

CAUSE NO. DC-18-08923

TRACY FLEMING and  
NORMA EGEA

Plaintiffs,

vs.

BRIAN CHILDRESS; NEYLU, INC.;  
RICHARD D. SCHUBERT, M.D., and;  
SMITH & NEPHEW, INC.

Defendants.

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IN THE DISTRICT COURT OF

DALLAS COUNTY, TEXAS

192<sup>nd</sup> JUDICIAL DISTRICT

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SMITH & NEPHEW, INC.’S SUPPLEMENTAL MOTION FOR PROTECTION

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NOW COMES, Defendant, Smith & Nephew, Inc. (“S&N”), who files its Supplemental Motion for Protection and in support thereof would respectfully show as follows:

**I. DISCUSSION**

As argued in its Motion for Protection, disproportionate discovery that imposes unnecessary and excessive costs on the responding party is not permissible under the Texas discovery rules. TEX. R. CIV. P. 192.4(b), 192.6(b); *In re Alford Chevrolet-Geo*, 997 S.W.2d 173, 180 (Tex. 1999). In addition to the undue burden and overbreadth shown in the motion, these 544 additional requests (except for the number that S&N has agreed to produce) will impose excessive costs that are disproportionate to the needs of this case.

Plaintiff’s disclosed economic injury in this case is uncertain, however, he has calculated mental anguish, medical expenses and lost wages at less than \$400,000 as of June 2018. While Plaintiff is certainly seeking a larger recovery than this, his actual alleged out of pocket loss does not support a claim that is proportionate to the level of discovery already produced in this case or the costs thereof. Discovery has already resulted in production of over 1.4 million pages of

documents. Ex. BB (Declaration of Matthew Sloane). These new requests will add a minimum of 193,578 pages to this production at a cost of 18,039 hours and \$439,888.74. These added costs and work are disproportionate to the alleged claim and present an undue burden.

## **II. CONCLUSION AND PRAYER**

Plaintiff was given 700,000 pages of documents and two depositions of the sales rep, Childress, and the surgeon, Dr. Schubert, before this case even started. S&N has now produced over 1.4 million pages of documents in *Kemp* and *Fleming* and a significant volume remains to be produced, at considerable expense, to respond to the RFPs already served. With the limited exceptions identified at the outset of this Motion, the RFPs are redundant, overly broad, seek irrelevant information, and are disproportionate to the needs of the case.

S&N respectfully prays that this Court grant this Motion for Protection as to Requests No. 1-198, 201-208, 264-272, 277-327, and 337-544, and order that these requests be quashed.

Respectfully submitted,

By: /s/ Brian P. Johnson

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**ATTORNEYS FOR DEFENDANT  
SMITH & NEPHEW, INC.**

**CERTIFICATE OF SERVICE**

I certify that, in accordance with the Texas Rules of Civil Procedure, a true and correct copy of the foregoing document was served upon the following counsel of record on the 17th day of April 2020 via e-service:

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*/s/ Brian P. Johnson*

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Brian P. Johnson



7. UnitedLex has compiled an estimate for the performance of services related to the searches for, review of, and redaction of documents responsive to Plaintiff Tracy Fleming's Fifth Requests for Production, attached as "Exhibit A," served in the above-captioned matter.

8. UnitedLex did not include in its estimate the requests that outside counsel identified as excluded from Smith & Nephew's Motion for Protection, specifically Requests 199-200, 209-263, 273-276, and 328-336. UnitedLex also did not include requests that outside counsel identified as not conducive to the running of search terms.

9. This estimate includes the costs associated with the services performed by UnitedLex and does not include any work performed by outside counsel. The services performed by UnitedLex include identifying potentially responsive documents, reviewing documents for responsiveness and privilege, and redacting privileged information and protected data where appropriate.

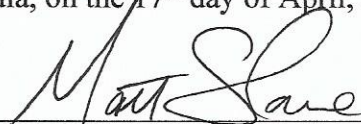
10. To identify responsive documents, UnitedLex first must craft a search to capture documents potentially responsive to each request or group of closely related requests. Documents hitting on those searches are then reviewed for responsiveness, confidentiality, redactions, and privilege, including attorney-client communication and work product, by UnitedLex attorneys. UnitedLex conducts a second-level review for purposes of quality control, during which errors committed during the first-level review are identified and corrected. In addition, UnitedLex conducts quality control checks and consistency validations to determine whether any inconsistent decisions have been applied, and samples of documents reviewed by UnitedLex are promoted to Smith & Nephew's outside counsel for quality control review.

11. UnitedLex has worked with outside counsel to craft searches designed to capture documents potentially responsive to Plaintiff's Fifth Requests for production, with the exception of those described in Paragraph 8.

12. Excluding the documents that have already been produced in this matter and the *Kemp* matter, it is anticipated that approximately 193,578 potentially responsive documents will require review for this project. Using the responsiveness, privilege and redaction rates seen in the BHR MDL, it is estimated that it would take approximately 18,039 total hours and cost approximately \$439,888.74 for UnitedLex to perform the services associated with the production of documents in connection with Plaintiffs' Fifth Requests for production, excluding those described in Paragraph 8. This estimate considers review efficiencies UnitedLex will employ and does not include work that has already been performed for documents that have been produced.

My name is Matthew Theodore Slone, my date of birth is 20 January 1983, and my address is A-291, Belaire, Gurugram, Haryana India 122001. I declare under penalty of perjury that the foregoing is true and correct.

Executed in Gurugram, State of Haryana - India, on the 17<sup>th</sup> day of April, 2020.

  
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Matthew Slone