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November 2, 2018

VIA ECF AND ELECTRONIC MAIL

Honorable Catherine C. Blake
101 W. Lombard Street
Baltimore, Maryland 21201
Stephanie_James@mdd.uscourts.gov

Re: *In re Smith & Nephew Birmingham Hip Resurfacing (BHR) Hip Implant Products Liability Litigation, MDL 2775 (Case No. 1:17-md-02775-CCB)*

Dear Judge Blake:

Plaintiffs are submitting this letter brief pursuant to the Court's Order of October 26, 2018, directing the parties to submit briefing on a deposition protocol.

A deposition protocol is a mechanism used in some mass torts to give procedural guidance to ensure that the parties are on the same page when approaching depositions. *See, e.g., Manual For Complex Litigation*, Sect. 40.29 "Deposition Guidelines" attached hereto as Exhibit A.

A party should not be permitted to craft a deposition protocol designed to gain a tactical advantage over another party. Unfortunately, that is what plaintiffs see here. The defendant seeks to impose unjustified limits on the plaintiffs through a protocol that exceed the requirements of the Federal Rules of Procedure and District of Maryland's Local Rules and Guidelines. Notably, none of S&N's sought-after limitations are found in the exemplar "Deposition Guidelines" of the Manual of Complex Litigation. (Exhibit A).

The plaintiffs enclose with this letter brief their proposed Deposition Protocol (Exhibit B) and, for ease of comparison, a working Deposition Protocol that includes both the Plaintiff and Defendant submissions in different color ink (black for agreed upon language; blue for plaintiffs' proposal; and red for defendant's proposal) (Exhibit C). The following are the principal differences between the submissions for the Court's resolution.

I.A. General Provision: Attendance

First, no rule limits a deposition to only one questioner. As a matter of practice, plaintiffs traditionally have one person conduct a deposition. There are, however, likely instances in which more than two attorneys may be necessary to ask non-duplicative questions. In this circumstance one attorney asks all the questions he/she has, and then passes the witness to the next attorney to conclude the deposition. Such a procedure may be necessary, when, for example:

- A defendant corporate custodian may have so many documents that it is virtually impossible to have one attorney be prepared to take the deposition;
- A 30(b)(6) deponent may address several disparate categories. In this case, having more than one questioning attorney is prudent and will result in a more efficient and streamlined deposition. Plaintiffs have already taken one deposition with this method, and Smith & Nephew did not suffer any prejudice.
- A defense science expert may address liability and causation issues;
- A science expert may address epidemiology and toxicology issues, and attorneys with relative strengths in the different scientific disciplines may be warranted.

The defendant asks plaintiffs to meet and confer or seek leave of court to effectuate a normal deposition process – time that will be wasted and judicial intervention required for something, frankly, as mundane as this. Plaintiffs agree to limit the MDL questioning attorneys to two attorneys, and will meet and confer with the defendant in the highly unusual circumstance that more than two questioners are appropriate.

II.A. Conduct of Depositions: Examination

In no mass tort that we're familiar with has there been a requirement that a party identify the name of the examining attorney in advance of the deposition. There is no Federal or State Court rule requiring such disclosure. To the extent the defendant knows of such a case, certainly that is not the norm in Maryland in single event cases or otherwise. When the plaintiffs decide who will take the deposition, and who that may be, has no bearing on the defendant or the deponent. It's a curious thing that a party would even need to ask for such information.

Certainly, for security and logistical purposes, we've agreed to provide the names of attendees by noon the day before the deposition upon representation that building security requires that people check in at the front desk before being given access to the building or to ensure an appropriately sized conference room is used.

II.B. Conduct of Depositions: Duration

FRCP 30(d)(1) limits the testimony of a single individual to seven hours in one day. Indeed, plaintiffs agree that in the ordinary course, fact and expert witnesses should have their depositions concluded in one day. The difficulty arises with 30(b)(6) depositions where multiple topics may dictate longer depositions. See *Columbia Gas Transmission, LLC v. 252.071 Acres*,

More or Less, in Baltimore Cty., Maryland, No. ELH-15-3462, 2016 WL 7167979, at *7 (D. Md. Dec. 8, 2016) (court permits 30(b)(6) deposition to be 10 hours).

