

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

**In re:** : **MDL Docket No. 01-CV-9000**  
: **JUDGE O'MALLEY**  
**Inter-Op Hip Prosthesis Product** : **JUDGE O'MALLEY**  
**Liability Litigation** : **THIS DOCUMENT RELATES TO**  
: **ALL CASES**  
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**CASE MANAGEMENT PLAN**

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This Order shall apply to all cases currently a part of MDL-1401, as well as all cases subsequently filed in, removed to, or transferred to this Court as part of MDL-1401. This Order also vacates any prior scheduling order issued by a federal court prior to the transfer of a case to MDL-1401. The local rules of a federal transferor court will not be binding on the parties once a case has been transferred to MDL-1401, so long as the case remains before this transferee court.

**RESPONSIBILITIES OF COUNSEL**

A. Generally. Plaintiffs' Co-Lead Counsel shall be responsible for coordinating the activities of

Plaintiffs' Steering Committee ("PSC"), Special Counsel (SC), and Class Counsel ("CC")<sup>1</sup> during pretrial proceedings. Plaintiffs' Co-Lead Counsel shall also be responsible for coordinating the activities of the above counsel with the Special State Counsel Committee ("SSCC"),<sup>2</sup> to the extent reasonably possible. Co-Lead Counsel shall:

1. Determine (after consultation with other members of PSC and CC, and other counsel as may be appropriate) and present to the Court and opposing parties the position of Plaintiffs on all matters arising during pretrial proceedings;
2. Delegate specific tasks to other counsel in a manner to assure that pretrial preparation for Plaintiffs is conducted effectively, efficiently, and economically;
3. Enter into stipulations with opposing counsel necessary for the conduct of the litigation;
4. Prepare and distribute to the parties and to the SSCC periodic status reports;
5. Maintain adequate time and expense records covering services of the PSC, SC, and CC;
6. Monitor the activities of co-counsel to assure that schedules are met and unnecessary

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<sup>1</sup> The Court temporarily appointed the following individuals as MDL Co-Lead Counsel in its Order dated July 6, 2001, and confirmed those appointments in its Order dated August 17, 2001: John R. Climaco, R. Eric Kennedy, and Stanley M. Chesley. In the same Orders, the Court appointed Mr. Kennedy as Plaintiffs' Liaison Counsel.

The Court appointed the following individuals as Class Co-Counsel in its Order dated August 29, 2001, at 2-3: John R. Climaco, R. Eric Kennedy, Donald Barrett, Keith M. Fleischman, Richard S. Wayne, Stanley M. Chesley, Wendell H. Gauthier, and Daniel E. Becnel, Jr.

The Court temporarily appointed the members of the Plaintiffs' Steering Committee in its Order dated July 6, 2001, and confirmed those appointments in its Order dated August 17, 2001. The 17 members of the PSC are listed in Exhibit A to docket no. 2. The Court temporarily appointed the members of Special Counsel in its Order dated July 6, 2001, and confirmed those appointments in its Order dated August 17, 2001. The 14 members of SC are listed in Exhibit B to docket no. 2 (listing 11 members), as amended by the addendum to docket no 16 (adding 3 members).

<sup>2</sup> The SSCC is discussed further in the following subsection.

expenditures of time and funds are avoided;

7. Perform such other duties as may be incidental to proper coordination of Plaintiffs' pretrial activities or as authorized by further order of the Court;
8. Negotiate or appoint representatives to negotiate any and all discovery-related resolutions in the MDL. It remains, however, the duty and obligation of CC to negotiate any amendment to the proposed settlement agreement.

B. Participation of State Court Counsel.

**The Court invites the submission of applications (two-page letters) from attorneys representing class members in state court actions to participate in discovery in this case.** From these applications, the Court shall appoint a seven-member committee to assist in and/or monitor the discovery process of MDL-1401. Applicants should briefly describe their qualifications, explain why they seek appointment to the SSCC, and set out how they would add to and work with the PSC, CC, and SC. See also page 9 of this Order ("Responsibility").

