

**CAUSE NUMBER: DC-15-07162**

<b>BONNIE KIRBY and</b>	§	<b>IN THE DISTRICT COURT OF</b>
<b>ADRIAN KIRBY</b>	§	
<b>Plaintiffs,</b>	§	
	§	
	§	
<b>vs.</b>	§	<b>DALLAS COUNTY, TEXAS</b>
	§	
<b>SMITH &amp; NEPHEW, INC.,</b>	§	
<b>SMITH &amp; NEPHEW, INC.,</b>	§	
<b>ORTHOPAEDIC DIVISION;</b>	§	
<b>SMITH &amp; NEPHEW, INC.,</b>	§	
<b>ORTHOPAEDIC RECONSTRUCTION</b>	§	
<b>AND TRAUMA DIVISIONS;</b>	§	
<b>NEYLU, INC.; and</b>	§	
<b>BRIAN CHILDRESS</b>	§	
<b>Defendants.</b>	§	<b>192nd JUDICIAL DISTRICT</b>

**PLAINTIFF BONNIE KIRBY’S MOTION TO COMPEL  
PRODUCTION OF UNREDACTED DOCUMENTS  
AND PRIVILEGE LOG**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Plaintiff Bonnie Kirby, and files this her Motion to Compel Production of Unredacted Documents and Privilege Log, and for such would show the Court as follows:

I.

**BACKGROUND**

Plaintiffs allege in this products liability case that the Defendants made and distributed defective, unregulated hip implants that were implanted into Plaintiff Bonnie Kirby’s right and left hips during two surgeries in 2009. Smith & Nephew faces hundreds of lawsuits nationwide involving its hip implants, and the parties have agreed that documents from two similar cases can be used in this case.

Specifically, Defendants have produced thousands of documents in this case that were originally from a West Virginia case known as *Anna Raab v. Smith & Nephew*. They have also produced thousands of documents from a Dallas case known as *Tim Hutchens v. Smith & Nephew*. This agreement was made with the intention of streamlining and expediting discovery, but it seems to be having the exact opposite effect. The problem is that Defendants have redacted very extensive information from the *Raab* and *Hutchens* documents without any explanation of why. More importantly, the heavily redacted *Raab* and *Hutchens* documents clearly establish that significant information has been withheld in this case without an objection or claim of privilege. Even worse, the *Raab* documents establish that Smith & Nephew has apparently provided false and misleading information in its formal answers to written discovery in this case.

The parties are about to engage in substantial and expensive discovery, and Plaintiffs need to designate experts in just three weeks. It is imperative that the Plaintiffs can reasonably rely on the veracity of the discovery responses and documents produced thus far and in the future. Unfortunately, allowing Defendants to produce documents from other cases has somehow created a lack of accountability for the documents that they produce, and this has resulted in written discovery answers that are incomplete and untrue. Plaintiffs will use just one response to one Request for Production as an example of why the Defendants should be ordered to produce a Privilege Log or Redaction Log for the documents they produced from *Raab* and *Hutchens*.

II.

#### **THE SAFETY AND EFFICIACY REVIEW BOARD DOCUMENTS**

The so-called “SERB” documents present a useful example of why a Redaction Log or Privilege Log must be provided when excessive redactions occur. “SERB” stands for Safety and Efficacy Review Board. The Safety and Efficacy Review Board is a group of high level Smith & Nephew officials, engineers, physicians, salesmen, and scientists who meet regularly to discuss issues of product-related

safety and efficacy. SERB meetings are formal in nature. There is a written agenda circulated before the meetings, a record of attendees is kept, and detailed Meeting Minutes are circulated after the meetings. In addition, there are almost always presentations, slide shows, handouts, videos, and/or Power Point presentations that go along with the meetings. In short, SERB Meetings and SERB documents are a rich source of very reliable and highly relevant information about the safety and effectiveness of the company's conduct and products.

In recognition of the importance of SERB meetings, Plaintiff Bonnie Kirby included in her First Request for Production of Documents a request for "SERB" documents as follows:

**"Any Safety & Efficacy Review Board documents or meeting minutes involving any of the components listed in Ex. B."** (See Request for Production Number 238 of Bonnie Kirby's First Request for Production of Documents).

Smith & Nephew replied to this discovery request with what appeared to be a straightforward and complete response, identifying 88 pages of SERB documents located at "KIRBY-0029941 – 0030028." There were no objections to this discovery request and there have never been any supplemental or amended responses to it. (The 88 pages are not attached to this Motion because they all contain a stamp designating them as "Confidential- Subject to Protective Order.") The only documents that Smith & Nephew has ever identified as "SERB" documents in this case are the 88 pages that were identified when it responded to this specific discovery request on July 28, 2017. Defendants even agreed to double check their discovery responses when Plaintiffs' counsel complained that the answers to written discovery in *Kirby* looked, "cryptic and inaccurate." Defendants agreed on September 11, 2017 to "revisit" each of their answers to discovery and evaluate whether the responses should be changed, but no other answers were ever provided.

