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IN RE PHYSIOMESH LITIGATION
(Flexible Composite Mesh)

FILED

NOV 14 2018

JOHN C. PORTO, J.S.C.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: ATLANTIC COUNTY
MASTER CASE NO. ATL-L-2122-18

CASE NO: 627
Civil Action

CASE MANAGEMENT ORDER NO. 3
(Depositions)

This matter having been opened to the Court at a Case Management Conference held on November 14, 2018; in the presence of the attorneys for the plaintiffs and the attorneys for the defendants; and good cause appearing;

IT IS on this 14th day of November, 2018,

ORDERED:

I. APPLICABILITY; STIPULATIONS

A. Applicability

This Order applies to all depositions in In Re Physiomesh Litigation, Case No. 627 (“Physiomesh MCL, No. 627”), except for expert witness depositions, which will be addressed by a separate Order.

B. Stipulations

The parties (and when appropriate, a nonparty witness) may by agreement alter, amend, or modify any practice relating to noticing or conducting of a deposition, including, but not limited to the provisions in this Order.

II. WITNESS IDENTIFICATION, SCHEDULING and TIMING

A. Good-Faith Cooperation and Coordination with Physiomesh MDL No. 2782¹

Counsel shall endeavor in good faith to agree upon the depositions to be taken and the scheduling of those depositions, taking into account (a) the need to preserve relevant testimony; (b) the overall discovery schedule established by the Court; (c) all applicable Rules Governing the Courts of the State of New Jersey; and (d) the logistics of document productions necessary for the depositions. Counsel shall cooperate in good faith to avoid unnecessary conflicts or imposing unreasonable travel demands or timing difficulties.

¹ *In re Ethicon Physiomesh Composite Hernia Mesh Products Liability Litigation*, MDL No. 2782

Moreover, given the similarity of facts and issues in these actions as they pertain to the Physiomesh device, and those consolidated in Physiomesh MDL No. 2782, Lead/Liaison Counsel shall engage in good faith efforts to coordinate with lead counsel in Physiomesh MDL No. 2782 to avoid duplicative depositions of the same witnesses, whenever reasonably possible. Nothing in this Order shall preclude Plaintiffs from fully deposing a witness on a non-Physiomesh Ethicon hernia mesh device even if the witness has previously been deposed in MDL No. 2782.

B. Identification of Company Fact and Rule 4:14-2(c) Depositions

1. On or before November 30 2019, Defendant shall serve a list of current and former company employees whose job duties or responsibilities included the following:
 - a. the sale of Physiomesh or the training or education of sales personnel relative to Physiomesh;
 - b. the marketing, physician education and/or physician training relative to Physiomesh;
 - c. the design of Physiomesh;
 - d. the testing of Physiomesh for safety and efficacy; and
 - e. analysis, investigation or handling of adverse event complaints (post-marketing surveillance).
2. Before scheduling depositions, the parties shall meet and confer in a good faith effort to address the following issues:
 - a. objections, if any;
 - b. whether the document collection for any of the custodians on the list warrants supplementation in advance of a deposition;

- c. whether plaintiffs will be seeking documents other than a custodial file with respect to a particular witness, and the timing of such requests in relation to production;
 - d. the timing and order of depositions;
 - e. whether coordination with other jurisdictions is appropriate; and
 - f. the method and recipient of service for former company employees.
3. To the extent the parties do not come to agreement on one or more of the issues set forth in paragraphs II.B.3.a-e above, the issue(s) shall be presented to the Court for resolution.
4. Defendants assert that it will take approximately 45 days to produce or supplement a custodial file to the date of production (depending on the number of custodians and volume of responsive materials) and that additional time may be required to the extent that plaintiffs seek documents beyond custodial files for a witness or in connection with a Rule 4:14-2(c) deposition. If the parties cannot agree on the time for production, the parties will bring the issue to the court for resolution.
5. Requests for additional company witnesses or Rule 4:14-2(c) depositions shall be handled consistent with the principles set forth in this Section (Section II).

III. NOTICES; SUBPOENAS

A. Notices

1. All depositions will be noticed and conducted pursuant to New Jersey Court Rule and the terms of this Order.
2. All notices of deposition or subpoenas shall be served at least 30 days before the scheduled deposition, to the extent practicable. Plaintiffs' counsel understands this is an exception to the New Jersey Court Rules, and only in this litigation do they agree to such terms and conditions. This exception is made solely for this litigation due to the facts and circumstances in this matter alone.
3. To the extent documents are sought from defendants in a notice or subpoena that have not already been discussed and agreed-upon by the parties in connection with the protocol in Section II above, such requests shall be made at least 45 days in advance of the date by which Plaintiffs' Lead Counsel seek the production of documents to allow for collection and production and/or resolution of objections, if any. Defendants will provide their written responses and objections to such document requests within 7 days. Plaintiffs' counsel understands this is an exception to the New Jersey Court Rules, and only in this litigation do they agree to such terms and conditions. This exception is made solely for this litigation due to the facts and circumstances in this matter alone.
4. Ethicon will produce documents agreed upon for production (or ordered by the Court if no agreement is reached) no later than 20 days in advance of a deposition. To the extent that defendants determine that they will be

unable to produce documents 20 days in advance, Defendants shall promptly advise Plaintiffs' Lead Counsel.