Co-Lead Counsel will make reasonable efforts to ensure that the SSCC is kept apprised of the course of this litigation, and particularly the general status and results of discovery efforts. Co-Lead Counsel will also coordinate its activities, to the extent possible, with the SSCC to ensure its participation in discovery.

- C. Term of Appointment. The persons who accept the appointment to serve as CC, SC, and on the PSC and SSCC agree to serve for the duration of this litigation or until such time as the Court

determines that a change in the duration of service or other terms of service shall be made. The Court may decide from time to time to enlarge or reduce the size of the PSC, or to change the membership of the PSC, SC, CC, SSCC, or Co-Lead Counsel, depending upon such need brought on by the litigation.

The Court has appointed the named persons to the PSC and SC because of the expectation of their personal contribution to the work of the PSC and to the furtherance of the completion of the MDL portion of the litigation. For this reason, the Court will look to the individual members to satisfy the goals that the Court expects the PSC to achieve. The Court will likewise consider the contribution of each of the PSC members when the Court is called upon to determine appropriate compensation for service rendered by the PSC. While the Court contemplates that each of the PSC members will require the assistance of colleagues, paralegals, support staff, and others in the fulfillment of their committee assignments, the Court expects the individual members to be responsible for the ultimate outcome of the activities performed by the PSC.

D. Liaison Counsel.

The primary function of Liaison Counsel is to receive service of all pleadings (except service of the original complaint naming a party), motions, briefs, orders, and similar papers on behalf of all Plaintiffs and Defendants, respectively, in all cases that have been or are subsequently filed in, removed to, or transferred to the United States District Court for the Northern District of Ohio, Eastern Division, as part of MDL-1401. Liaison Counsel are also designated to receive service on behalf of other persons on the “Panel Service List” of all orders issued by, and all petitions, requests, motions, notices of opposition,

briefs, and other papers filed with, the Judicial Panel on Multidistrict Litigation for MDL-1401. Liaison Counsel are responsible for promptly distributing such papers to the parties for whom they are acting as Liaison Counsel, and who are not registered to receive Electronic Service, on a “need to know” basis, and for providing a convenient, inexpensive means by which any other parties for whom they are acting can obtain copies if desired. In determining the persons to whom further distribution and dissemination of papers should be made, Liaison Counsel are expected to exercise discretion and judgment to eliminate unnecessary costs. Other administrative functions may be assigned from time to time to Liaison Counsel by the court.

E. Service Upon Liaison Counsel.

Service upon Liaison Counsel is sufficient service except in the following circumstances:

1. Motions claiming default or seeking other penalties or sanctions against a party for failure to take some action within a time period measured from the date of service of a document must be served on counsel of record for that party as well as Liaison Counsel; and
2. Case specific filings (i.e. papers that affect only a particular party or a particular case – for example, a motion seeking to dismiss a party in a case or to remand a case to state court) must be served on counsel in that specific case, as well as on Liaison Counsel.

The clerk shall copy each Court Order to Liaison Counsel for distribution as appropriate to counsel and parties. The clerk shall also serve each Order electronically to all counsel who have registered for Electronic Service.

F. Communication Among Counsel.

This Court recognizes that cooperation by and among Plaintiffs' counsel and by and among Defendants' counsel is essential for the orderly and expeditious conduct of this litigation. The communication of information among and between Plaintiffs' counsel and Defendants' counsel shall not be deemed a waiver of their attorney-client privilege or the protection afforded attorney's work product, and cooperative efforts contemplated above shall not in any way be used against any Plaintiff by any Defendant or against any Defendant by any Plaintiff. Nothing contained in this paragraph shall be construed to limit the rights of any party or counsel to assert the attorney-client or joint defense privilege or the attorney work-product doctrine.

**ELECTRONIC FILING**

The Court has ordered this matter into the Electronic Case Filing System. See Order dated August 17, 2001. The parties are expected to follow the Northern District of Ohio's policies and procedures on Electronic Case Filing. For further information on this topic, see the "NOTICE" included in the Court's "PRACTICE & PROCEDURE ORDER" dated July 6, 2001.

