsuccessful, the parties and/or attorneys may present the issue to the court for resolution. The proponent of continued confidentiality will have the burden of persuasion that the document or material should be withheld from the public record in accordance with (a) Local Rule of Civil Procedure 26.4, (b) the *Administrative Procedures for Electronic Filing in the Southern District of West Virginia* § 12, and (c) controlling precedent. *See, e.g., Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8-9 (1986); *Virginia Dept. of State Police v. Washington Post*, 386 F.3d 567, 575 (4<sup>th</sup> Cir. 2004).

**ENTERED:** February 9, 2016



Cheryl A. Eifert  
United States Magistrate Judge