



## II. FACTUAL BACKGROUND.

The only discovery requests that are directly at issue in this Motion are the following:

- Eighth Requests for Production served on May 20, 2020.
- Third Requests for Admissions served on May 21, 2020.
- Fourth Requests for Admissions served on May 21, 2020.

Every one of these discovery requests either seeks follow up information about production documents or is a good faith attempt to avoid taking satellite depositions of uncooperative company witnesses with heavy foreign accents.

None of these discovery requests ask about totally new information. Most of them, including the Requests for Admissions, are directly related to information known to exist solely because of documents already produced. Every one of these discovery requests is narrowly drafted and seeks legitimate information that still has not been provided after all this time. Every one of them was served just two or three days after the alleged Rule 11 deadline for written discovery requests.

There is conceivably some confusion associated with the “discovery cutoff” in this Court’s Agreed Second Amended Scheduling Order that is attached as **Exhibit A**. The new Scheduling Order moved the trial date to October 19, 2020 due to COVID-19, and the Order also imposed a discovery cutoff of August 31, 2020. This Order was entered *after* the Rule 11 agreement that Defendants cite in their Motion. Like the other two Scheduling Orders that this Court has signed (on February 14, 2020 and November 22, 2019), it has a blanket deadline for the discovery period ending and does not explicitly distinguish between written and other types of discovery.

This Order was sent to Plaintiffs on May 1, 2020, weeks after filing the Rule 11 agreement. This agreed Order was circulated by Defendants’ counsel in an email from Brian Johnson that plainly stated: “Please see attached draft of an Agreed Second Amended Scheduling Order with

some new deadlines for our Oct 2020 trial setting.” See **Exhibit B**. Rule 11 itself provides that these “new deadlines” superseded any Rule 11 agreement to the contrary. See TEX. R. CIV. P. 11 (“Rule 11 is subject to modification by any other Rule of Civil Procedure”).

The Agreed Second Amended Scheduling Order controls when discovery, including written discovery, ends in this case. The Order states:

DISCOVERY PERIOD ENDS. All discovery must be conducted before the end of the discovery period. Parties seeking discovery must serve a request sufficiently far in advance of the end of the discovery period so that the deadline for responding will be within the discovery period. Counsel may conduct discovery beyond this deadline by agreement. Incomplete discovery will not delay the trial.

That should be the end of discussion on this entire Motion. Discovery will close on August 31, 2020.

### **III. ARGUMENT AND AUTHORITIES.**

#### **A. This Court should not end all discovery.**

Defendants are arguing that this court’s entire Discovery Control Plan is defective. The Texas rules specifically state that a Discovery Control Plan for a Level 3 case “must include . . . a discovery period during which all discovery must be conducted or all discovery requests must be sent, for the entire case or an appropriate phase of it.” TEX. R. CIV. P. 190.4(b). Texas Rule of Civil Procedure 190.4 requires the Court to list the discovery deadlines for the entire case. Defendants agreed to extend the discovery deadline for all discovery; that is what the Court ordered on May 4, 2020. Defendants’ Motion cannot succeed without invalidating the Scheduling Order itself. The Order is valid under Rule 190.4. Defendants agreed to the “new deadlines,” and the Order has the effect of superseding the prior Rule 11 agreements to the contrary. If it did not, then we need a new Discovery Control Plan to rectify this confusion.

This is not the first time a party finds itself needing more time to follow up on recently

produced documents. It happens so frequently that the Texas Rules of Civil Procedure have a specific provision that gives clear guidance on the right thing to do in this situation. TEX. R. CIV. P. 190.5 provides that this Court can modify a Discovery Control Plan at any time, and arguably must do so when the interest of justice requires. In fact, the Rules *require* additional discovery:

(a) related to new, amended or supplemental pleadings, or new information disclosed in a discovery response or in an amended or supplemental response, if:

(1) the pleadings or responses were made after the deadline for completion of discovery or so nearly before that deadline that an adverse party does not have an adequate opportunity to conduct discovery related to the new matters, and

(2) the adverse party would be unfairly prejudiced without such additional discovery;

(b) regarding matters that have changed materially after the discovery cutoff if trial is set or postponed so that the trial date is more than three months after the discovery period ends.

TEX. R. CIV. P. 190.5.