**REFINEMENT OF ISSUES**

A. Class Action Complaint.

Plaintiffs' Counsel filed an Amended and Consolidated Class Action Complaint (Master Complaint) on August 15, 2001. The allegations of the Master Complaint are not deemed automatically included in any particular case. However, in order to avoid possible problems with statutes of limitations

or doctrines of repose, it shall be deemed (except to the extent a Plaintiff thereafter files an amended complaint disavowing such claims and theories or limits its claims and theories to those contained in an amended complaint) that as of this date, for cases now pending in this Court (or as of the date other cases are filed in, removed to, or transferred to this Court), a motion is filed in each such case to amend the complaint to add any claims, theories and parties from the Master Complaint not contained in the complaint actually filed in that case. The Court's Order of August 29, 2001 and Memorandum and Order signed August 31, 2001 were based on this Master Complaint.

B. Answer, Cross-claims and Counterclaims.

Defendants shall file an answer to the Master Complaint and any cross-claims or counterclaims thereto, by September 15, 2001. Defendants' answer to the Master Complaint shall constitute an answer to any and all related actions transferred to this Court.

C. Additional Parties.

Except with leave of Court, no additional parties may be added after November 15, 2001.

**NOTICE**

A. Preliminary Notice.

The parties shall jointly file a motion with the Court by September 17, 2001 to approve the mailing of "Preliminary Notice" to class members.

B. Final Notice.

The Parties shall jointly file a motion with the Court by December 15, 2001 to approve the mailing of “Final Notice” to class members.

C. Content.

Both the Preliminary and Final Notice shall include the following established dates:

1. March 2, 2002. This shall be the last date in which a class member will be allowed to: (a) exercise their right to opt-out of the settlement; (b) file a written objection to the settlement; or (c) submit a written request to participate in the Fairness Hearing.
2. March 12, 2002 at 10:00 a.m. This shall mark the commencement of the Fairness Hearing to determine the fairness and reasonableness of the proposed Class Action Settlement Agreement.

D. Timing of Notice.

Preliminary Notice shall be sent no later than October 10, 2002. Final Notice shall be sent no later than January 5, 2002.

E. Manner of Notice.

The plan of Notice shall include direct mail, publication, and the establishment of a website.

## DISCOVERY - GENERALLY

### A. Scope.

The scope of discovery shall include, but not be limited to, the following:

1. The direct and indirect liability of Sulzer AG for claims relating to either the “Inter-Op Acetabular Shell” or the “Natural Knee Tibial Baseplate;”<sup>3</sup>
2. Insurance coverage applicable to all claims relating to either the Inter-Op Acetabular Shell or the Natural Knee Tibial Baseplate;
3. The financial condition of Sulzer Medica; and
4. Issues relating to the alleged liability of all Defendants for any personal injury claims arising out of implantation of the Natural Knee Tibial Baseplate.

### B. Responsibility.

All discovery undertaken by the Plaintiffs shall be at the direction of Co-Lead Counsel, with the input of CC, SC, and the PSC. The role of the SSCC in discovery will be determined after receipt of applications and suggestions therein.<sup>4</sup>

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<sup>3</sup> While the Court has not included claims relating to the Natural Knee implant within its conditional class certification or preliminary settlement approval, the parties continue to contend that it may be appropriate to expand the class and settlement ultimately approved in this case, if any, to include such claims. The Court finds, accordingly, that it is more efficient to include issues relating to this knee implant within the scope of expedited discovery to be conducted under this Order.

<sup>4</sup> With regard to participation of the SSCC in deposition discovery, see page 16-17 of this Order (“attendance”).

