

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

192nd JUDICIAL DISTRICT

SMITH & NEPHEW, INC.'S OPPOSITION TO PLAINTIFFS'
AMENDED MOTION TO COMPEL DOCUMENTS

NOW COMES, Defendant, Smith & Nephew, Inc. ("S&N"), who files its Opposition to Plaintiffs' Amended Motion to Compel Documents:

I. INTRODUCTION

As discussed in S&N's Motion for Protection, Plaintiffs' counsel has served 5,535 Requests for Production ("RFPs") in this case and another metal-on-metal hip implant case in Jefferson County, *Kemp v. Pure Play Orthopaedics, et al.* Almost 1,200 RFPs were served after the President declared a state of national emergency due to COVID-19. Plaintiffs' counsel has also served hundreds of Requests for Admission and continues to do so. Most recently, counsel filed a motion in *Kemp* to serve an additional 600 Interrogatories on topics designated for corporate representative depositions – and he plans to take the corporate representative depositions as well.

In response to this discovery onslaught, S&N has produced over 1.4 million pages of documents, and counting. Even before this suit was filed, S&N had made available over 700,000

pages of documents produced in other metal-on-metal hip cases, *Hutchens v. Smith & Nephew, Inc.*, *Raab v. Smith & Nephew, Inc.*, and *Kirby v. Smith and Nephew, Inc.* Plaintiffs' counsel was counsel of record in *Raab* and *Kirby*. *Kirby* and *Hutchens* involved the same surgeon, Dr. Richard Schubert, and the same sales representative, Brian Childress. Plaintiffs' counsel has deposed Dr. Schubert and Mr. Childress twice.

While Plaintiffs' ridicule this 2.1 million page production (*see e.g.*, p.10 of their Motion, characterizing S&N's discussion of the enormous production as "bragging"), the truth is that Plaintiffs have been provided fulsome discovery. Yet, no matter how much S&N produces, Plaintiffs insist on more. The discovery has gone far afield of the pertinent issues and has long been redundant, repetitive, and over-reaching.

The Motion should be denied. The Texas courts have warned against "using discovery as a weapon capable of imposing large and unjustified costs on one's adversary." *See In re Alford Chevrolet-Geo*, 997 S.W. 2d 173, 180 (Tex. 1999). Discovery must be relevant, not overly broad, and cannot impose unreasonable expenses on the opposing party. *Id.* at 181. Requests that are not tied to the allegations in the pleading such as by time, location, or scope are improper regardless of the burden. *In re CSX Corp.*, 124 S.W. 3d 149, 153 (Tex. 2003). Central to the overbreadth question is whether discovery could have been more narrowly tailored so that it captured pertinent information without encouraging unnecessarily tenuous responses. *Id.*

Each of Plaintiffs' categories of Requests is discussed in turn.

II. SCHUBERT/BAYLOR RELATED (118, 141, 253-255)

One of Plaintiffs' unfounded accusations is that Baylor or Dr. Schubert "probably" received kickbacks for using S&N's products. This accusation is totally baseless and exists only in the overly-imaginative mind of Plaintiffs' counsel. As discussed in the Motion for Protection,

S&N has produced its contract with Baylor and is searching for and will produce the documents surrounding the negotiations which led to it. In fact, some of the documents in those negotiations have already been produced. S&N is also producing a corporate representative for deposition on the Baylor contract and the negotiations surrounding it. None of this discovery gives credence to Plaintiffs' pet theory.

One of Plaintiffs' favorite tactics is to take a phrase or language from a document from a previous production and ask for all documents relating to that phrase or language. Plaintiffs have served hundreds of requests of this type in a transparent attempt to impose punitive discovery obligations and costs on S&N. The usually off-hand and innocuous phrase or language is often taken out of context. Searches for documents "relating to" some phrase or language in previously produced documents are inherently difficult and expensive, as they often require a large volume of documents to be reviewed to find a proverbial needle in a haystack. Any pertinent information related to the topic of the phrase or language can almost always be uncovered with a more appropriately tailored request. The Requests in the Baylor/Schubert group are examples of this tactic.

RFP 118 asks for "any information that 'Memphis [has] on file' about Dr. Schubert as referred in KIRBY-000238" (Ex. "A"). KIRBY-000238 is an email chain dated 18 months after Plaintiff's surgery. The chain discusses Dr. Schubert's intent to attend a training course on surgical technique – at a time and place that would have nothing to do with the training received relevant to Plaintiffs' surgeries. The sales rep, Mr. Childress, is attempting to help Dr. Schubert register for the course. In this context, while asking the S&N representative to assist the registration, Childress states in his email that "Memphis should have all of his info on file."