The rule restricting a witness to seven hours means the witness shall not testify more than seven hours *in one day*. In *Proa v. NRT Mid-Atl., Inc.*, No. CV AMD-05-2157, 2008 WL 11363286, at *11 (D. Md. June 20, 2008), Judge Davis set a limit on the number of hours of deposition time allotted in the case. As here, the defendant sought to limit the number of deposition hours of the 30(b)(6) witnesses. In *Proa*, Judge Susan Gauvey denied the defendant's request because the rule does not restrict the totality of the witness' testimony to seven hours:

Federal Rule of Civil Procedure 30(d) limits the deposition of a party to **one seven hour day**. Fed. R. Civ. Pro. 30(d). The depositions of witnesses designated under 30(b) (6) are each considered separate for the purposes of this time limitation. *Id.*, Advisory Committee's Note to 2000 amendment ("For purposes of this durational limit, the deposition of each person designated under Rule 30(b)(6) should be considered a separate deposition."). See also Wright, Miller, & Marcus, *supra* § 2104.1; *Quality Aero Technology, Inc. v. Telemetrie Elektronik, GMBH*, 212 F.R.D. 313, 319 (E.D.N.C. 2002) ("**[T]here is no aspect of the Rules which either restricts a party to a single 30(b) (6) deposition or restricts the allotted time for taking a 30(b)(6) deposition.**"). This limitation therefore does not restrict the deposition of CBRB to one day, **so long as each individual designee's deposition lasts no more than one day.**

Proa, at 11 (emphasis added). Accordingly, Plaintiffs request that this Court enter plaintiff's proposed paragraph concerning the length of depositions of 30(b)(6) witnesses.

II.D. Cross-Noticing of Depositions by Plaintiffs in State Actions

The defendant's proposal presents a situation where they are asking this Court and the plaintiffs to impose limitations on state court counsel. MDL Plaintiffs cannot agree to any limitation upon state court counsel as we have no authority to agree to limits that are under the jurisdiction of a state court judge.

The Manual for Complex Litigation (Fourth) discusses the need for federal and state judges to exchange protocols to promote the efficient prosecution of mass tort cases.

Pretrial motions and hearings. State and federal judges have often worked together during the pretrial process. . . .

At a minimum, judges should exchange case-management orders, master pleadings, questionnaires, and *discovery protocols*. This simple step can encourage judges to adopt the same or similar approaches to discovery and pretrial management.

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MCL 4th, Sect. 20.313. Thus, plaintiffs cannot consent to a deposition protocol that places any limitations on state court litigants when it is not in their capacity or interest to do so.

F. Disputes Relating to Depositions (Paragraph 2).

The defendant asked for limitations on depositions. The Court ultimately ruled and limited the parties to 245 deposition hours. The defendant knows that time on the clock is valuable.

At the very first deposition in this case, of the very first witness, following the very first question, defense counsel took the opportunity to embarrass plaintiff's counsel, and waste time on the clock in a needless colloquy that could have and should have occurred before the deposition began, as if it were needed at all:

BY MR. ASSAAD:

Q: Good morning. Will you please state your name for the record?

A: Lindsay Allison D'Alessandro.

MR. O'QUINN: Mr. Assaad, I don't want to interrupt you, so before you get too far into it, as a matter of housekeeping and introduction, do you have cases in the MDL and which Plaintiffs do you represent?

MR. ASSAAD: I have one case in the MDL.

MR. O'QUINN: And which one is that sir?

MR. ASSAAD: I don't remember the name of it right now. I am a member of the PS[C]. Is there an issue here?

MR. O'QUINN: I'm sorry, I just did not know you and I want to make sure that you are properly enrolled as required by the CMOs and et cetera, you are telling me you are.

MR. ASSAAD: I've entered an appearance and I am a member of the PS[C].

D'Alessandro Depo. (excerpts at Exhibit D). The rest of the deposition included an endless stream of objections by defense counsel, including improper substantive objections as to the scope of the questions which were designed to and did affect the witness's testimony. While plaintiffs are not seeking any sanctions at this juncture, including potential revocation of *pro hac vice* or costs, our concern about limitations on depositions was validated not five seconds into the first deposition. Accordingly, Plaintiffs seek a mechanism by which deposition time can be reinstated if this type of conduct continues. Plaintiffs' proposal in this regard seeks to accomplish just that.

Very truly yours,



Robert K. Jenner



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cc: Jasper Ward, Esquire
Genevieve Zimmerman, Esquire
Terri Reiskin, Esquire

40.29 Deposition Guidelines

It is ORDERED¹ that depositions be conducted in accordance with the following rules:

1. *Cooperation.* Counsel are expected to cooperate with, and be courteous to, each other and deponents.
2. *Stipulations.* Unless contrary to an order of the court, the parties (and when appropriate, a nonparty witness) may stipulate in any suitable writing to alter, amend, or modify any practice relating to noticing, conducting, or filing a deposition. Stipulations for the extension of discovery cutoffs set by the court are not valid, however, until approved by the court.
3. *Scheduling.* All depositions in this litigation may be cross-noticed in any related action pending in state court. Liaison counsel representing the side initiating a deposition shall provide to all known state liaison counsel at least ___ days notice of all depositions filed by plaintiffs and defendants, respectively. Absent extraordinary circumstances, counsel shall consult in advance with opposing counsel and unrepresented-proposed deponents in an effort to schedule depositions at mutually convenient times and places. [That some counsel may be unavailable shall not, however, in view of the number of attorneys involved in this litigation, be grounds for deferring or postponing a deposition if another attorney from the same firm or who represents a party with similar interests is able to attend.]