C. Attempts to Resolve Disputes.

To avoid unnecessary litigation concerning discovery disputes, counsel are directed to meet in person and confer before contacting the Court. The Court will meet with Co-Lead Counsel for Plaintiffs and Lead Counsel for the Defendants on a monthly basis to address any unresolved discovery disputes. If discovery disputes arise which the parties cannot resolve on their own and which require resolution before the next regularly scheduled meeting with the Court, the parties shall contact the Court by telephone. The Court, at its discretion, will then either: (1) schedule an additional meeting with Lead Counsel; (2) conduct a telephonic conference call with Lead Counsel; or (3) invite written submissions from the parties explaining the dispute. Any motion to compel or motion for protective order not previously authorized by the Court will be summarily denied for failure to follow this procedure.

**WRITTEN DISCOVERY**

A. Preservation of Evidence.

Each party and its respective officers, agents, servants, employees, subsidiaries and attorneys shall preserve all devices, tangible things, documents, and other records. Preservation includes the obligation not to alter any such thing as to its form, content, or manner of filing. Each party shall notify in writing (which in this context excludes e-mail) its respective officers, agents, servants, employees, subsidiaries and attorneys of their obligation to preserve documents in accordance with this Order.

Before any devices, tangible things, documents, and other records which are reasonably calculated to lead to admissible evidence are destroyed, altered, or erased, counsel shall confer to resolve questions as to whether the information should be preserved. If counsel are unable to agree, any party may apply

to the Court for clarification or relief from this Order upon reasonable notice.

B. Scope.

The scope of this Order is to tangible things and documents containing information potentially relevant to the subject matter of this litigation. Any tangible thing, document, or information described or referred to in any discovery request or response made during this litigation shall, from the time of the request or response, be treated for purposes of this Order as containing potentially relevant information, unless and until the Court rules such information is irrelevant.

“Document” shall mean any writing, drawing, film, videotape, chart, photograph, phonograph record, tape recording, retrievable data (whether carded, taped, coded, electrostatically or electromagnetically recorded, or otherwise), or other data compilation from which information can be obtained, including but not limited to notices, memoranda, diaries, minutes, purchase records, purchase invoices, market data, correspondence, computer storage media, books, journals, ledgers, statements, reports, invoices, bills, vouchers, worksheets, jottings, notes, letters, abstracts, audits, charts, checks, diagrams, drafts, recordings, instructions, lists, logs, orders, recitals, transcripts, telegram messages, telephone bills and logs, resumes, summaries, compilations, computations, and other formal and informal writings or tangible preservations of information.

C. Confidentiality.

The “Stipulated Protective Order” signed by this Court on July 24, 2001 shall apply to this litigation.

D. Document Repositories.

A Document Repository has been established at the offices of Weisman, Goldberg & Weisman, Co., L.P.A. located at 1600 Midland Building, Cleveland, Ohio 44115. The protocol for the inspection of documents at the Repository may be requested by contacting Donna Rozman by telephone at (216) 781-1111 x229 or by email transmission at [drozman@weismanlaw.com](mailto:drozman@weismanlaw.com).

E. Numbering System and Indexing of Documents.

The parties shall develop and use a system for identifying, by a unique number or symbol, each document produced or referred to during the course of this litigation. Each producing party will give each page of its documents produced a unique number, using a numbering system that identifies the producing party (using a letter or series of letters as a prefix). All reasonable efforts should be made to avoid having the same page assigned more than one identifying number except when there is a need to account for different copies of the same document or page, for example, because of special notations being placed on the document.

F. Document Inventories.

Each producing party shall prepare an inventory covering all of the documents produced. The inventory shall reasonably describe, given the time and expense constraints and the volume of documents to be inventoried, the contents of each banker's box or similar unit of documents. If the producing party already has an index or inventory to some or all of the documents produced (an "existing index"), the inventory may consist (in whole or in part) of this existing index so long as it meets the criteria described

within this paragraph. The inventory shall include any identifying number already on such box or similar unit. Each inventory shall also list the persons responsible for the preparation of the inventory.

The inventories are intended to permit the parties: (a) to make a general determination of the existence or location of particular categories of documents, and (b) to determine whether the parties have complied with this Order. Each inventory shall contain a statement, under penalty of perjury, that the party has made a good faith effort to assure that the inventory matches the documents delivered by that party.