Plaintiffs' Request turns this exchange into some sort of "file" that is supposedly kept on Dr. Schubert (the "Memphis file," Motion p. 3) and asks for "any information" that "Memphis has on file" about Dr. Schubert. Plaintiff simply cannot and has not provided a credible explanation of how information pertinent to registration for a course 18 months after surgery would have any useful connection to this litigation such that it would fall within the scope of proper discovery. It is unclear from the context precisely what information Brian Childress believed was "on file," but the circumstances do indicate that his request was limited to the information necessary to register Dr. Schubert for a course. As discussed in the Motion for Protection, S&N has produced a host of documents on Dr. Schubert and Mr. Childress, their relationships to each other, and their relationship to the company. RFP 118 requires S&N to perform a speculative Easter-egg hunt that with no effort to narrowly-tailor the requests and that is disproportionate to the needs of the case, especially given the voluminous production on Dr. Schubert, his relationship with S&N, and the training and education he was provided.

Similarly, Requests 141, 253, 254, and 255 refer to a document produced as "HUTCHENS(SN)-0015647 (Ex. "B"). The document is a February 24, 2010 email from S&N District Manager John Hebel and is titled "2/23 9 a.m. BHCS/ACTION Initial Business Review 90 Day into New Contract – RECAP & "Action Items." The document includes the a line that states "BHR cup usage pre-2009 v. post-2009 – specifically measure units implanted by Dr. Schubert and Dr. Rathjen – SN lead John Hebel."

Plaintiff takes this document and asks for "all follow-up events or other written communications relating to the Baylor Business Meeting" and "all written communications relating to," "any report discussing," and "all documents discussing" "BHR cup usage pre-July 2009 v. post-July 2009." The Requests are overly broad fishing expeditions of the worst kind-

failing to even make an effort to relate the requests to this litigation. Plaintiffs can obtain and are obtaining pertinent information within the proper scope of discovery through appropriate requests. S&N has produced the Baylor contract; it is producing the communications surrounding the negotiations; it has produced a list of all Schubert off-label metal-on-metal surgeries; it has produced Dr. Schubert's consulting contracts and the consulting fees paid to him, etc.

III. THE CFR PART 99 REQUESTS (230, 236-238)

These Requests ask for documents relating to S&N's compliance with 21 CFR 201 and 501, which concern FDA procedures for dissemination of written information about off-label uses. The Requests are not limited to Dr. Schubert, who was deposed twice and has never testified he received any written materials on off-label uses of S&N's hip devices. A properly written request would not engage in the kind of nationwide search involving any persons and any time period. S&N has already produced written marketing pieces with for the device components Plaintiff received and has produced and is continuing to produce training and educational materials provided to Dr. Schubert. A generalized Request for "all documents" S&N maintained to comply with 21 CFR Part 99 is overly broad and disproportionate.

IV. THE "FOUR STRATEGIC PILLARS" (382)

Plaintiffs seek "final versions" of the "Four Strategic Pillars" documents. Requests for the Four Strategic Pillars documents are redundant and overly broad. As confirmed in Plaintiffs' Motion itself, the Request is not limited to Dr. Schubert or the issues in this case: the documents contain "updates about sales figures, high sales customers, high selling sales districts, training updates, compliance updates, and individual product sales numbers." These Requests are yet another attempt by Plaintiffs to turn a case about a single surgeon and a single sales rep into a

nationwide hunt for documents involving any surgeon and all time periods. S&N has produced and continues to produce the training and educational materials relating to Brian Childress. It has produced and continues to produce documents relating to marketing campaigns for the BHR products generally and as relating to Dr. Schubert specifically. These requests fail the test for proper tailoring of discovery and are overbroad as a matter of law.

V. MISCELLANEOUS (RFPs 160, 415)

RFP 160 asks for “documents relating to the video update referenced in HUTCHENS(SN)-0069601.” Plaintiffs ignore the fact that S&N’s response to RFP 160 refers them to its response to RFP 159, in which S&N stated “S&N is conducting a diligent search for written communications related to the referenced video update and will produce responsive documents identified.” This search is sufficient; requiring the same search to be executed multiple times (which Plaintiff has repeatedly attempted) falls afoul of the stricture against using discovery to impose unnecessary costs on the responding party.. Any “document” relating to the video update is a “written communication” of some sort.