Scheduling should take into account (a) the availability of documents from among those produced by the parties and third parties, (b) the objective of avoiding the need to subject any person to repeated depositions, and (c) the need to preserve relevant testimony. As a general rule, no witness should be deposed on the same subject more than once in this litigation. A party seeking to take a second deposition of a witness shall provide the opposing party its basis for an exception and a listing of the subjects for which it seeks to depose the witness. Second depositions on new subject matter shall be permitted only upon consent of the parties or an order of this Court issued for good cause shown.

4. *Location.* The location of depositions should be as consistent as possible within each city so that any videotape, videoconferencing, or other equipment can be left in place.
5. *Attendance*
 - (a) *Who May Be Present.* Unless otherwise ordered under Fed. R. Civ. P. 26(c), depositions may be attended by counsel of record, members and employees of their firms, attorneys specially engaged by a party for purposes of the deposition, the parties or the representative of a party, counsel for the deponent, and potential witnesses. While a deponent is being examined about any stamped confidential document or the confidential information contained therein, persons to whom disclosure is not authorized under the Confidentiality Order shall be excluded.

- (b) *Unnecessary Attendance.* Unnecessary attendance by counsel is discouraged and may not be compensated in any fee application to the court. Counsel who have only marginal interest in a proposed deposition or who expect their interests to be adequately represented by other counsel may elect not to attend and to conduct, pursuant to paragraph 13 of this order, supplemental interrogation of the deponent should a review of the deposition reveal the need for such examination.
- (c) *Notice of Intent to Attend a Deposition.* To allow counsel to make arrangements for adequate deposition space, counsel who intend to attend a deposition noticed in the above-captioned litigation should advise counsel for the noticing party at least three days prior to the deposition, if feasible.

6. *Conduct*

- (a) *Examination.* Each side should ordinarily designate one attorney to conduct the principal examination of the deponent, and examination by other attorneys should be limited to matters not previously covered. Counsel should cooperate so examinations by multiple attorneys do not exceed the allotted time.
- (b) *Transmittal of Copies.* The attorney who conducts the principal examination for the noticing party is responsible for assuring that a copy of the deposition transcript, diskettes, and any videotapes are provided to the document depository and to liaison counsel.
- (c) *Objections and Directions Not to Answer.* Counsel shall comply with Fed. R. Civ. P. 30(d)(1). When a privilege is claimed, the witness should nevertheless answer questions relevant to the existence, extent, or waiver of the privilege, such as the date of a communication, who made the statement, to whom and in whose presence the statement was made, other persons to whom the contents of the statement have been disclosed, and the general subject matter of the statement, unless such information is itself privileged.

Any objection made at a deposition shall be deemed to have been made on behalf of all other parties. All objections, except those relating to form and foundation, are preserved.

- (d) *Private Consultation.* Private conferences between deponents and their attorneys in the course of interrogation are improper except for the purpose of determining whether a privilege should be asserted. Unless prohibited by the court for good cause shown, such conferences may be held during normal recesses and adjournments.
- (e) *Continuation of Deposition.* If a deposition is not finished on Friday of a deposition week, it will continue on the following Monday, subject to the availability of the witness. If the witness is unavailable, it will resume on a newly noticed date.

7. *Documents*

- (a) *Production of Documents.* Witnesses subpoenaed to produce documents should ordinarily be served at least 30 days before the scheduled deposition.

Arrangements should be made to permit inspection of the documents before the interrogation commences.

- (b) *Confidentiality Order.* A copy of the confidentiality order shall be provided to the deponent before the deposition commences if the deponent is to produce or may be asked about documents that may contain confidential information. [Counsel shall comply with the provisions of the confidentiality order when examining a deponent about confidential information.]
 - (c) *Copies.* Extra copies of documents about which counsel expect to examine the deponent should ordinarily be provided to opposing counsel and the deponent. Deponents should be shown a document before being examined about it except when counsel seek to impeach or test the deponent's recollection.
 - (d) *Marking of Deposition Exhibits.* Documents shall be referred to by the unique alpha-numeric identifier assigned by the document depository.
8. *Depositions of Witnesses Who Have No Knowledge of the Facts.* An officer, director, or managing agent of a corporation or a government official served with a notice of a deposition or subpoena regarding a matter about which such person has no knowledge may submit to the noticing party, a reasonable time before the date noticed, an affidavit so stating and identifying a person within the corporation or government entity believed to have such knowledge. Notwithstanding such affidavit, the noticing party may proceed with the deposition, subject to the right of the witness to seek a protective order.
9. *Recording Depositions by Nonstenographic Means*
- (a) *Tape-Recorded Depositions.* By so indicating in its notice of a deposition, a party may record the deposition by tape recording in lieu of stenographic recording pursuant to Fed. R. Civ. P. 30(b)(2) and (3). Other parties may at their own expense arrange for stenographic recording of the deposition, may obtain a copy of the tape and transcript upon payment of a pro rata share of the noticing party's actual costs, and may prepare and file their own version of the transcript of the tape recording.
 - (b) *Videotaped Depositions.* By so indicating in its notice of a deposition, a party may record the deposition by videotape pursuant to Fed. R. Civ. P. 30(b)(2) and (3).
 - (1) *Rules for Videotaped Reporting*
 - (i) *Video Operator.* The operator(s) of the videotape recording equipment shall be subject to the provisions of Fed. R. Civ. P. 28(c). At the commencement of the deposition the operator(s) shall swear or affirm to record the proceedings fairly and accurately.
 - (ii) *Attendance.* Each witness, attorney, and other person attending the deposition shall be identified on camera at the commencement of the deposition. Thereafter, only the deponent (and demonstrative materials used during the deposition) will be videotaped.