G. Documents Produced by Non-Parties.

In the event that documents are produced by persons or entities who are not parties to this action when produced, the party at whose request production was made shall be responsible for numbering the documents in accordance with the terms of this subsection.

H. Legibility of Documents.

Each producing party shall take reasonable steps to assure that the copies of the documents it produces are legible. To the extent a producing party cannot or does not produce a legible copy, it shall make the original document(s) available for inspection and copying.

I. Authentication.

Documents produced, whether as part of the initial disclosure, in response to formal document requests, or by agreement, shall by reason of such production be deemed to be authentic documents under Fed. R. Civ. P. 901, and be deemed to qualify as records of regularly conducted business activities under

Fed. R. Evid. 803(5), unless at the time of production, or within fifteen days thereafter, or 15 days from the date of this Order for previously produced documents, the producing party specifies that a document is or may not be authentic, or is or may not be a record of regularly conducted business activity. All such specifications shall identify the document with particularity and briefly indicate the basis or reason for the belief that the document is or may not be authentic or a business record.

J. Inadvertent Disclosures.

The inadvertent production or disclosure of any privileged, confidential or otherwise protected document shall not be deemed a general waiver of privilege, confidentiality or work product protection as to the document inadvertently produced or disclosed. In the event of inadvertent disclosure of any document, promptly upon discovery of such inadvertent disclosure, the producing party may notify any party receiving the document that production was inadvertent, and that the producing party intends to move the Court for a protective order with respect thereto. Upon receipt of such notification, the receiving party shall treat the document as confidential, and shall not disclose the document to any other person or use the document for any purpose in this litigation. Upon finding that the document is privileged, confidential, or otherwise protected, and that its production was inadvertent, the Court may direct the return of the document and all copies thereof to the producing party, preclude the use of the document and any information contained therein for any purpose in this litigation, and order such other relief as the Court deems necessary and appropriate. Before making application to the Court for such relief, the producing party shall confer with the receiving party in an attempt to resolve informally any dispute regarding the inadvertent production.

## **WRITTEN DISCOVERY – SCHEDULE**

### **A. Master Set – Scheduling.**

1. Plaintiffs shall propound a single master set of interrogatories and document requests addressed to the Defendants on September 10, 2001; and

2. Defendants may propound a single master set of interrogatories and document requests to the Class Representatives by October 14, 2001.

Responses and answers shall be served and made within twenty days after receipt of the discovery requests. For purposes of these and any subsequent interrogatories, the limitations on the number of interrogatories of Fed. R. Civ. Proc. 33(a) shall not apply.

### **B. Additional Document Requests.**

The parties will confer concerning, and attempt in good faith to agree upon, any additional document requests not described above. In the absence of agreement, no further document requests may be propounded to Plaintiffs or Defendants without prior Order of the Court.

### **C. Supplementation of Responses.**

The supplementation of responses required by Fed. R. Civ. P. 26(e) shall be made by the parties, at the latest, thirty days from the date of Defendants' initial disclosures, and every thirty days thereafter.

### **D. Document Subpoenas to Non-Parties.**

Commencing upon entry of this Order, any party may serve subpoenas on non-parties for the

production of documents without testimony, pursuant to Fed. R. Civ. P. 45.

## **DISCOVERY – DEPOSITIONS**

A. Cooperation.

Counsel are expected to cooperate with, and be courteous to, each other and deponents.

B. Timing Of Depositions And Notice.

Depositions shall begin immediately and be concluded by January 1, 2002. Notice of each deposition shall be provided to all counsel of record in MDL-1401, and to counsel in state court cases by liaison counsel **for the Defendants**.

C. Postponements.

Once a deposition has been scheduled, it shall not be taken off calendar, postponed, rescheduled, or relocated less than three calendar days in advance of the date it is scheduled to occur, except upon agreement or by leave of Court for good cause.