Request 415 seeks the production of websites required by the Department of Justice to publicly disclose surgeon payments from 2007 to 2009. The Request is not limited to Dr. Schubert and is overly broad. Plaintiffs state that they “are trying to determine how much money [S&N] paid Dr. Schubert in the two years leading up to Mr. Fleming’s surgery” and that “after all this time, [S&N] still refuses to say.” This explanation is not credible, as Plaintiffs know that S&N has already produced Dr. Schubert’s consulting contracts, description of services he performed, and documents showing his consulting fees from 2007 to 2014 in the *Hutchens* case, all of which discovery is available by agreement to Plaintiff in this litigation. S&N has also produced the Baylor contract and is producing the documents surrounding the negotiation of that

contract, even though Plaintiffs' search for phantom kickbacks is a wild goose chase. RFP 415 is overly broad, duplicative and disproportionate.

VI. ANY DOCUMENTS DESCRIBING S&N'S EVALUATION OF CHILDRESS OR NEYLU "AT ANY TIME" (RFP 128)

RFP 128 asks for "any documentation" describing S&N's evaluation of Childress or Neylu "at any time." Not said are what type of evaluations, when the evaluations occurred, who the evaluations related to, or how they might be selected to include information that is even slightly pertinent to this litigation. In short, the RFP is not limited to the issues or even the relevant time period and is patently overbroad.

VII. NON-RESPONSIVE SEARCHES AND "EXHIBIT A"

As a threshold issue, Plaintiffs make several misstatements on Page 12 of their Motion. First, the First RFPs from Fleming and Egea were the subject of numerous meet-and-confer exchanges. The first RFPs from these Plaintiffs had over 700 Requests, and as this Motion shows, the parties narrowed it to these relatively few, compared to the 700 originally propounded. After numerous meet-and-confer exchanges, memorialized in Rule 11 Agreements, S&N "stood by its objections" to these remaining Requests because the objections are valid.

Second, as discussed with Plaintiffs' counsel several times, S&N is scheduled to produce documents within the time frame for discovery. S&N cannot commit to specific production deadlines for specific requests during the COVID-19 pandemic. Nonetheless, despite its document review teams being under quarantine and working remotely (many with school children at home) since March 13, S&N has produced over 300,000 pages of documents since the stay at home orders were issued.

Third, S&N is not obligated to identify what documents were produced in response to specific requests. S&N is providing documents in a searchable format in the manner in which they are kept in the ordinary course of business. TEX. R. CIV. P. 196.3(c). S&N has commenced rolling production of documents as they have been identified through searches and reviewed for responsiveness and privilege.

Plaintiffs’ “non-responsive search” argument concerns documents that Plaintiffs selectively quote and then ask for “all documents related to” the selectively quoted language or phrase.¹ Again, as discussed above, these RFPs typically ask for the proverbial needle in a haystack when they have already asked for and received the haystack. Furthermore, they don’t even narrowly tailor their request to say what kind of needle it is – sewing needle, knitting needle, crochet needle. These requests are a net cast into the water in the hope of catching a fish – not a proper method of discovery. For example, RFP 405 asks for “any documents discussing” a specific sales CD. S&N is providing documents relating to its marketing campaigns for these products; a search for specific documents relating to one CD is duplicative, redundant and oppressive. Nonetheless, S&N agreed to search for documents that mention the CD by name.

Many, but not all, of the Requests in Exhibit A are of this same type. However, some of the RFPs are not limited to the language Plaintiffs quote and reflect that S&N is conducting a diligent search for requested documents, e.g., 37, 148, and 161. The responses to many of the Exhibit A RFPs are subsumed in the responses to a broader request, e.g., 38, 39, 64, 69, 71, 72,

¹ Plaintiffs also complain that S&N agreed to give Plaintiffs all FDA submissions regarding the device components Plaintiff received in response to RFP 229. These documents are in a searchable format. The Response is fulsome and addresses all of Plaintiffs requests for submissions to the FDA in one pass. This was the most efficient way to address Plaintiffs’ Requests for FDA materials.

201, and 202. In those cases, the requests are duplicative efforts to improperly and punitively increase S&N's costs of production.