- (iii) *Standards.* The deposition will be conducted in a manner to replicate, to the extent feasible, the presentation of evidence at a trial. Unless physically incapacitated, the deponent shall be seated at a table or in a witness box except when reviewing or presenting demonstrative materials for which a change in position is needed. To the extent practicable, the deposition will be conducted in a neutral setting, against a solid background, with only such lighting as is required for accurate video recording. Lighting, camera angle, lens setting, and field of view will be changed only as necessary to record accurately the natural body movements of the deponent or to portray exhibits and materials used during the deposition. Sound levels will be altered only as necessary to record satisfactorily the voices of counsel and the deponent. Eating and smoking by deponents or counsel during the deposition will not be permitted.
- (iv) *Interruptions.* [The videotape shall run continuously throughout the active conduct of the deposition.] [Videotape recording will be suspended during all “off the record” discussions.]²
- (v) *Index.* The videotape operator shall use a counter on the recording equipment and after completion of the deposition shall prepare a log, cross-referenced to counter numbers, that identifies the positions on the tape at which examination by different counsel begins and ends, objections are made and examination resumes at which exhibits are identified, and any interruption of continuous tape recording occurs, whether for recesses, “off the record” discussions, mechanical failure, or otherwise.
- (vi) *Filing.* [The operator shall preserve custody of the original videotape in its original condition until further order of the court.] [Subject to the provisions of paragraph 10 of this order, the original of the tape recording, together with the operator’s log index and a certificate of the operator attesting to the accuracy of the tape, shall be filed with the clerk.] No part of a videotaped deposition shall be released or made available to any member of the public unless authorized by the court.
- (vii) *Objections.* Requests for pretrial rulings on the admissibility of evidence obtained during a videotaped deposition shall be accompanied by appropriate pages of the written transcript. If needed for an informed ruling, a copy of the videotape and equipment for viewing the tape shall also be provided to the court.
- (viii) *Use at Trial; Purged Tapes.* A party desiring to offer a videotape deposition at trial shall be responsible for having available appropriate playback equipment and a trained operator. After the designation by all parties of the portions of a videotape to be used at trial, an edited copy of the tape, purged of unnecessary portions (and any portions to which objections have been sustained), [may] [shall] be pre-

pared by the offering party to facilitate continuous playback; but a copy of the edited tape shall be made available to other parties at least ____ days before it is used, and the unedited original of the tape shall also be available at the trial.

10. *Telephonic Depositions.* By indicating in its notice of a deposition that it wishes to conduct the deposition by telephone, a party shall be deemed to have moved for such an order under Fed. R. Civ. P. 30(b)(7). Unless an objection is filed and served within ____ days after such notice is received, the court shall be deemed to have granted the motion. Other parties may examine the deponent telephonically or in person. However, all persons present with the deponent shall be identified in the deposition and shall not, by word, sign, or otherwise, coach or suggest answers to the deponent.
11. *Waiver of Transcription and Filing.* The parties and deponents are authorized and encouraged to waive transcription and filing of depositions that prove to be of little or no usefulness in the litigation or to agree to defer transcription and filing until the need for using the deposition arises.
12. *Use.* Depositions conducted in this litigation may be used in related cases in any state court to the extent permitted by that state's laws and rules. Depositions may, under the conditions prescribed in Fed. R. Civ. P. 32(a)(1)–(4) or as otherwise permitted by the Federal Rules of Evidence, be used against any party (including parties later added and parties in cases subsequently filed in, removed to, or transferred to this court as part of this litigation):
 - (a) who was present or represented at the deposition;
 - (b) who had reasonable notice thereof; or
 - (c) who, within 30 days after the filing of the deposition (or, if later, within 60 days after becoming a party in this court in any action that is a part of this litigation), fails to show just cause why such deposition should not be usable against such party.
13. *Supplemental Depositions.* Each party not present or represented at a deposition (including parties later added and parties in cases subsequently filed in, removed to, or transferred to this court) may, within 30 days after the filing of the deposition (or, if later, within 60 days after becoming a party in this court in any action that is a part of this litigation), request permission to conduct a supplemental deposition of the deponent, including the right to take such deposition telephonically and by nonstenographic means. If permitted, the deposition shall be treated as the resumption of the deposition originally noticed; and each deponent shall, at the conclusion of the initial deposition, be advised of the opportunity of nonattending parties to request a resumption of such deposition, subject to the right of the deponent to seek a protective order. Such examination shall not be repetitive of the prior interrogation.
14. *Disputes During Depositions*
 - (a) Disputes between the parties that arise during a deposition should be addressed to this [MDL] court rather than the district court in which the depo-