The 88 pages of SERB documents disclose that five SERB meetings occurred from March 2012 to February 2015. Defendants said those were the only meetings and the only documents, and Plaintiffs believed them. Plaintiffs began scheduling depositions and relied on the representation that the 88

pages were the only SERB documents in existence. All 88 pages were attached on October 4, 2017 to a deposition of one of the Defendants' most knowledgeable hip implant employees (Tim Band, from the Defendants' United Kingdom office). Plaintiffs' counsel had no reason to suspect that other SERB documents existed in the thousands of documents produced from **Raab** or **Hutchens** in this case. Tim Band was not questioned about other SERB meetings because no other pages were identified and because of the limited time available with the witness.

III.

### **ADDITIONAL SERB DOCUMENTS AND MEETINGS**

Unfortunately, there were numerous additional SERB meetings held and dozens of SERB documents generated that were not identified when SERB documents were specifically requested. At least three of these undisclosed meetings occurred before Bonnie Kirby received her Smith & Nephew hip implants, and they are highly relevant for that reason alone. Worse, the Defendants buried dozens of SERB Meeting Minutes, SERB Agendas, and SERB presentations in a massive production of heavily redacted documents they produced from **Raab v. Smith & Nephew**. They did not identify those meetings when they produced the 88 SERB documents in this case. The documents from the **Raab** case reveal that Smith & Nephew failed to identify at least the following eight additional SERB Meetings: (1) March 2006 in Memphis (Raab-0041906), (2) March 24, 2006 in Chicago (Raab-0042120), (3) February 2007 in San Diego (Raab-0041906), (4) July 2, 2012 (Raab-0042294), (5) August 27, 2012 (Raab-0042302), (6) September 28, 2012 (Raab-0042312), (7) December 3, 2013 (Raab-0042330), and (8) October 8, 2015 (Raab-0042353). There is a surprising gap of almost five years between meetings, and the heavy redactions in the produced documents make it impossible to know if there are more undisclosed SERB meetings. In addition, there is an entire "SERB Folder" with multiple subfolders that has not been produced. (Raab-0041906).

The Defendants inexplicably failed to identify these meetings or produce these documents when they identified the 88 pages of SERB documents that are marked KIRBY-0029941 – 0030028. Defendants would have easily seen those documents if they had provided a Privilege Log or otherwise explained why they were redacting extensive information from produced documents. The Defendants' decision to conceal information about eight or more other SERB meetings resulted in an incomplete and misleading deposition of a very high-level Smith & Nephew executive from the United Kingdom on October 4, 2017. Plaintiff anticipates moving for sanctions when the full extent of the Defendants' conduct involving produced documents is revealed, but the only relief presently requested is to order the Defendants to produce a Privilege Log, Redaction Log, or some other written explanation of what information they are withholding and why.

#### IV.

#### **CONCLUSION AND PRAYER**

A party responding to discovery requests has the burden to explain why it is redacting or withholding documents. A party who does not object to a discovery request and who identifies certain documents as responsive to it must at least try to truthfully identify all documents responsive to that discovery request. That has not happened here. In fact, just the opposite has occurred: Defendants identified only a small fraction of the SERB meetings and produced only a small fraction of responsive documents, knowingly misleading Plaintiffs' counsel in the process. Even now, they have not completely and honestly answered the Request for Production asking for SERB documents.

Plaintiff requests the Court to set this matter for hearing and to order the Defendants to produce unredacted documents or provide a detailed Redaction or Privilege Log, and to grant such other relief as the Court deems appropriate.

Respectfully submitted,

**LAW OFFICE OF KIP PETROFF**

By: \_\_\_\_\_/s/\_\_\_\_\_

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### **Certificate of Conference**

The undersigned certifies that he has spoken at length on several occasions with Smith & Nephew's Lead Counsel, Mr. Brian Johnson, about the merits of this Motion and a draft of this Motion was even sent to all opposing counsel on October 20 before it was filed. Agreement could not be reached. Therefore, this Motion is submitted to the Court as an OPPOSED Motion and the Plaintiff will seek a hearing on this Motion on October 30, 2017 at 2:30 P.M. when a hearing on Defendants' Motion to Seal Court Records is already scheduled.

SIGNED on October 20, 2017.

\_\_\_\_\_/s/\_\_\_\_\_

Kip A. Petroff

### **Certificate of Service**

The undersigned certifies that on October 20, 2017, a true and correct copy of the foregoing Motion was emailed to Mr. Brian Johnson at Johnson, Trent, West & Taylor, 919 Milam Street, Suite # 1700, Houston, Texas 77002. A courtesy copy was also sent via email to all other counsel of record on the same date.

\_\_\_\_\_/s/\_\_\_\_\_

Kip A. Petroff