S&N will be prepared to discuss Exhibit A in detail at the oral argument, but some RFPs deserve special mention. RFP 68 asks for the attachment related to a "Special Department failure to deliver a reliable working product" as referenced in a business conditions report on numerous S&N products and sales territories. The quoted language "Special Department for failure to deliver a reliable working product" is not in the BHR section of the report. That language is in the "Miscellaneous" area. There is no indication that this attachment has anything to do with metal-on-metal or this case. Nonetheless, S&N agreed to search for documents containing the quoted language.

Likewise, RFP 98 asks for "Mike Frisette and John Soto comms" mentioned in KIRBY-0029964. That document is a BHR safety review from May 30, 2012, more than two and a half years after Plaintiff's surgery – again not related in time, place, or subject matter to the issues at hand in this litigation. On the page entitled "Take Home Messages," there is a single line – "Reiterate our Commitment to the BHR – Mike Frisette and John Soto comms." There is no indication of what this line means or how it is at all probative. S&N has produced a huge volume of documents on the performance of these devices. RFP 98 is yet another needle in a haystack, dredge the ocean to find a fish, overly broad and vague Request.

Finally, RFPS 33-35 ask for "any written communications" or "any documents" relating to any emails from S&N regarding a June 12, 2011 email from Dr. Schubert. S&N has produced S&N's response to the email and the internal communications surrounding it.

VIII. CONCLUSION

As discussed in the Motion for Protection, the discovery in this case and *Kemp* has gone well beyond the pertinent issues, beyond the allowable scope of discovery, and beyond any rational connection to the time, place, and subject matter of the allegations and pleadings. The RFPs in the Motion to Compel are redundant, overly broad, and/or disproportionate. S&N respectfully prays that the Motion be denied.

Respectfully submitted,

By: /s/ Brian P. Johnson

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 1st day of May 2020 via email:

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/s/ Brian P. Johnson _____

Brian P. Johnson

Message

From: BRIAN CHILDRESS [bdchill@me.com]
Sent: 26/05/2011 20:42:38
To: Hebel, Jon [Jon.Hebel@smith-nephew.com]
CC: Hubbard, Kami [Kami.Hubbard@smith-nephew.com]
Subject: Re: Smith & Nephew Direct Anterior Training in Austin

Mandi is sending me his new address. He does about 150 hips a year. Stem of choice Synergy. He is a VSP for synergy and BHR. Memphis should have all his info on file.

Sent from my iPhone

On May 26, 2011, at 9:39 AM, "Hebel, Jon" <Jon.Hebel@smith-nephew.com> wrote:

> Today is usually an office type day for Brian. But, he might be rocking cases.
> I am down in grapevine/mid cities.

>
> Brian,
> Call you call and or email kami Schubert data. Thks

>
> Jon Hebel
> 972-522-9390

>
> Sent from iPhone

>
> On May 26, 2011, at 9:19 AM, "Hubbard, Kami" <Kami.Hubbard@smith-nephew.com> wrote:

>> Do you have the rest of the information?

>>
>> Kami Hubbard
>> Assistant to Al Kepler, Southwest RVP
>> Orthopaedic Reconstruction and Trauma

>>
>> Smith & Nephew

>>
>> 9290 Sandtrap Ct.

>>
>> Park City, UT 84098

>>
>> kami.hubbard@smith-nephew.com

>>
>> C 913.486.9015

>> F 435-655-4974

>>
>> -----Original Message-----

>> From: Hebel, Jon

>> Sent: Tuesday, May 24, 2011 10:23 AM

>> To: BRIAN CHILDRESS

KIRBY-000238

>> Cc: Hubbard, Kami
>> Subject: RE: Smith & Nephew Direct Anterior Training in Austin

>>
>> Cool.
>> I need to get some info to Kami today to confirm his registration and
>> get a formal invite out to him and Mary with the course details

>>
>> Name
>> Address
>> Contact #
>> Practices at - locations
>> # of hips per year
>> Preferred hip product and hip procedure
>> Any specific food and or room preferences

>>
>> Thanks. I get this over to Kami. Great job locking Dr Schubert in for
>> training. You are going right?