Sample Orders

§ 40.29

sition is being conducted. The undersigned will exercise by telephone the authority granted under 28 U.S.C. § 1407(b) to act as district judge in the district in which the deposition is taken.²

- (b) *Immediate Presentation.* Disputes arising during depositions that cannot be resolved by agreement and that, if not immediately resolved, will significantly disrupt the discovery schedule or require a rescheduling of the deposition, should be presented by telephone to the court. If the judge is not available during the period while the deposition is being conducted, the dispute may be submitted to Magistrate Judge _____ by telephone or as the judge may direct.³ The presentation of the issue and the court's ruling will be recorded as part of the deposition.⁴

Dated: _____
United States District Judge

Notes:

1. See *supra* section 11.45.
2. The power to exercise authority over nonparty deponents outside the district is available only in multidistrict litigation, unless the judge has been given an intracircuit or intercircuit assignment.
3. See *supra* section 11.456.
4. If a simultaneous stenographic transcript is being made, the court may prefer that "off the record" discussions be eliminated from the videotape.

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

IN RE: SMITH & NEPHEW BIRMINGHAM
HIP RESURFACING (BHR) HIP IMPLANT
PRODUCTS LIABILITY LITIGATION

MDL No. 2775
Master Docket No. 1:17-md-2775

JUDGE CATHERINE C. BLAKE

**THIS DOCUMENT RELATES TO ALL
ACTIONS**

**[PLAINTIFF’S PROPOSED] CASE MANAGEMENT ORDER NO. __
Deposition Protocol**

Pursuant to the parties’ agreement, it is ORDERED that the following deposition protocol (“Order”) shall be followed in all depositions conducted in MDL No. 2775 (the “MDL”).

I. GENERAL PROVISIONS

A. Attendance

1. Who May be Present. Unless otherwise ordered under Fed. R. Civ. P. 26(c), and subject to available space, depositions may be attended by counsel of record, members and employees of their firms, expert witnesses, consulting expert witnesses, attorneys specially engaged by a party for purposes of the deposition, the parties or the representative of a party (including in-house counsel), court reporters, videographers, the deponent, and counsel for the deponent. Upon application, and for good cause shown, the Court may permit attendance by a person who does not fall within any of the categories set forth in the preceding sentence. While the deponent is being examined about any document stamped “Confidential,” “Confidential Foreign Personal Data,” or “Confidential Foreign Sensitive Personal Data” or the confidential information contained therein, persons to whom disclosure is not authorized under the Protective

Order or Supplement to the Protective Order in this MDL [R. Doc. 88, 909] shall be excluded from the deposition.

2. Notice of Intent to Attend a Deposition. In order to make arrangements for adequate deposition space, Liaison Counsel for each party shall confer in advance of the deposition regarding the space constraints of the selected location and expected attendance. No later than noon the day before the deposition, the party hosting the deposition shall be advised of the names of the people attending the deposition if the building security requires check-in.

II. CONDUCT OF DEPOSITIONS

A. Examination

3. Absent agreement of the parties or an order of the Court, there shall be no more than two examining or defending attorneys for the MDL Plaintiffs and one examining or defending attorney for Smith & Nephew, Inc. for each witness whose deposition is taken. Questioning should strive to be non-duplicative.

4. All deposition objections are reserved, except as to the form of the question. Counsel shall otherwise comply with Fed. R. Civ. P. 30(d)(1) and the District of Maryland Local Rules and Guidelines concerning objections at depositions. An objection by one party preserves the objection for all parties.

B. Duration

5. Depositions of fact and expert witnesses shall not exceed seven hours on the record, except as agreed upon by the parties and the witness or as ordered by the Court. Deposition of 30(b)(6) corporate witnesses not be subject to the seven hour limitation.

C. Location of Depositions

6. The Court expects counsel to mutually agree upon the date and location for

depositions. In the absence of agreement regarding location, depositions of witnesses will take place in the deponent's home district for witnesses who reside in the United States. For depositions of witnesses who reside outside the United States, if no agreement on location can be reached, their depositions shall be taken not more than 100 miles from their place of work or place of residence.

D. Cross-Noticing of Depositions by Plaintiffs in State Actions

7. Should state court cross notice a deponent, the parties shall meet and confer about the time allocated to each questioning party. If the parties cannot agree on allocation, the parties will promptly contact the Court for resolution.