D. Attendance.

Unless otherwise agreed, depositions may be attended only by CC (or their designees, which may be selected from the PSC or SC), class representatives, lead and liaison defense counsel, the deponent, the deponent's attorney, in-house counsel for the parties, court reporters, videographers, and any person who is assisting the litigation whose presence is reasonably required by counsel. In addition, two (2)

representatives from the SSCC may attend any deposition and ask non-duplicative questions. While a deponent is being questioned about any stamped confidential document or the confidential information contained therein, persons to whom disclosure is not necessary under the confidentiality Order shall be excluded.

Unnecessary attendance by counsel is discouraged and may not be compensated in any fee application to the Court. Counsel who have only marginal interest in a proposed deposition or who expect their interests to be adequately represented by other counsel may elect not to attend and to conduct supplemental interrogation of the deponent should a review of the deposition reveal the need for such examination.

E. Numbering of Deposition Exhibits.

Each document referred to at deposition shall be referred to by its production number (alpha-numeric) rather than by exhibit numbers, except in the case of documents which have not yet received production numbering at the time of the deposition.

F. Conduct.

Each side should ordinarily designate no more than two attorneys to participate in the deposition. One attorney will normally conduct the principal examination of the deponent, and examination by the other attorney should be limited to matters not previously covered. Counsel should cooperate in the allocation of time so that time limits set by the Court are complied with.

Counsel shall comply with Fed. R. Civ. P. 30(d)(1). Directions to the deponent not to answer are

improper except on the ground of privilege or to enable a party or deponent to present a motion to the Court for termination of the deposition on the ground that it is being conducted in bad faith or in such a manner as unreasonably to annoy, embarrass, or oppress the party or the deponent.

The only objections that may be raised at the deposition are those involving a privilege against disclosure or some matter that may be remedied if presented at the time, such as to the form of the question or the responsiveness of the answer. Objections on other grounds are unnecessary and should not be made. Any objections that are made must be stated concisely and in a non-argumentative and non-suggestive manner, such as would be appropriate if the examination was conducted before a judicial officer.

When a privilege is claimed, the witness should nevertheless answer the questions relevant to the existence, extent, or waiver of the privilege, such as the date of a communication, who made the statement, to whom and in whose presence the statement was made, other persons to whom the contents of the statement have been disclosed, and the general subject matter of the statement.

Private consultations between deponents and their attorneys during the actual taking of the deposition are improper except for the purpose of determining whether a privilege should be asserted. Unless prohibited by the Court for good cause shown, such conferences may be held during normal recesses and adjournments.

G. Disputes.

Disputes arising during depositions that cannot be resolved by agreement and that, if not immediately resolved, will significantly disrupt the deposition schedule, would require a rescheduling of the deposition, or might result in the need to conduct a supplemental deposition, shall be presented to the Court

by telephone. In the first instance, the parties are directed to negotiate such disputes in good faith. In the event agreement cannot be reached after such negotiation, any party seeking a ruling from the Court shall arrange such a telephone conference call with the Court's law clerk at the Court's earliest convenience. Facilities shall be provided so that counsel attending the deposition and the reporter can hear the proceedings.

The deposition reporters shall make a transcript along with a formatted disc of the conference call, which will be transcribed immediately and bound separately. During such proceedings, counsel shall have the opportunity to argue to the Court and the Court will, whenever possible, resolve the dispute during the conference call proceedings.

In the event the Court is unavailable by telephone to resolve disputes arising during the course of a deposition, the deposition shall nevertheless continue to be taken as to matters not in dispute.

None of the provisions in this paragraph shall deny counsel the right to continue the deposition, file an appropriate motion with the Court at the conclusion of the deposition, and appear personally before the Court if counsel deems it necessary.

Disputes between the parties should be addressed to this Court rather than to the District Court in which the deposition is being conducted.

H. Location.

Except as otherwise agreed by liaison counsel or ordered by the Court, all depositions of fact witnesses who are current or former officers, directors or employees of a party Defendant shall be conducted in the witness's area. The location of non-party depositions will be determined by agreement

of the counsel who notices the deposition and the witness or his/her counsel. Depositions conducted outside of the United States may be conducted by telephone or teleconference.