>>
>> Jon Hebel
>> District Manager - Dallas/Ft. Worth
>> Smith & Nephew, Inc.
>> 4950 Keller Springs, Suite 280
>> Addison, TX 75001

>>
>> jon.hebel@smith-nephew.com

>>
>> O: 972.774.9026
>> C: 972.522.9390

>>
>>
>>
>>
>> This electronic transmission is strictly confidential to Smith & Nephew
>> and intended solely for the addressee. It may contain information, which
>> s covered by legal, professional, or other privilege. If you are not the
>> intended addressee, or someone authorized by the intended addressee to
>> receive transmissions on behalf of the addressee, you must not retain,
>> disclose, in any form, copy or take any action in reliance on this
>> transmission. If you have received this transmission in error, please
>> notify us as soon as possible and destroy this message.

>>
>>
>> -----Original Message-----
>> From: BRIAN CHILDRESS [mailto:bdchili@me.com]
>> Sent: Tuesday, May 24, 2011 10:16 AM
>> To: Mary Kinsman
>> Cc: Dr. Schubert; Hebel, Jon; Chris Baker; Peter Saunders - personal
>> eMail
>> Subject: Smith & Nephew Direct Anterior Training in Austin

>>
>> Mary,
>>
>> Dr. Schubert wanted me to have you put the dates of July 22 & 23 on his
>> calendar as dates for him to be in Austin. There is a Direct Anterior
>> Hip approach course he is planning on attending. More specific details

KIRBY-000239

>> will be coming in the near future.

>>

>> Thanks,

>> Brian

>>

>> Sent from my iPhone

>>

>

Message

From: Hebel, Jon [Jon.Hebel@smith-nephew.com]
Sent: 2/24/2010 12:25:27 AM
To: Scott, Pamela L. [PScott@BaylorHealth.edu]; Pollo, Fabian [fabianp@BaylorHealth.edu]; York, Christopher C. [Christopher.York@baylorhealth.edu]
CC: Kepler, Al [Al.Kepler@smith-nephew.com]; Emery, Nicole [Nicole.Emery@smith-nephew.com]; Brian Childress [bdchili@me.com]
Subject: 2/23 9AM BHCS / SN initial Business Review 90 day into new contract - RECAP & "Action Items"
Importance: High

2/23 9AM BHCS / SN initial Business Review 90 day into new contract - RECAP & "Action Items"

Email to Fabian & Pam from Jon Hebel & SN points of contact

- Co-Op Advertising Program - details and overview of program - SN point of contact and Regional Marketing Manager- Nicole Emery - live in Dallas
- PCP "Dinner Program" Overview & actual orthopedic surgeon presentation & "talking points" - SN point of contact - Jon Hebel - You will receive an email from me. Good marketing opportunity for new, young orthopedic surgeon developing practice. PCP "Dinner Program" is Not location specific, can work in any location

"Exceptions Committee" - prior to case with an approved & or contracted item, currently being review for pricing and or additional approvals:

- Prior to case, with as much advanced notice as possible, send an email to Fabian and Chris with a cc to the requesting surgeon - email from Brian Childress and or Jon Hebel (example - upcoming Visionaire cases)

Past Visionaire cases - resolving credit issues/billing issues, etc. Leads Chris York & Jon Hebel

- Chris, I will email you the invoices on PDF's - FYI, large file size email, sorry in advance
- Chris is planning a meeting with Genesa, in the near future, to discuss and review past approvals on Visionaire product

BHR cup usage pre July 2009 vs post July 2009 - specifically measure units implanted by Dr Schubert & Dr Rathjen - SN lead Jon Hebel

- Generate report and email to Fabian and Pam

72 hour PO/Bill only turnaround on SN open orders - BHCS - Lead Pam & Jon:

- Pam to resolve bill only delayed deliveries to SN and create, change, refine BHCS internal process to meet 72 hour BHCS/SN contracted timeframe (line item 5.7)
- Example - 72 hour "mark" for sales period #2 ending on March 5, 2010 would be all open orders closed on cases completed on Tuesday, March 2, 2010.
- BHCS Current stats on open orders for sales period 2 is \$327K total sales \$'s and February 10, 2010 for the latest PO closed date

Legion Revision focus - Gilbert & Mollabashy

- Approach and discuss revision options to replace TM for bone in growth - Lead Brian Childress, Chris Baker - SN BUMC Reps

Hutchens(SN)-0015647

Thank you for the time today. More than ever, I understand how busy and in-demand each of you are on a daily basis. Moving the BHCS / SN partnership forward is the goal. Thanks for the continued support.

Jon Hebel

District Manager - Dallas/Ft. Worth
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