Those conditions are easily met here. Smith & Nephew continues to produce hundreds of thousands of pages of new, relevant, and important materials in response to discovery that was served months or years ago. In fact, Smith & Nephew still has not produced the documents the Court ordered it to produce after the May 4 hearing that lasted almost three hours. Smith & Nephew has confirmed that it has finished responding to only a small fraction of the numerous outstanding discovery requests. Witnesses are still being deposed. Finally, the trial setting is about two months after the discovery period ends.

Without continued discovery, important documents are going to be unceremoniously dumped on Plaintiffs in ten-thousand or hundred-thousand-page production sets, and when Plaintiffs finally uncover those important documents, Plaintiffs will have no way to use them to uncover additional information about this case. TEX. R. CIV. P. 190.5 provides for an easy solution: extend the written discovery deadline, which is exactly what the Amended Scheduling Order does.

It would be unfair to “close discovery” in this case because the Defendants continue to reluctantly produce many thousands of new documents which usually reveal that they have been concealing relevant documents for months or even years. That will undoubtedly happen when Smith & Nephew finally produces the documents the Court ordered it to produce after the May 4 hearing. The reason more time for discovery is needed is because Smith & Nephew objects to every single discovery request and usually produces nothing without a fight or only after being specifically ordered to do so.

B. Protective Orders are for specific discovery, and the discovery at issue here is narrowly-tailored and relevant.

Limitations on the scope of discovery are the exception, not the rule. *See* TEX. R. CIV. P. 192.3. Restrictions should be applied “only to prevent unwarranted delay and expense.” TEX. R. CIV. P. 192.7, cmt. 7 (1999). A defining principle is that “[p]arties are ‘entitled to full, fair discovery’ and to have their cases decided on the merits.” *Ford Motor Co. v. Castillo*, 279 S.W.3d 656, 663 (Tex. 2009) (internal quotations and citations omitted). Granting Smith & Nephew’s Motion for Protective Order would unfairly eliminate items from discovery that have still not been fully disclosed. “To the extent that a discovery request is burdensome because of the responding party’s own conscious, discretionary decisions, that burdensomeness is not properly laid at the feet of the requesting party, and cannot be said to be ‘undue.’” *ISK Biotech Corp. v. Lindsay*, 933 S.W.2d 565, 569 (Tex. App.—Houston [1st Dist.] 1996, orig. proceeding). Such is the case here.

Smith & Nephew’s noncompliance with the Texas Rules of Civil Procedure in previous litigation is largely why Plaintiffs are forced to ask additional Requests that Smith & Nephew rightfully should have “closed the door on” long ago. The vast majority of the document production to date has not been compelled. Smith & Nephew has agreed to the discovery, mostly by Rule 11 agreements negotiated right before scheduled hearings. They should not be allowed to weaponize

those good-faith agreements now, when this discovery is saving costs in cases in Oregon, California, and Texas.

The Texas Rules of Civil Procedure, and the governing case law, emphasize the Court's obligation to review the discovery pending before it. *See* TEX. R. CIV. P. 192.4 ("The discovery . . . should be limited if . . . the discovery sought is unreasonably cumulative or duplicative . . . or . . . the burden or expense of the proposed discovery outweighs its likely benefit . . . ") (emphasis added); TEX. R. CIV. P. 192.6(a) ("A person from whom discovery is sought, and any other person affected by the discovery request, may move within the time permitted for response to the discovery request for an order protecting that person from the discovery sought."). Here, that is two sets of Requests for Admissions that can resolve numerous factual issues without a costly corporate representative deposition and narrow Requests for Production related to these very specific items: (a) payments to a named Defendant, (b) communications with a designated expert, (c) materials related to a specific surgeon training session, (d) video updates for the entire Smith & Nephew sales force, and (e) communications directly related to a single recently-produced email.

### **CONCLUSION AND PRAYER**

Defendants agreed to the Agreed Second Amended Scheduling Order, and their Motion should be denied.

Plaintiffs respectfully request the following relief:

(1) Deny the Defendants' Motion; and,

(2) Clarify that written discovery may be conducted through August 31, 2020 in accordance with the Agreed Second Amended Scheduling Order.

