UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

IN RE: SMITH & NEPHEW BIRMINGHAM HIP RESURFACING (BHR) HIP IMPLANT PRODUCTS LIABILITY LITIGATION	MDL No. 2775 Master Docket No. 1:17-md-2775 JUDGE CATHERINE C. BLAKE **THIS DOCUMENT RELATES TO ALL ACTIONS**

DEFENDANT SMITH & NEPHEW, INC.'S BRIEF REGARDING REMOTE DEPOSITIONS

Defendant Smith & Nephew, Inc. ("Smith & Nephew") submits this brief in accordance with the Court's Memorandum to Counsel of May 12, 2020, to address the issue of remote depositions in this MDL as a result of the ongoing COVID-19 global pandemic. Specifically, Smith & Nephew addresses the following: (1) Plaintiffs' request that the Court adopt an order requiring all depositions be taken by remote means (or permitting the noticing party to determine unilaterally whether depositions will be taken remotely or in person); (2) the interrelationship between any amendment of CMO 16 deadlines and the ability to complete Core Discovery depositions and beyond; and (3) the need for a remote deposition protocol to facilitate taking of any depositions remotely.

At the outset of the pandemic, Smith & Nephew opposed proceeding remotely with depositions of surgeons for two primary reasons. First, and most importantly, Smith & Nephew believes it is unfairly prejudiced by remote depositions of surgeons whom Plaintiffs' counsel have met or talked with *ex parte* prior to the deposition, because the deposition is the only opportunity for Smith & Nephew's counsel to interact in person with these critical witnesses. To the extent that Defense counsel has been effective in at least trying to neutralize the impact of Plaintiff

counsel's prior *ex parte* communications, in-person interaction has been very important to that effort. Remote depositions simply do not allow for the ability to critically assess the credibility and persuasiveness of a witness, nor do they present the same opportunity to establish rapport as an in-person deposition. *See Quarrie v. Wells*, 2020 U.S. Dist. LEXIS 63710 (D. N.M. Apr. 10, 2020) ("The Court remains persuaded by Defendants' arguments regarding the prejudicial nature of remotely-taken depositions here, including the complexity of the case, the need to present documents, the probable length of the deponents' testimony, the possibility of technological difficulties, and the difficulty of preparing witnesses remotely").

Second, the technology used to take remote depositions is far from ideal, including the potential for delayed feeds, dropped or interrupted audio, difficulties in using exhibits, and poor video recordings. Indeed, depositions are intended to be precise and accurate, and anything that disrupts that process in a meaningful way could effectively undermine the impact of deposition testimony and the ability to hold witnesses accountable. Since most witnesses are outside the jurisdiction of the Court, these video recordings may be all that is available for any case ultimately tried in Maryland, so they effectively function as trial depositions and should be treated as such.

As the pandemic moves into a new phase of limited, scattered, and inconsistent re-openings, with the expectation that the situation may drag on for some period of time, Smith & Nephew understands and accepts that it is time to revisit its prior position on remote depositions. Yet, in doing so, it is cautious in considering or proposing avenues inconsistent with the equitable process already in place, and strives to avoid a solution that is more problematic than helpful. There can be no doubt that COVID-19 has and continues to put a strain on virtually all aspects of our society, including the legal and medical communities. However, this does not justify the abandonment of fundamental fairness and justice for all parties. While we all must continue to

adapt as conditions change, that does not justify prematurely adopting a one-size fits all "solution" that may be out of date almost as soon as it is put in place. An order that all depositions be taken remotely, even over the opposition of one party, would be premature and unfair, as discussed more fully below.[1]

Similarly, the extension of deadlines in CMO 16 (largely agreed upon) should be undertaken with the goal of retaining the status quo between the parties, to be revisited as the situation warrants. Simply allowing remote depositions will not address all of the scheduling problems created by the pandemic. However, given the reinstatement of both monthly status conferences and interim calls, the Court will have the opportunity to monitor and adjust deadlines as the situation requires. Remote depositions may prove adequate for some depositions; travel to take some depositions in person may be feasible over the next few weeks or months; society may continue gradually to re-open (or may lock down again); and surgeons (and the institutions they work for) may or may not be available or willing to schedule depositions. And these are only a few of the variables in this unprecedented situation. Smith & Nephew advocates an extension of deadlines that is reasonable in the circumstances, but that can and should be reconsidered and revisited as experience and developments dictate. Changes made now, as necessary, should not