E. MDL Track Designation

8. A deposition notice shall indicate whether the deposition is intended to be taken in the BHR Track, the THA Track or in all cases in this MDL. The parties shall confer regarding whether the witness will be produced in the designated track, a different track, or in all cases, and in the event of disagreement, shall seek a ruling from the Court prior to the deposition. If a witness deposed in one track is later noticed for deposition in the other track, the second deposition shall be limited to non-duplicative questioning.

9. The use of depositions and deposition exhibits at trial shall be governed by the Federal Rules of Civil Procedure and the Federal Rules of Evidence. The noticed designation of a deposition as being taken in one track shall serve to limit the scope of the deposition to topics relevant to the track in which it is being taken, but shall not be used as the basis for objection of the use of that deposition or deposition exhibits in another track if any testimony or exhibits are subsequently determined to be relevant to another track.

F. Disputes During or Relating to Depositions-

10. Disputes between parties relating to depositions should be addressed to this Court. Disputes arising during depositions that cannot be resolved by agreement and that, if not immediately resolved, will significantly disrupt the discovery schedule or require rescheduling of the deposition, or might result in the need to conduct a supplemental deposition, shall be presented to the MDL Judge, the Honorable Catherine C. Blake, by telephone (410-962-3220) or Judge Blake's designee. If the MDL Judge (or her designee) is not available, the deposition shall continue with full reservation of rights for a ruling at the earliest possible time. Nothing in this Order shall deny counsel the right to suspend a deposition pursuant to Fed. R. Civ. P. 30(d)(3), file an appropriate motion with the Court at the conclusion of the deposition, and appear personally or telephonically before the Court.

11. The Court has placed limitation of 245 deposition hours in this case. If any party believes that an opposing party is unfairly expending deposition time through unnecessary colloquy and/or objections, the aggrieved party may seek judicial intervention to request a reinstatement of the expended time. This provision does not limit an aggrieved party from seeking other sanctions available through the Federal Rules.

G. Documents Used in Connection with Depositions

12. Objections to the relevance or admissibility of documents used as deposition exhibits are not waived and are reserved for later ruling by the Court or by the trial judge.

H. Confidentiality/Correcting and Signing Depositions

13. Confidential material at a deposition should be designated pursuant to Section 4(b) of the Protective Order and the Supplement to the Protective Order, if applicable. Unless waived by the deponent, the transcript of a deposition shall be submitted to the deponent for correction and signature, and shall be corrected and signed within sixty (60) days after receiving the final transcript of the completed deposition. Absent agreement on extension, if no corrections are made during this time, the transcript will be presumed accurate.

III. FEDERAL RULES OF CIVIL PROCEDURE AND LOCAL RULES APPLICABLE

14. The Federal Rules of Civil Procedure, Federal Rules of Evidence, and District of Maryland Local Rules and Guidelines shall apply in all proceedings unless specifically modified herein.

IT IS SO ORDERED, this ____ day of _____ 2018.

HON. CATHERINE C. BLAKE
UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

IN RE: SMITH & NEPHEW BIRMINGHAM
HIP RESURFACING (BHR) HIP IMPLANT
PRODUCTS LIABILITY LITIGATION

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Order or Supplement to the Protective Order in this MDL [R. Doc. 88, 909] shall be excluded from the deposition.

Plaintiff:

2. Notice of Intent to Attend a Deposition. In order to make arrangements for adequate deposition space, Liaison Counsel for each party shall confer in advance of the deposition regarding the space constraints of the selected location and expected attendance. No later than noon the day before the deposition, the party hosting the deposition shall be advised of the names of the people attending the deposition if the building security requires check-in.

Defendant:

2. Notice of Intent to Attend a Deposition. In order to make arrangements for adequate deposition space, Liaison Counsel for each party shall confer in advance of the deposition regarding the space constraints of the selected location and expected attendance. No later than three business days before the start of the deposition, the party who noticed and will be taking the deposition shall advise the other parties of the names of the examining attorney(s) and all other people planning to attend the deposition and their roles, if not counsel of record.

II. CONDUCT OF DEPOSITIONS

A. Examination

Plaintiff:

3. Absent agreement of the parties or an order of the Court, there shall be no more than two examining or defending attorneys for the MDL Plaintiffs and one examining or defending attorney for Smith & Nephew, Inc. for each witness whose deposition is taken. Questioning should strive to be non-duplicative.

Defendant:

3. Absent agreement of the parties or an order of the Court, there shall be no

more than one examining or defending attorney for the MDL Plaintiffs and one examining or defending attorney for Smith & Nephew, Inc. for each witness whose deposition is taken, exclusive of any attorney who has cross-noticed the deposition pursuant to Section D, below. If a party believes it necessary to have two examining or defending attorneys for any deposition, the party will provide notice and a reason for the request at least 7 business days prior to the deposition. The parties will meet and confer no later than 3 business days before the deposition, and if agreement cannot be reached on the number of examining or defending attorneys, will promptly contact the Court for a resolution. In any deposition in which there is more than one examiner, questioning should be non-duplicative.

