

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

ORDER ON MOTIONS HEARD ON MAY 4, 2020

On May 4, 2020, came on to be heard the Motions listed below, and the Court makes the following rulings after having considered the Motions, Responses, and the arguments of counsel:

I. Defendant Smith & Nephew, Inc.’s Motion for Protection re: Plaintiff’s 5th RFPs

Request Nos.	GRANTED	DENIED	Comments
1, 4, 7, 10, 13, 16, 19, 22, 25	X		Withdrawn by Plaintiff
20, 21, 23–27	X		Withdrawn by Plaintiff
68–78	X		Withdrawn by Plaintiff
83–85, 87	X		Withdrawn by Plaintiff
147, 149, 151, 153	X		Withdrawn by Plaintiff
163–167, 170, 171	X		Withdrawn by Plaintiff
189–198	X		Withdrawn by Plaintiff
266–271	X		Withdrawn by Plaintiff
277	X		Withdrawn by Plaintiff
327	X		Withdrawn by Plaintiff
340, 341, 349–351	X		Withdrawn by Plaintiff
357–359	X		Withdrawn by Plaintiff
365–367, 370–373	X		Withdrawn by Plaintiff
452	X		Withdrawn by Plaintiff
471–476	X		Withdrawn by Plaintiff

483	X		Withdrawn by Plaintiff
487	X		Withdrawn by Plaintiff
518	X		Withdrawn by Plaintiff
55-67		X	Childress Training Materials. By agreement, Smith & Nephew is producing all training materials for Brian Childress or Neylu, Inc. from January 1, 2007-September 28, 2009.
79-82	IN PART	IN PART	Field marketing director training. Smith & Nephew is ordered to produce all field marketing director training information requested in Requests 79-82 from January 1, 2007-September 28, 2009 for the field marketing directors responsible for Dr. Schubert or Brian Childress. GRANTED otherwise.
86, 88-102, 121, 123, 125, 127-136, 169,	X***		Ruling deferred as requested. See below.
103-120, 122, 124, 126, 137-146, 148, 150, 152, 172-174, 265		X***	Ruling deferred as requested. See below.
154-162, 168	IN PART	IN PART	Surgeon "Media Training". Smith & Nephew is ordered to produce any documents relating to Smith & Nephew's training of Dr. Schubert from January 2006-September 28, 2009, including any "media training". GRANTED otherwise.
175-188	IN PART	IN PART	FDA Communications. Smith & Nephew is ordered to produce any communications with the FDA from 2007-September 2009 sent pursuant to 21 CFR Part 99. GRANTED otherwise.
199	---	---	Schubert Visit Agendas. By agreement, Smith & Nephew is producing documents pursuant to this

			request. <i>See</i> Motion for Protective Order, page 10.
272	X***		Ruling deferred as requested. See below.
278–326	IN PART	IN PART	Contracts with HCPs. Smith & Nephew has agreed to produce contracts and communications exchanged with Baylor and North Central Surgical Center in negotiating the contracts if they exist. <i>See</i> Motion for Protective Order at page 13.
337, 338, 342, 343	IN PART	IN PART	Previous Production Documents. Request 337 is withdrawn by Plaintiffs. Smith & Nephew is ordered to produce all documents that are responsive to Requests 338, 342, and 343.
344–348, 352–356, 360–364, 368, 369, 374–380	IN PART	IN PART	Training Agenda Sign In Sheets. Smith & Nephew is ordered to produce any documents relating to Smith & Nephew’s training of Dr. Schubert from January 2006–September 28, 2009, including agendas and sign in sheets, for all orthopedic devices. GRANTED otherwise.
477–482, 484–486, 488	IN PART	IN PART	Celebrity Endorsements. Smith & Nephew is ordered to conduct a diligent search for and produce documents responsive to Request 488. GRANTED otherwise.
489–517, 519–525	IN PART	IN PART	Compliance Monitoring. Smith & Nephew is ordered to produce all documents that are responsive to Requests 489–494. GRANTED otherwise.
537–544			MOM Hip Revision Videos. Smith & Nephew will investigate whether a revision video exists and consult with plaintiffs.

2, 3, 5, 6, 8, 9, 11, 12, 14, 15, 17, 18	IN PART	IN PART	Dr. Schubert Communications. Smith & Nephew is ordered produce all communications with Dr. Schubert from 2007–September 28, 2009.
525–536	X		Linda Schubert Communications
381–451, 453–470	IN PART***	IN PART	Dr. Schubert Payments. Motion granted as to all but 446-447 and 453-456.
28–54		X	Communications with Experts. Smith & Nephew is ordered produce communications and other documents requested for the experts listed in RFP Numbers 28 to 54.