[1] The Maryland District Court's COVID-19 Orders emphasize a preference for proceeding in civil discovery based on agreement, consistent with health guidelines and local authority, which is exactly what Smith & Nephew urges here. *See* In re: COVID-19 Pandemic Procedures Order 13, issued on April 10, 2020, clarifying that the suspension of filing deadlines in Standing Order 2020-07, which extended all filing deadlines set to fall between March 16 and June 5 by 85 days, "does not include the conduct of discovery in civil cases, *provided that all parties agree to continue with discovery, and that the conduct of discovery does not involve conduct by counsel or the parties that would contravene public health orders or directives issued in response to the COVID-19 pandemic*." (emphasis added)

prematurely alter the balance and the fair approach adopted in CMO 16, to the detriment of Smith & Nephew.

In light of the circumstances and the need to advance the litigation to the extent possible, Smith & Nephew is willing to proceed with a limited number of (up to five) remote depositions of surgeons on a trial basis, beginning with those whom the parties have both identified as likely candidates due to such factors as their having previously been deposed or who appear to be available in the relatively near future, or are otherwise agreed upon.[2] Smith & Nephew agrees that the parties should continue to try to put dates on the calendar for the remaining Core Discovery depositions, but the Court should not require those depositions to be taken remotely, or permit them to be taken remotely over the opposition of the opposing party. Instead, the parties should have the option to appear in person if possible, taking into account witness preference, the limitations imposed by individual medical institutions, and local or state social-distancing and other public health requirements. Smith & Nephew's strong desire is to attend depositions in person and is hopeful that this will be more feasible as time passes.

Once the first remote depositions are taken, the parties can report back to the Court and if different steps are needed, they can be addressed based on actual experience. It is premature to order Smith & Nephew to participate remotely in all depositions over its opposition and in the face of the prejudice that would result. The circumstances simply do not require such an order at this time.

[2] Without waiver, Smith & Nephew has elected not to pursue the issue of whether the Federal Rules of Civil Procedure permit depositions in which the court reporter is not present with the deponent, but the remote deposition protocol should include a requirement that depositions taken without a court reporter in the presence of the deponent meet certain conditions for verification of the deponent's identity, and that the local authority must permit the administration of the oath by remote means.

I. THE COURT SHOULD NOT ORDER THAT ALL DEPOSITIONS PROCEED REMOTELY.

Smith & Nephew opposes any order that would require all depositions to proceed remotely or to allow the noticing party to unilaterally force a remote deposition. Because Smith & Nephew is already disadvantaged with respect to surgeons who have met or talked *ex parte* with Plaintiffs' counsel, the parties are not similarly situated when it comes to remote depositions of surgeons. There is little doubt that Plaintiffs would see this matter quite differently if Smith & Nephew had the advantage of pre-deposition communications with the doctors and they did not. There can be no serious contention that Plaintiffs' pre-deposition meetings do not give them a meaningful and distinct advantage; otherwise, they would not have fought so hard to maintain their position, and taken full advantage of those communications so extensively.

The disadvantages of remote depositions of physicians fall disproportionately on Smith & Nephew. Plaintiffs have already had the opportunity, whether in person, via videoconference or on the phone, to talk through their theories of the case, to learn how the surgeon will respond to particular questions, and to build rapport and credibility.[3] They have also been able to share documents in advance of the deposition to allow the surgeon to take his or her time in reviewing them, using paper copies if he or she prefers. With a remote deposition, Smith & Nephew may be limited – even with perfectly functioning technology – to posting exhibits on the screen for the witness to review and respond to on the spot, with limited ability to assess understanding or ensure complete review of a multi-page exhibit (as with a paper document), for example. While this may

[3] After the telephone conference with the Court on May 11, Smith & Nephew's counsel asked Plaintiffs' counsel which surgeons Plaintiffs have spoken or otherwise communicated with but not met in person, but Plaintiffs' counsel declined to provide that information.

be necessary for some physician depositions, no one should be under the illusion that it is equally burdensome or problematic to both sides. It is not.