4. All deposition objections are reserved, except as to the form of the question. Counsel shall otherwise comply with Fed. R. Civ. P. 30(d)(1) and the District of Maryland Local Rules and Guidelines concerning objections at depositions. An objection by one party preserves the objection for all parties.

B. Duration

Plaintiff:

5. Depositions of fact and expert witnesses shall not exceed seven hours on the record, except as agreed upon by the parties and the witness or as ordered by the Court. Deposition of 30(b)(6) corporate witnesses not be subject to the seven hour limitation.

Defendant:

5. Depositions shall not exceed seven hours on the record, except as agreed upon by the parties and the witness or as ordered by the Court.

C. Location of Depositions

6. The Court expects counsel to mutually agree upon the date and location for depositions. In the absence of agreement regarding location, depositions of witnesses will take

place in the deponent's home district for witnesses who reside in the United States. For depositions of witnesses who reside outside the United States, if no agreement on location can be reached, their depositions shall be taken not more than 100 miles from their place of work or place of residence.

D. Cross-Noticing of Depositions by Plaintiffs in State Actions

Plaintiff:

7. Should state court cross notice a deponent, the parties shall meet and confer about the time allocated to each questioning party. If the parties cannot agree on allocation, the parties will promptly contact the Court for resolution.

Defendant:

7. If any party or a state court plaintiff cross-notices a deposition being taken in the MDL, the party who noticed the MDL deposition shall be the primary examining attorney. Upon conclusion of the examination by the primary examining attorney, counsel for the state court plaintiff(s) may ask non-duplicative additional questions. The state court plaintiff counsel's time shall not count against the time limits identified in Section B or the total deposition hours set by the Court on September 17, 2018. State court plaintiff counsel shall collectively limit their time to asking non-duplicative, additional questions, for no longer than two (2) hours, exclusive of breaks, or as otherwise ordered by the Court. The noticing party reserves the right to seek the Court's intervention to seek a limit of less than two (2) hours for such cross-noticing attorney's questioning or, in the case of Defendant, to produce the witness at a different time and place for the purpose of such state court plaintiff counsel's questioning, if the parties cannot agree on the time limitations or time and place for such questioning.

8. If a state court plaintiff cross-notices a deposition being taken in the MDL, counsel for that plaintiff shall be provided with a copy of this Case Management Order. If the

plaintiff decides to maintain the cross notice, that plaintiff agrees to be bound by the provisions of this Case Management Order for purposes of the cross-noticed deposition and further agrees that he/she will not take a subsequent deposition of that witness in the state court proceeding except for good cause shown.

9. Nothing herein shall be construed as waiving a party's objection to a cross-notice and/or the appropriateness of the deposition in the pending state court action.

[Note for This Working Draft: Paragraph numbering in the competing proposals now change because of the disagreement as to the number of paragraphs in the preceding section.]

E. MDL Track Designation

- A deposition notice shall indicate whether the deposition is intended to be taken in the BHR Track, the THA Track or in all cases in this MDL. The parties shall confer regarding whether the witness will be produced in the designated track, a different track, or in all cases, and in of the event of disagreement, shall seek a ruling from the Court prior to the deposition. If a witness deposed in one track is later noticed for deposition in the other track, the second deposition shall be limited to non-duplicative questioning.

- The use of depositions and deposition exhibits at trial shall be governed by the Federal Rules of Civil Procedure and the Federal Rules of Evidence. The noticed designation of a deposition as being taken in one track shall serve to limit the scope of the deposition to topics relevant to the track in which it is being taken, but shall not be used as the basis for objection of the use of that deposition or deposition exhibits in another track if any testimony or exhibits are subsequently determined to be relevant to another track.

F. Disputes During or Relating to Depositions

- Disputes between parties relating to depositions should be addressed to this Court. Disputes arising during depositions that cannot be resolved by agreement and that, if not

immediately resolved, will significantly disrupt the discovery schedule or require rescheduling of the deposition, or might result in the need to conduct a supplemental deposition, shall be presented to the MDL Judge, the Honorable Catherine C. Blake, by telephone (410-962-3220) or Judge Blake's designee. If the MDL Judge (or her designee) is not available, the deposition shall continue with full reservation of rights for a ruling at the earliest possible time. Nothing in this Order shall deny counsel the right to suspend a deposition pursuant to Fed. R. Civ. P. 30(d)(3), file an appropriate motion with the Court at the conclusion of the deposition, and appear personally or telephonically before the Court.

Plaintiff:

- The Court has placed limitation of 245 deposition hours in this case. If any party believes that an opposing party is unfairly expending deposition time through unnecessary colloquy and/or objections, the aggrieved party may seek judicial intervention to request a reinstatement of the expended time. This provision does not limit an aggrieved party from seeking other sanctions available through the Federal Rules.