Respectfully submitted,

**LAW OFFICE OF KIP PETROFF**

/s/ Kip Petroff

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**ATTORNEYS FOR PLAINTIFFS**

**Certificate of Service**

I HEREBY CERTIFY that on **June 11, 2020**, a true and correct copy of the foregoing was served on the Defendants by email as follows:

Defendants **Smith & Nephew, Inc., Brian Childress and Neylu, Inc. to:** Mr. Brian P. Johnson, Ms. Leila D'Aquin, Mr. David O'Quinn, Ms. Sarah Segrest-Jay, Mr. Douglas Moore, and Ms. Kealy Sehic.

Defendant **Richard D. Schubert, M.D., to:** Mr. David Criss and Ms. Alexandra Sallade.

/s/

Caio Formenti

# **EXHIBIT A**

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

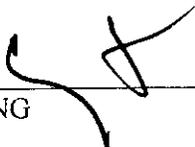
**AGREED SECOND AMENDED SCHEDULING ORDER**

1. **JOINDER.** The deadline for joinder has passed.
2. **EXPERT WITNESS DESIGNATION.** The deadlines for designating experts have passed.
3. N/A. **ALTERNATIVE DISPUTE RESOLUTION.**  
  
By agreement of the parties, there will be no Court-ordered mediation or alternative dispute resolution in this case.
4. 08/31/20 **DISCOVERY PERIOD ENDS.** All discovery must be conducted before the end of the discovery period. Parties seeking discovery must serve a request sufficiently far in advance of the end of the discovery period so that the deadline for responding will be within the discovery period. Counsel may conduct discovery beyond this deadline by agreement. Incomplete discovery will not delay the trial.
5. **DISPOSITIVE MOTIONS AND PLEAS.** Must be set for hearing or submission as follows:
  - (a) 09/10/20 Dispositive motions or pleas subject to an interlocutory appeal must be filed by this date.
  - (b) 09/10/20 Summary judgment motions not subject to an interlocutory appeal must be filed by this date.
  - (c) 01/24/20 Rule 166a(i) motions related to claims involving Smith & Nephew may not be set before this date. However, the Plaintiffs' No Evidence

Motion for Summary Judgment that is already on file involving Neylu and Brian Childress' Affirmative Defenses may be heard at any time after the required written notice of hearing is provided to all counsel.

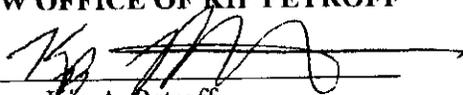
6. 09/10/20 **CHALLENGES TO EXPERT TESTIMONY.** All motions to exclude expert testimony and evidentiary challenges to expert testimony must be filed by this date, unless extended by leave of court.
7. 08/13/20 **PLEADINGS.** All amendments and supplements must be filed by this date. This order does not preclude prompt filing of pleadings directly responsive to any timely filed pleadings.
8. 10/19/20 **TRIAL SETTING.** If not assigned by the second Friday following this date, the case will be reset. The parties will exchange motions in limine and proposed jury charges one week before trial. Plaintiffs will provide exhibits lists and deposition excerpts to Defendants two weeks before trial and Defendants will provide exhibit lists and deposition excerpts to Plaintiffs one week before trial.

SIGNED this 4 day of May, 2020.

  
\_\_\_\_\_  
JUDGE PRESIDING

APPROVED:

**LAW OFFICE OF KIP PETROFF**

By: 

Kip A. Petroff

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AGREED SECOND AMENDED SCHEDULING ORDER  
PAGE 2

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TRACY FLEMING and NORMA EGEA

**JOHNSON, TRENT & TAYLOR, LLP**

By: \_\_\_\_\_

  
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ATTORNEYS FOR DEFENDANTS,  
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SMITH & NEPHEW, INC.

CRISS LAW GROUP, PLLC

By: David Criss <sup>Ⓢ</sup>

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ATTORNEYS FOR DEFENDANT,  
RICHARD D. SCHUBERT, M.D.

<sup>Ⓢ</sup> *Signed with permission*

# **EXHIBIT B**

**From:** [Brian Johnson](#)  
**Sent:** Friday, May 1, 2020 1:51 PM  
**To:** [Kip Petroff](#); [David Criss](#); [alexandra@criss-law.com](mailto:alexandra@criss-law.com); [David O'Quinn](#); [Caio Formenti](#); [Kris Bonham](#)  
**Subject:** RE: DC-18-08923 FLEMING VS CHILDRESS---updated scheduling order with new trial setting in Oct 2020  
**Attachments:** draft\_Agreed Second Amended Scheduling Order\_948543\_1.docx; Brian Johnson.vcf

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**Importance:** High

Hi Folks,

Please see attached draft of an Agreed Second Amended Scheduling Order with some new deadlines for our Oct 2020 trial setting.

