

March 31, 2020

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**RE: Status of Discovery**

Dear Counsel:

We hope this letter finds you and your families, friends and colleagues healthy and safe. This is an extremely challenging situation for all of us on personal and professional levels, and we are doing the best we can to navigate through the chaos as people and parents and human beings first, and lawyers second. We know you are endeavoring to do the same.

We will let MDL plaintiffs' attorneys know that Smith & Nephew believes that "business as usual" is an appropriate standard for Plaintiffs' Fact Sheets.

In terms of what you've termed "*ex parte*" surgeon conversations, as you know, that issue was previously briefed to the Court, and decided by Judge Blake. We have complied with the letter and the spirit of that Order at every step. You brought what is effectively a motion for reconsideration. As you know, your reconsideration motion has been fully briefed and previewed to the Court. It was set to be heard at a telephone hearing two weeks ago, but, understandably, the Court stayed deadlines for two weeks. The Order remains valid and we intend to continue to abide by it. As a professional courtesy to Kim Moore, we agreed to stand down on conducting any additional meetings with potential bellwether Plaintiff's treating physicians for two weeks, assuming we would all likely hear something from Judge Blake in that timeframe. S&N has apparently declined our offer, which is fine. We will continue to abide by the Order in place.

We appreciate S&N agreeing to a 30-day extension for the current deadlines in CMO 16. Specifically, we are not planning to produce expert disclosures on April 15. We agree that we should continue to discuss amendments to CMO 16, bellwether discovery schedules and trial planning in light of the constantly shifting ground to get a date certain for those disclosures.

Our view is that we should step back and determine whether the current overall bellwether and trial plan still makes sense in light of the drastically changed circumstances and the overall purpose of bellwether discovery as we lead up to trial set for early 2021. It isn't plausible to wait to resume surgeon depositions in BHR cases and likewise wait to begin depositions in the THA cases until such time as lawyers for the parties can all travel and be in the same room together, and devise a trial schedule around that landmark. The ground has shifted so significantly in the past ten days, it seems impossible to predict when things return to "normal." Although we have no

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greater insight than what we hear from the nation's science leaders, it does not seem possible that we will be able to resume traveling for depositions in May or even June.

Our preferred way forward is an agreement that, while not perfect, the parties will use video depositions with any surgeon, Plaintiff, sales representative, or fact witness who is willing and able to be deposed consistent with their personal health and safety under the circumstances. It is always our preference to take depositions live, in person, as well. Despite that preference, and in recognition of the unprecedented time we are all living in, we suggested we push forward with depositions via video at least in the short term. We would complete as many of these depositions as possible over the next 60 days, and then the BHR trial pool would be selected from the cases we were able to complete by that deadline. Obviously not every witness will be available, but we shouldn't give up before we even make an attempt. We should do the best we can with those who are available. Video depositions are an imperfect solution, but they are equally imperfect for both sides.

Further, while you cite two court orders, the vast majority of courts have entered contrary orders regarding video depositions. By way of example, we are including Orders from: the Second Circuit (both the U.S. District Court for the Eastern and Southern Districts of New York); the Fourth Circuit (the Eastern District of Virginia); the Fifth Circuit (the Middle District of Louisiana); the Seventh Circuit (the Northern District of Illinois); the Eighth Circuit (both the District of Minnesota and the District of Nebraska); and the Eleventh Circuit (the Southern District of Florida); the Governor of California; the Florida Supreme Court; the Indiana Supreme Court; the Supreme Court of Massachusetts; the Superior Court of New Jersey; Cook County, Illinois; Madison County, Illinois; Indeed, the Court of Appeals of Maryland entered an order on remote electronic participation in 2018 anticipating these very issues. Suffice it to say that while Plaintiffs prefer to conduct depositions live in person as well, worldwide people are being forced to conduct their daily lives in circumstances far from ideal at this point. It is our position we owe it to our respective clients and to the Court to keep things moving to the best of our abilities.

Because of the sudden increase in the need for video depositions, many court reporting firms have stepped up with features, options, tutorials, webinars, and options for doing video depositions - with exhibits - across the country. If you have not received notifications about this from any reporting firms, we are happy to forward you the contact information for various options. This is becoming standard practice in both single event and mass tort litigation, and there is no reason that MDL 2775 should be any different. It's been nearly three years since the MDL was formed, and we are presently set for the first bellwether trial in January of 2021. We believe we can work together in a cooperative way to achieve the common goal of continuing to move this litigation along apace.

Further, Dr. Boucher and Dr. Della Valle should both be able to be deposed via video on April 20<sup>th</sup> and 30<sup>th</sup>, respectively. As you know, both have already been deposed in person in this litigation, which obviates one of your biggest concerns about video depositions. Similarly, Dr. Peter Brooks has worked with Smith & Nephew for years, and it is our understanding that S&N has retained him to serve as an expert in this case. Therefore, there is no reason Plaintiffs should not be permitted to depose Dr. Brooks by video if that is the only option; clearly Smith & Nephew suffers no prejudice.




When we first proposed video depositions on March 11<sup>th</sup> and 12<sup>th</sup>, Smith & Nephew refused outright. We were particularly troubled as it was our clear impression that you indicated to Judge Blake that Smith & Nephew was open to this suggestion. Since then, the need for video depositions has only become clearer and Courts across the country have made this the default requirement. We believe Smith & Nephew's position is untenable under the circumstances.

We look forward to responses from Smith & Nephew on the numerous outstanding discovery issues that are pending, including the outstanding written discovery, further document productions, cost allocation for bellwether surgeon depositions, an audit trail on the internal review and production of the Dave Telling email regarding the label change (SN\_BHR\_MDL\_2235576), the destructive testing issue our expert would like to conduct, and deposition dates for additional witnesses.

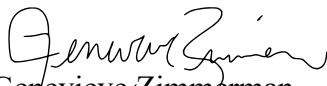
Sincerely,

**JONES WARD PLC**



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Co-Lead Counsel

**MESHBESHER & SPENCE, LTD.**



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