In addition, the technology for remote depositions, while improving, still poses a significant challenge. Smith & Nephew has consulted with several court reporting services, including the one the parties have used to date, and has found an array of different IT solutions, some better than others, none of which is ideal, and all of which hinge on uncontrollable factors such as the bandwidth available at each remote location, the availability of adequate computers, and a quiet location (recent videoconferences have been interrupted by sirens, lawn mowers, barking dogs and a grandfather clock, not to mention the infamous Supreme Court "flush" heard 'round the world). It is unnecessary to commit to a less-than-desirable process, over the objections of Smith & Nephew, without at least trying it out, pausing, and then evaluating its operation and effectiveness.

Following the telephone conference with the Court on May 11, Smith & Nephew reached out to Plaintiffs' counsel on May 13 to propose a compromise that would avoid the need for this briefing: Smith & Nephew would agree not to argue about the authority to order remote depositions, and to proceed with a limited number of "trial-run" remote depositions of surgeons who have previously been deposed or upon whom the parties agree, working with Plaintiffs to agree on a deposition protocol instead of spending time briefing these issues. In exchange, Plaintiffs would drop their request for an order requiring all depositions to be remote, and withdraw the requested language in CMO 16 prematurely trying to limit the pool of cases available for the Trial Pool. Plaintiffs refused this offer, insisting that the pandemic is a "drastic change in circumstances" that requires eliminating from eligibility for the Trial Pool all cases (regardless of how many that turns out to be out of the 17 cases agreed upon for the Discovery Pool) as to which

Core Discovery cannot be completed by the deadline set by the Court.[4] This is neither necessary nor reasonable.

This is not the first time Plaintiffs have proposed limiting the pool of cases eligible for selection to the Trial Pool. Their interest in cutting off discovery to push forward to trial predates the pandemic; only their use of the pandemic as a purported justification is new. However, in this changed world, their effort to cut corners to get to trial is actually even more inappropriate, not less. Consider, in particular, the fact that once cases are selected for the Trial Pool, another round of case-specific discovery will begin, involving in many cases depositions of larger numbers of treating physicians and fact witnesses than in the Core Discovery phase. With the pandemic's effects uncertain, and likely extending well into the Trial Pool discovery and expert discovery that is scheduled to occur this Fall (under the proposed 90-day-extended version of CMO 16), the difficulties in completing all of the necessary trial discovery, with or without limitations on the number of cases and even with some remote depositions, will be challenging at best.

In contrast, taking more time to complete Core Discovery on the 17 Discovery Pool cases in the coming months, and pushing the next phases into 2021 increases the likelihood that *all* of the necessary discovery can be completed and the process can unfold toward trial in the way the parties and the Court contemplated was most fair and equitable. It also allows for a less jam-packed schedule for expert discovery, *Daubert*, *in limine* and other trial-related motions practice, the schedule for which would be challenging in any event, and particularly so with counsel and the Court working from home and with staff and office facilities less available. Other than Plaintiffs' clear and continued desire to rush toward trial, there is no meaningful prejudice to either party in

[4] Plaintiffs did offer to share a draft remote deposition protocol, but none has been received as yet. Smith & Nephew hopes to work cooperatively with Plaintiffs to agree on as much of the protocol as possible and will review their proposal when it is received. *See* Section III.

this case by simply taking the necessary time to handle this matter consistent with the already agreed-upon discovery and Trial Pool selection process.

This District's general approach throughout the pandemic has been to encourage civil discovery to proceed *where the parties can agree to do so* consistent with public health guidelines. Here, Smith & Nephew is agreeing to a small number of remote depositions on a trial basis to keep discovery progressing. Other depositions can be put on calendar, if the witnesses agree, so that scheduling issues will not delay them if the parties can attend in person or if they agree to proceed remotely. This potentially includes some THA Track plaintiff depositions, as well as physician depositions. As parts of the country begin to open up, it may be possible to resume in-person depositions of some witnesses in some locations in the not-too-distant future, and this is Smith & Nephew's preference if at all possible. Events are unfolding and changing on a daily basis, making it premature to enter the blanket order Plaintiffs seek.