II. Plaintiffs’ Amended Motion to Compel re: First Requests for Production

Request No.	GRANTED	DENIED	Comments
T. Fleming’s First RFP No. 118	X		Memphis File. Smith & Nephew is ordered produce all information that it has on file in Memphis for Dr. Schubert from 2007–December 31, 2009, including but not limited to surgeon profiles, surgeon payments, surgery schedules, and past surgical history.
T. Fleming’s First RFP No. 141	X		Baylor Business Meeting. Smith & Nephew is ordered to produce responsive documents for the nine-month window starting in May 2009 to February 2010. Such documents shall be produced at least ten days before the deposition of any corporate representative testifying on healthcare provider contracts.
T. Fleming’s First RFP No. 253	X		BHR Cup Usage. Smith & Nephew is ordered to produce all responsive documents at least ten days before the deposition of any corporate representative testifying on healthcare provider contracts.
T. Fleming’s First RFP No. 254	X		BHR Cup Usage. Smith & Nephew is ordered to produce all responsive documents at least ten days before the deposition of any corporate representative testifying on healthcare provider contracts.
T. Fleming’s First RFP No. 255	X		BHR Cup Usage. Smith & Nephew is ordered to produce all responsive documents at least ten days before the deposition

			of any corporate representative testifying on healthcare provider contracts.
T. Fleming's First RFP No. 230	X		CFR Part 99. Smith & Nephew is ordered to produce any communications with the FDA from 2007 to September 2009 sent pursuant to 21 CFR Part 99.
T. Fleming's First RFP No. 236	X		CFR Part 99. Smith & Nephew is ordered to produce any communications with the FDA from 2007 to September 2009 sent pursuant to 21 CFR Part 99.
T. Fleming's First RFP No. 237	X		CFR Part 99. Smith & Nephew is ordered to produce any communications with the FDA from 2007 to September 2009 sent pursuant to 21 CFR Part 99.
T. Fleming's First RFP No. 238	X		CFR Part 99. Smith & Nephew is ordered to produce any communications with the FDA from 2007 to September 2009 sent pursuant to 21 CFR Part 99.
T. Fleming's First RFP No. 382	X		"Four Strategic Pillars." Smith & Nephew is ordered to produce the final version of any Four Strategic Pillars a/k/a/ 4 Strategic Pillars presentations that were created during 2007–September 28, 2009.
T. Fleming's First RFP No. 160	X		President's Video Update. Smith & Nephew is ordered to produce the Joe DeVivo video update referred to in Request 160.
T. Fleming's First RFP No. 415	X		Compliance website. Smith & Nephew is ordered to produce any information regarding Dr. Schubert that appears on any version of the compliance website.
N. Egea's First RFP No. 128	X		Brian Childress Evaluations. Smith & Nephew is ordered to produce any formal evaluations that it has for Brian Childress, including performance evaluations and sales awards, from the start of his affiliation with Smith & Nephew until September 28, 2009.

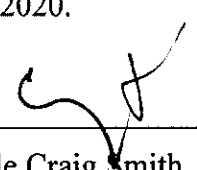
Plaintiffs and Defendant Smith & Nephew, Inc. are FURTHER ordered to meet and confer, pursuant to the standing Order issued by this Court, on the search terms that Defendant Smith & Nephew, Inc. is using to conduct its searches in response to the written discovery exchanged in this case. Any agreements will be reduced into a signed writing pursuant to Texas Rule of Civil Procedure 11. Any disagreements will be submitted to the Court in the form of an appropriate Motion.

III. Defendant Smith & Nephew, Inc.'s Motion to Quash Notice of Deposition

The deposition is quashed without prejudice to the Plaintiffs. The Court ORDERS the parties as follows: The Court grants Plaintiffs leave to serve Defendant Smith & Nephew, Inc. with a combined, indexed list of documents. Defendant Smith & Nephew, Inc. is ORDERED to identify the source, custodian, and authenticity of these documents, as well as state any and all specific objections to the admissibility of these documents in the trial of this lawsuit. Any agreements will be reduced into a signed writing pursuant to Texas Rule of Civil Procedure 11. Any disagreements will be submitted to the Court in the form of a Motion to Compel.

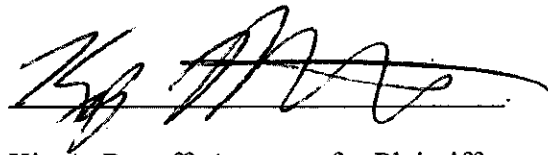
*** The parties have requested the Court to defer ruling on the discovery requests with an asterisk in the "Granted" or "Denied" column. They want to see the hearing transcript before requesting a ruling, and that is acceptable under the circumstances.

SIGNED this 29 day of May, 2020.




Honorable Craig Smith, Judge Presiding

APPROVED AS TO FORM ONLY.



Kip A. Petroff, Attorney for Plaintiffs



David W. O'Quinn, Attorney for Smith &
Nephew, Inc., Brian Childress, and Neylu, Inc.