G. Documents Used in Connection with Depositions

- Objections to the relevance or admissibility of documents used as deposition exhibits are not waived and are reserved for later ruling by the Court or by the trial judge.

H. Confidentiality/Correcting and Signing Depositions

- Confidential material at a deposition should be designated pursuant to Section 4(b) of the Protective Order and the Supplement to the Protective Order, if applicable. Unless waived by the deponent, the transcript of a deposition shall be submitted to the deponent for correction and signature, and shall be corrected and signed within sixty (60) days after receiving

the final transcript of the completed deposition. Absent agreement on extension, if no corrections are made during this time, the transcript will be presumed accurate.

III. FEDERAL RULES OF CIVIL PROCEDURE AND LOCAL RULES APPLICABLE

- The Federal Rules of Civil Procedure, Federal Rules of Evidence, and District of Maryland Local Rules and Guidelines shall apply in all proceedings unless specifically modified herein.

IT IS SO ORDERED, this ____ day of _____ 2018.

HON. CATHERINE C. BLAKE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

-----: MDL No. 2775
IN RE: SMITH & NEPHEW :
BIRMINGHAM HIP : Master Docket No.
RESURFACING (BHR) : 1:17-md-2775
HIP IMPLANT PRODUCTS :
LIABILITY LITIGATION : JUDGE CATHERINE C. BLAKE
:
: THIS DOCUMENT RELATES TO
: BHR CASES

Transcript of the videotaped
deposition of LINDSAY D'ALESSANDRO, taken before
LISA FORLANO, CCR, CRR, RMR, at the offices of
SIDLEY AUSTIN, LLP, 787 7th Avenue, New York, New
York on Wednesday, September 19, 2018, commencing at
8:52 a.m.

Page 2

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12 P-38 Letter dated May 9, 2006 from the 261
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13 Nephew Orthopaedics

14 P-42 Retrieval Analysis Report of a Smith & 262
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18 (Only exhibits used in the deposition were
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1 VIDEO OPERATOR: This is the videotaped

2 deposition of Lindsay D'Alessandro. Today's

3 date is September 19, 2018. The time is 8:52

4 a.m.

5 This is the case of In Re: Smith &

6 Nephew, Birmingham Hip Resurfacing (BHR) Hip

7 Implant Products Liability Litigation, Master

8 Docket No. 117-md-2775. This case is pending

9 in the United States District Court, District

10 of Maryland.

11 My name is Albert Serino and I am

12 representing Paszkiewicz Court Reporting. The

13 court reporter is Lisa Forlano, also

14 representing Paszkiewicz Court Reporting.

15 This deposition is being taking place

16 at 787 Seventh Avenue, New York, New York.

17 Appearances will be noted on the

18 record.

19 Will the court reporter please swear in

20 the witness.

21 LINDSAY D'ALESSANDRO, having been duly

22 sworn, was examined and testified as follows:

23 BY MR. ASSAAD:

24 Q Good morning. Will you please state

25 your name for the record?

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1 A Lindsay Allison D'Alessandro.

2 MR. O'QUINN: Mr. Assaad, I don't want

3 to interrupt you, so before you get too far

4 into it, as a matter of housekeeping and

5 introduction, do you have cases in the MDL and

6 which Plaintiffs do you represent?

7 MR. ASSAAD: I have one case in the

8 MDL.

9 MR. O'QUINN: And which one is that,

10 sir?

11 MR. ASSAAD: I don't remember the name

12 of it right now. I am a member of the PSE.

13 Is there an issue here?

14 MR. O'QUINN: I'm sorry, I just did not

15 know you and I want to make sure that you are

16 properly enrolled as required by the CMOs and

17 et cetera, you are telling me you are.

18 MR. ASSAAD: I've entered an appearance

19 and I am a member of the PSE.

20 Let's do some other housekeeping issues

21 here.

22 MR. O'QUINN: I think that's a good

23 idea.

24 MR. ASSAAD: I would like to ask her,

25 though.

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1 BY MR. ASSAAD:

2 Q Miss D'Alessandro, do you go by another

3 name?

4 A Lindsay Allison D'Alessandro is my

5 name.

6 Q Your maiden name is Cummings?

7 A Yes, my maiden name was Cummings.

8 Q When did you get married, I guess?

9 A September 2012.

10 Q Okay. Yesterday, while preparing for

11 your deposition, did you come to realize that there

12 was some documents that were not produced to

13 Plaintiffs?

14 MR. O'QUINN: Object to the form.

15 THE WITNESS: In preparing for the

16 deposition, I was reviewing some of the files,

17 yes.

18 BY MR. ASSAAD:

19 Q And did it come to your attention that

20 documents were not produced to the Plaintiffs in

21 this case?

22 MR. O'QUINN: Object to the form.

23 BY MR. ASSAAD:

24 Q Certain complaints?

25 A The complaint files that I reviewed did