5. Lead Counsel shall be responsible for accepting service of notices of deposition and subpoenas and for distributing the same to affiliated counsel.

B. Third-Party Subpoenas

1. Third-party witnesses subpoenaed to produce documents shall be served with a subpoena *duces tecum* in accordance with the New Jersey Court Rules.
2. The parties recognize that documents that may be responsive to third-party subpoenas which may contain confidential and/or proprietary information that is subject to a Stipulated Protective Order entered in this matter.
3. Upon receipt of documents responsive to any third-party subpoena, counsel for Plaintiffs shall transmit one copy of the received documents to counsel for Defendants as soon as practicable. Defendants shall have 30 days from the receipt of the documents to make their confidentiality designations. Once the 30 days for confidentiality designations has expired, counsel for Defendants shall transmit to Plaintiffs' Lead Counsel a set of the documents with unique bates numbers (but also including the original bates numbers, if any) and the appropriate confidentiality designations in conformance with the provisions set forth in a Stipulated Protective Order. Those documents specifically designated as confidential by Defendants shall be protected under the provisions of the Stipulated Protective Order.

4. Any documents received in response to any third-party subpoenas shall be immediately treated as confidential under the Stipulated Protective Order and remain so for a period of 30 days from Defendants' receipt of the documents. During that time period, the documents may be used in depositions, but shall not be disseminated beyond counsel for Plaintiffs in this litigation, and their expert witnesses as necessary.
5. After Defendants have made their confidentiality designations, or the 30 day confidentiality designation period has expired, whichever is earlier, the original documents received by counsel for Plaintiffs (without the confidentiality designations) shall be maintained by Plaintiffs' Lead Counsel. To the extent that these documents have been loaded into any database or review platform without the confidentiality designations, those designations shall be added to these documents. These original documents shall be destroyed or returned at the conclusion of this litigation.
6. Nothing in this Agreed Order is a waiver of any right of Plaintiffs to challenge any confidentiality designation under the provisions of the Stipulated Protective Order.
7. Furthermore, nothing in this Order is intended to conflict with any other agreement concerning third party subpoenas, except that the requirements of this order will be the minimum requirements for the protection of confidential information.

IV. DEPOSITION PROCEDURES AND LIMITATIONS

A. General

1. No more than two depositions of current or former employees of the defendants may be scheduled by any party on the same day absent agreement by the parties or order of the Court.

B. Number of Depositions and Rule 4:14-2(c) Topics

1. For any witness who has been previously deposed in Physiomesh MDL No. 2782 without the participation of New Jersey counsel, the parties shall meet and confer to determine whether testimony taken in Physiomesh MDL No. 2782 may be admissible in this proceeding (subject to evidentiary objections other than that the deposition was not taken in this action), whether an additional deposition is necessary, and the scope and time anticipated to be needed for any such additional deposition. The parties shall work in good faith to avoid duplication of questioning and to prevent undue burden on witnesses. The fact that a topic was addressed in a prior deposition shall not in and of itself be a basis to object to or deny an additional deposition.
2. For all depositions of Defendants' current employees residing in the United States that are agreed to or ordered by the Court, such witnesses will be made available for deposition without requiring a subpoena.
3. Unless otherwise agreed, depositions shall take place only on business days (Mondays through Fridays, excluding legal holidays).

C. Sequence of Examination of Current and Former Company Employees

1. Except as otherwise ordered by the Court or agreed to by the parties, depositions are limited to ten and a half hours, as set forth in paragraph C (3) below. This limitation only extends to depositions noticed only in this MCL. Time management, sequence, and examination of cross-noticed and/or coordinated depositions may be addressed in subsequent Order(s).
2. To the extent a party seeks to take a deposition lasting in excess of these limits, the parties shall meet and confer to consider the time required for the deposition. If the parties are unable to agree, the issue will be presented to the Court.
3. A deposition may be recessed for the day by either party after 6 hours of testimony or any time after 6:00 pm local time. The deposition will resume the next day to finish the remaining initial examination, to be followed, if desired, by examination by the opposing party of up to two hours, reexam by the original examining party of up to one hour, and reexam by the opposing party of up to thirty minutes.

D. Treating Physicians

1. The parties agree that each side will have a reasonable opportunity to question individual treating physicians whose testimony is reasonably necessary under the circumstances of this case.
2. If the parties agree to a treating physician's request to limit the time for a deposition, the parties will work together to ensure that each side receives adequate time.

3. Any additional provisions with respect to treating physician depositions will be established by further order of the Court.