Please let me know if ok to sign with your permission or if we need to tweak the draft Order.

Many thanks,  
Brian



---

**Brian P. Johnson**  
*Partner*

---

**Johnson, Trent & Taylor, L.L.P.**

**Phone** 713-860-0509

**Fax** 713-222-2226

**Email** [bjohnson@JohnsonTrent.com](mailto:bjohnson@JohnsonTrent.com)

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**From:** Kip Petroff [mailto:kpetroff@petroffassociates.com]  
**Sent:** Thursday, April 30, 2020 2:54 PM  
**To:** Bertha Moore; Brian Johnson; David Criss; alexandra@criss-law.com; David O'Quinn; Caio Formenti; Kris Bonham  
**Subject:** DC-18-08923 FLEMING VS CHILDRESS (ZOOM INVITATION FROM THE 192ND COURT)

Hi Bertha. You have the Plaintiffs listed correctly. Thanks,

Kip Petroff  
Dallas, Texas  
[www.kippetroff.com](http://www.kippetroff.com)  
email= [kpetroff@petroffassociates.com](mailto:kpetroff@petroffassociates.com)

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**From:** Bertha Moore <[bmoore@dallascourts.org](mailto:bmoore@dallascourts.org)>  
**Sent:** Thursday, April 30, 2020 2:35 PM  
**To:** [bjohnson@johnsontrent.com](mailto:bjohnson@johnsontrent.com); David Criss <[dcriss@criss-law.com](mailto:dcriss@criss-law.com)>; [alexandra@criss-law.com](mailto:alexandra@criss-law.com); David O'Quinn <[doquinn@irwinllc.com](mailto:doquinn@irwinllc.com)>; Kip Petroff <[kpetroff@petroffassociates.com](mailto:kpetroff@petroffassociates.com)>; Caio Formenti <[caio@kippetroff.com](mailto:caio@kippetroff.com)>; Kris Bonham <[kris@kippetroff.com](mailto:kris@kippetroff.com)>  
**Subject:** Re: DC-18-08923 FLEMING VS CHILDRESS (ZOOM INVITATION FROM THE 192ND COURT)

Counsel, I believe I have the distribution list correct for the hearing on Monday. Again, I apologize to anyone who has received this more than once.

Bertha Moore, Court Administrator  
192nd District Court  
George L. Allen Sr., Courts Building  
600 Commerce Street, Room 710-B  
Dallas, TX 75202  
214-653-7709

---

**From:** Bertha Moore  
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**Subject:** DC-18-08923 FLEMING VS CHILDRESS (ZOOM INVITATION FROM THE 192ND COURT)

Counsel, this is confirmation that the following hearings are set on Monday, May 4, 2020 before Judge Craig Smith at 9:00 a.m. -

**Defendant Smith & Nephew, Inc.'s Motion for Protection filed 4/16/2020,**  
**Supplemental Motion for Protection filed 4/17/2020,**  
**Plaintiffs' Amended Motion to Compel filed 4/23/2020**  
**Defendants Motion to Quash filed 4/29/2020**

**Judge Craig Smith is inviting you to a scheduled Zoom meeting.**

Topic: FLEMING VS CHILDRESS  
Time: May 4, 2020 09:00 AM Central Time (US and Canada)

Join Zoom Meeting

<https://txcourts.zoom.us/j/94426009405>

Meeting ID: 944 2600 9405

One tap mobile

+13462487799,,94426009405# US (Houston)

+16699006833,,94426009405# US (San Jose)

Dial by your location

+1 346 248 7799 US (Houston)

+1 669 900 6833 US (San Jose)

+1 253 215 8782 US (Tacoma)

+1 929 205 6099 US (New York)

+1 301 715 8592 US (Germantown)

+1 312 626 6799 US (Chicago)

Meeting ID: 944 2600 9405

Find your local number: <https://txcourts.zoom.us/u/axE19FCqR>

Join by Skype for Business

<https://txcourts.zoom.us/skype/94426009405>

Bertha Moore, Court Administrator

192nd District Court

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600 Commerce Street, Room 710-B

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