CAUSE NO. DC-18-08923

TRACY FLEMING and NORMA EGEA	§	**IN THE DISTRICT COURT OF**
	§	
Plaintiffs,	§	
	§	
vs.	§	**DALLAS COUNTY, TEXAS**
	§	
BRIAN CHILDRESS; NEYLU, INC.; RICHARD D. SCHUBERT, M.D., and; SMITH & NEPHEW, INC.	§	
	§	
Defendants.	§	**192nd JUDICIAL DISTRICT**

DEFENDANT SMITH & NEPHEW, INC.'S REPLY TO PLAINTIFFS' RESPONSE TO MOTION FOR PROTECTION FROM PENDING AND FURTHER WRITTEN DISCOVERY AND MOTION TO STRIKE UNTIMELY DISCOVERY

Plaintiffs' Response misrepresents their need for the information requested in the 206 discovery requests they issued after the Rule 11 agreement's May 18, 2020, deadline for written discovery, as well as the enforceability of that agreement.

As an initial matter, the objective of the parties' agreement to permit Plaintiffs' counsel to use documents produced in this case in his other matters, and vice-versa, was not to exponentially expand the scope and volume of discovery. Plaintiffs' counsel seems to believe that, because Smith & Nephew was agreeable to allow the use of documents in his other cases, that somehow entitles him to request seven times as many documents from the Defendants. Smith & Nephew made this agreement for one reason: to prevent the need for duplicative productions of documents already in Plaintiffs' counsel's possession. This saves the parties time and money, prevents unnecessary delay and avoids massive duplication. Plaintiffs' suggestion that Smith & Nephew's agreement to this cost-saving measure entitles them to unlimited discovery in this case is not supported by Texas law. Rather, the relevant question for the Court

to consider is whether the burden or expense of the proposed discovery is proportional to the needs of this particular case. *See* TEX. R. CIV. P. 192.4 (West 2020). As fully set forth in Smith & Nephew's Motion, the discovery completed in this case, which includes thousands of document requests and millions of pages of already produced documents, clearly exceeds the needs of this action. Additionally, the onslaught of discovery requests in this case and the *Kemp* matter has not prevented Plaintiffs' counsel from issuing similarly burdensome discovery requests in other cases. For example, "Set One" of Plaintiffs' counsel's Requests for Production and Things in a case pending in Los Angeles totaled 140 requests.

The discovery Plaintiffs served after the May 18, 2020 deadline may, as Plaintiffs state, "seek[] follow up information about production documents," but this does not change the fact that a limit must be placed on Plaintiffs' ability to keep issuing discovery requests. Over forty of these requests seek "follow up information" about documents produced in a case, *Kirby v. Smith & Nephew*, that preceded this one. The *Kirby* documents referenced in these requests were produced to Plaintiffs' counsel **in January 2018 at the latest**, and in most instances, even earlier. Plaintiffs cannot continue to be given the unbridled ability to issue more discovery requests simply because their requests relate to documents already produced. Plaintiffs have had 3,414 chances to request the documents they need in this case and another 4,050 chances to request these documents in the *Kemp* matter. They should not be rewarded with any more opportunities.

Lastly, the specific language in the parties' Rule 11 Agreement regarding "the deadline for serving additional discovery requests," which Plaintiffs' counsel proposed, signed, and filed, should be determinative of the deadline to serve written discovery requests. This language should take precedence over the language in the parties' Second Amended Scheduling Order, which, as

Plaintiffs state, "does not explicitly distinguish between written and other types of discovery." The Second Amended Scheduling Order is a standard form that makes no mention of the existing, agreed upon written discovery deadline. The purpose of entering that order was to extend the period by which to take depositions, since the coronavirus pandemic largely hobbled the parties' ability to do that. However, the Second Amended Scheduling Order says nothing about the Rule 11 agreement, and Smith & Nephew would not have consented to its entry if Plaintiffs' counsel would have disclosed that he believed it entitled him to continue battering the Defendants with written discovery requests. Therefore, any requests served after the Rule 11 Agreement's May 18 deadline, including the 206 requests Plaintiffs served on May 20-21, are untimely and should be treated as such.

On these facts, Smith & Nephew requests that the Court grant its Motion for Protection from Pending and Further Written Discovery and strike Plaintiffs discovery requests served after May 18, 2020.

Respectfully submitted,

By: */s/ Brian P. Johnson*

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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 12th day of June 2020 via email:

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