E. Coordination with Physiomesh MDL No. 2782/Cross-Noticing of Depositions

1. To the extent possible, depositions of Defendants' current or former company employees, corporate representatives, or other witnesses expected to be deposed in both this litigation and the Physiomesh MDL No. 2782 or any other action alleging injury from use of Physiomesh, shall be cross-noticed in the Physiomesh MDL No. 2782 and all other such actions.
2. Counsel in this litigation shall make good faith efforts to coordinate and otherwise cooperate with counsel in the Physiomesh MDL No. 2782 and any other action alleging injury from use of Physiomesh in scheduling depositions and establishing the duties for examination of the deponent. In the interest of efficiency, the use of examining attorneys shall be coordinated to the extent practicable for each deposition. This and all other provisions providing for coordination with the MDL are conditioned upon the assumption that the MDL and its leadership will fully cooperate with the New Jersey litigation. New Jersey counsel and litigants shall in no way be penalized in the event that the MDL and its leadership do not cooperate fully.
3. Under no circumstances shall more than two attorneys for each side (plaintiffs or defendants) from Physiomesh MCL, No. 627 question a witness. Plaintiffs' Lead/Liaison Counsel shall designate who will be permitted to question a witness at a deposition. Lawyers shall not ask

duplicative questioning, except to the extent necessary to establish foundation, where the witness fails to answer the question, where the witness is nonresponsive, or to address questioning deemed inadequate where the questioner did not have the opportunity to participate in the first instance

4. The parties will meet and confer in advance of any deposition cross-noticed with other proceedings in order to determine to what extent coordination and cooperation with other jurisdiction(s) is available and, if so, determine in advance of the deposition the sequence of examination and time parameters to be established. Nothing in this Order shall limit counsel from MCL No. 627 from questioning a witness regarding other products manufactured by Defendant which form the basis for claims in the MCL.

F. Use of Interpreter

1. All deposition questions will take place in English. If any witness requires an interpreter, the party defending the deposition shall endeavor to notify the party noticing the deposition at least 30 days before the deposition, or as soon as practicable after learning of the need, that an interpreter will be required.
2. Such depositions with an interpreter shall proceed in the same manner as all other depositions, except as follows:
 - a. A qualified interpreter (whom the parties will meet and confer to select) will translate all questions from English to the deponent's

- language, and will translate all of the deponent's answers back to English;
- b. The court reporter will be instructed to transcribe only the question (in English) and the interpreted answer (in English);
 - c. All depositions using an interpreter will be recorded in the native language and in English by audio and video recording;
 - d. All objections to the interpretation of any question or answer must be made within 60 days of receipt of the final transcript, or will be deemed waived;
 - e. At no point during the deposition will counsel for either party converse with the deponent in any language other than English;
3. If a witness testifies through an interpreter, the time limits for such deposition shall be increased as necessary.

V. COSTS AND TRANSLATORS

A. Cost of Physician Depositions, Translators

1. For depositions of physicians, the party noticing the deposition shall be responsible for payment.
2. For depositions requiring a translator, the party noticing the deposition shall be responsible for payment.

VI. ATTENDANCE; OBJECTIONS; DISPUTES

A. Attendance

1. Both Parties are encouraged to limit the number of attorneys present at any deposition. Defendants may have a client representative present.

2. Counsel for a party or nonparty witness shall have the right to exclude from depositions any person who is not authorized to receive HIGHLY CONFIDENTIAL Documents or Information pursuant to the Protective Order, but such right of exclusion shall be applicable only during periods of examination or testimony during which HIGHLY CONFIDENTIAL Documents or Information are being used or discussed. This does not include counsel for the deponent.

B. Objections

1. All objections, except as to the form of the question are reserved to the time of the trial and are not waived, including objections to the foundation.
2. An objection by one party reserves the objection for all parties.

C. Disputes

1. Disputes arising during depositions that cannot be resolved by agreement and that, if not immediately resolved, will significantly disrupt the discovery schedule, require rescheduling of the deposition, or possibly result in the need to conduct a supplemental deposition, shall be presented via telephone call to the Chambers of Judge Porto. The presentation of the issue and the Court's ruling will be recorded as part of the deposition.
2. In the event Judge Porto is not available, all efforts will be made to continue the deposition with full reservation of rights of the examination for a ruling at the earliest possible time.

VII. USE OF DEPOSITIONS

A. Use in Other Proceedings

Depositions may be used in accordance with the Rules Governing the Court of the State of New Jersey and/or as permitted by the New Jersey Rules of Evidence, be used against any party (including parties later added and parties in cases subsequently filed in, removed to, or transferred to this Court as part of this litigation): (a) who was present or represented at the deposition; (b) who had reasonable notice thereof; or (c) who, within 30 days after the completion of the deposition (or, if later, within 90 days after becoming a party in this court in any action that is a part of this litigation), fails to show just cause why such deposition should not be usable against such party.



HONORABLE JOHN C. PORTO, J.S.C.