II. ANY AMENDMENT TO CMO 16 SHOULD PRESERVE THE STATUS QUO AND ENSURE FAIRNESS.

The discussion of any amendment to CMO 16 to extend the dates for discovery and motion practice leading to trial is interrelated with the remote depositions issue. Smith & Nephew has already made its position on an amendment to CMO 16 known to the Court, and will not unduly prolong its discussion here, other than to say that forcing video depositions in an effort to limit the need to extend the CMO 16 deadlines is neither practical, nor a fair and appropriate way to proceed, for all the reasons Smith & Nephew has already expressed. Circumstances have changed due to the pandemic; none of us can control them, and adjustments need to be made. But whether the first BHR trial is in April or June or later in 2021 is not going to matter in the greater scheme of things. Fundamental fairness does not need to be sacrificed as a result of the pandemic.

As Smith & Nephew has explained, even with a 90-day extension of the deadlines currently set forth in CMO 16, it will be nearly impossible to complete all the Core Discovery in the Discovery Pool Cases, because depositions could not begin before June, which would leave less than two months to complete them.[5] Entering an unrealistic extension of the CMO 16 deadlines, whether depositions are remote or in person, will create the need for further extensions a couple of months from now. While it would be reasonable to defer entry of an amended CMO 16 to see how the initial remote depositions unfold and whether other depositions can be scheduled and when (remote or in person, as the parties may agree), if an amendment is entered now, the situation calls for an extension of all deadlines for at least 120 days. And regardless of the length of any extensions in an amended CMO 16, it is apparent that the Court and parties will need to revisit these issues periodically.

Further, using an amendment to CMO 16 to force an early restriction in the number of cases eligible to be chosen for the Trial Pool, as Plaintiffs, urge, is unnecessary, makes no sense, and would encourage gamesmanship by the parties, potentially delaying certain depositions in hopes of eliminating particular cases from the potential Trial Pool. Even if the Court later concludes, after allowing sufficient time for the current process to unfold, that it should not wait to complete Core Discovery in all 17 cases before selecting the Trial Pool cases, there are better – and fairer – ways to address the situation at that time. Plaintiffs' proposed process is premature, arbitrary, and would not result in a representative and equally balanced number of cases for the

[5] Dr. Boucher, who remains to be deposed in four Discovery Pool cases, is a good example. Plaintiffs have represented that Dr. Boucher's deposition in all four cases can be completed by August 3, but his counsel has offered only two dates (June 26 and July 24) for three hours on each date. That is by no means enough time to complete his deposition in all four cases.

potential Trial Pool picks, nor would there be any assurance that a fair process led to the determination of which cases would be available for Trial Pool inclusion.

III. A REMOTE DEPOSITION PROTOCOL SHOULD BE NEGOTIATED

The Court has asked Plaintiffs to submit a proposed deposition protocol for remote depositions. Smith & Nephew agrees that it makes sense to have such a protocol in place before proceeding with remoted depositions, and awaits receipt of the protocol proposed by Plaintiffs so as to be able to comment and provide input as appropriate, but will be prepared to submit and discuss its own if necessary.

CONCLUSION

No party should be able to take advantage of the COVID-19 pandemic to further its position. Any amendment to CMO 16 should maintain the status quo while the parties conduct a small number of remote depositions on a trial basis. No party should be forced to conduct remote depositions, in light of the potential prejudice, technological challenges and ever-changing situation which makes it premature to impose a one-size-fits-all solution at this time. We will report to the Court on a regular basis, and so long as we are able to proceed currently with some remote depositions on a test basis, we can consider the issue with better information in the future. For all these reasons, the Court should decline to order that all depositions be taken remotely, or that the noticing party can force a remote deposition over the objections of the other side, and should further decline prematurely to limit the cases eligible for the Trial Pool.

Dated: May 18, 2020

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of May, 2020, copies of the foregoing were served via CM/ECF on all counsel of record.

/s/ Terri S. Reiskin
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