I. Stenographic Recording.

A certified court reporter shall stenographically record all deposition proceedings and testimony. The court reporter shall administer the oath or affirmation to the deponent. A written transcript by the Court reporter shall constitute the official record of the deposition for purposes of Fed. R. Civ. P. 30(e) (submission to the witness) and 30(f) (filing, exhibits). The court reporter chosen shall have the means to make available transcripts in electronic format.

J. Videotaping.

Any deposition may be videotaped at the request of any party pursuant to the following terms and conditions:

1. All videotaped depositions shall be simultaneously stenographically recorded.
2. The party requesting videotaping of the deposition shall bear the expense of videotaping.
3. The operator(s) of the videotape recording equipment shall be subject to the provisions of Fed. R. Civ. P. 28(c). At the commencement of the deposition, the operator(s) shall swear or affirm to record the proceedings fairly and accurately.
4. Each witness, attorney, and other person attending the deposition shall be identified on camera at the commencement of the deposition. Thereafter, only the deponent (and demonstrative materials used during the deposition) will be videotaped.

5. No attorney shall direct instructions to the video operator as to the method of operating the equipment. With regard to interruptions, the video camera operation will be suspended during the deposition only upon stipulation by counsel and “off the record” discussions. The video operator shall record on camera the time of suspension and any subsequent reconvening of the deposition.
6. The deposition will be conducted in a manner to replicate, to the extent feasible, the presentation of evidence at trial. Unless physically incapacitated, the deponent shall be seated at a table except when reviewing or presenting demonstrative materials for which a change in position is needed. To the extent practicable, the deposition will be conducted in a neutral setting, against a solid background, with only such lighting as is required for accurate video recording. Lighting, camera angle, lens setting, and field of view will be changed only as necessary to record accurately the natural body movements of the deponent or to portray exhibits and materials used during the deposition. Sound levels will be altered only as necessary to record satisfactorily the voices of counsel and the deponent. Eating and smoking by deponents or counsel during the deposition is not permitted.
7. The videotape operator shall use an index/counter on the recording equipment and, after completion of the deposition, shall prepare a log, cross-referenced to counter numbers, that identifies the positions on the tape at which: (1) examination by different counsel begins and ends; (2) objections are made and examination resumes; (3) which exhibits are identified; and (4) any interruption of continuous tape-recording occurs, whether for

recesses, “off-the-record” discussions, mechanical failure, or otherwise.

8. After the deposition is completed, the video operator shall certify on camera the correctness, completeness, and accuracy of the videotape recording in the same manner as a stenographic Court reporter, and file a true copy of the videotape, the transcript, and certificate with liaison counsel for whomever noticed the deposition.
9. Depositions may, under the conditions prescribed in Fed. R. Civ. P. 32(a)(1-4), or as otherwise permitted by the Federal 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 thirty (30) days after the filing of the deposition (or, if later within sixty (60) days after becoming a party in this Court in any action which is a part of this litigation), fails to show just cause why such deposition should not be usable against such party.

K. Depositions of Expert-Related Fact Witnesses.

The parties may also depose during the period reserved for depositions of expert witnesses, persons or entities whom any expert testifies he or she relied upon to form opinions, or who form any part of the foundation for any of the testimony of the expert. The depositions of expert-related witnesses shall take place on no more than two tracks, one for the Plaintiffs and one for the Defendants, and shall be in addition to the single track for the depositions of the experts themselves.

**DISCOVERY – FAILURE TO DISCLOSE**

A party's failure to either produce or identify as withheld (pursuant to privilege) a relevant document will be viewed by the Court as a serious infraction of its Orders, justifying appropriate sanctions, unless exceptional circumstances justify the failure. Upon learning that there are any additional relevant documents which have not been produced or identified, a party is under an obligation to promptly make known the existence of the documents, including the reason for its failure, and submit the documents to the opposing party, or if withheld under a claim of privilege or protection, identify the documents.

**IT IS SO ORDERED.**

**s/Kathleen M. O'Malley**  
**KATHLEEN McDONALD O'MALLEY**  
**UNITED STATES DISTRICT JUDGE**