

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE: ETHICON PHYSIOMESH : MDL DOCKET NO. 2782
FLEXIBLE COMPOSITE : CIVIL ACTION NO.
HERNIA MESH PRODUCTS : 1:17-MD-02782-RWS
LIABILITY LITIGATION :
:

This document relates to: :

: Civil Action No.: _____
:

**PLAINTIFFS' MOTION TO PRECLUDE DEFENDANTS' EX PARTE
COMMUNICATIONS WITH PLAINTIFFS' TREATING PHYSICIANS
FOR PURPOSES OF RETAINING EXPERT WITNESSES**

Plaintiffs, by and through counsel, hereby move this Honorable Court to issue an order prohibiting Defendants' *ex parte* contact with Plaintiffs' treating physicians for the purpose of retaining Plaintiffs' treating physicians as "consultants" or experts." In support of this motion, Plaintiffs have submitted a memorandum of law herewith.

Respectfully submitted this 1st day of November 2017,

/s/Donald Migliori

Donald Migloiri

SC Bar#102549

Motley Rice, LLC

28 Bridgside Blvd

Mt. Pleasant, SC 29464

Attorney for Plaintiffs

FONT CERTIFICATION

Pursuant to Local Rule 7.1 D, I hereby certify that the foregoing document was prepared using Times New Roman 14 point type as provided in Local Rule 5.1.

/s/ Donald A. Migliori

Donald A. Migliori

CERTIFICATE OF SERVICE

I certify that on the 1st day of November, 2017, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which will automatically send e-mail notification of such filing to the following attorneys of record:

Jon Collins Conlin Mitchell Theo Theodore CORY WATSON ATTORNEYS 2131 Magnolia Avenue Birmingham, AL 35205 205-328-2200 Fax: 205-324-7896 Email: jconlin@corywatson.com mtheodore@corywatson.com Counsel for Plaintiff Patricia Wright v. Johnson & Johnson, et al, Case No. 1:17-cv-00526 (N.D. AL); George Holloway v. Johnson & Johnson, et al, Case No. 4:17-cv-00527 (N.D. AL);	Ryan Ladd Thompson Shelly Sanford Watts Guerra LLP - Austin, TX 811 Barton Springs Rd., Ste. 725 Austin, TX 78704 512-479-0500 Fax: 512-479-0502 Email: rthompson@wattsguerra.com Counsel for Plaintiff Daniel R. Ryder v. Ethicon, Inc., et al, Case No. 2:17-cv-01374 (AZ)	Mitchell Lloyd Berry Mitchell Law Firm 415 N McKinley St. Suite 1177 Little Rock, AR 72205 (501) 661-1000 ext. 2139 Email: mberry@dhgw.net Counsel for Plaintiff Valerie Sundberg v. Johnson & Johnson, et al, Case No. 4:17-cv-04014 (W.D. AR)
Arthur Mark Handel Arthur M Handel APLC 970 Meadowlark Drive Laguna Beach, CA 92651 949-637-1389 Email: handelplc@yahoo.com Counsel for Plaintiff Heather Haug, et al v. Johnson & Johnson, et al, Case No. 8:17-cv-00817 (C.D. CA)	Anita C. Pryor Terrell Hogan, PA 8th Floor 233 E Bay St Jacksonville, FL 32202 904/632-2424 Fax: 904/632-0549 Email: pryor@terrellhogan.com Counsel for Plaintiff Collin G. Ward, et al v. Johnson & Johnson, et al, Case No. 5:17-cv-00142 (M.D. FL)	Donald A. Migliori Lance V. Oliver Motley Rice, LLC 28 Bridgeside Blvd Mount Pleasant, SC 29464-4399 843/216-9000 Fax: 843/216-9450 Email: dmigliori@motleyrice.com loliver@motleyrice.com Counsel for Plaintiff Collin G. Ward, et al v. Johnson & Johnson, et al, Case No. 5:17-cv-00142 (M.D. FL)

Jonathan D. Orent Kate E. Menard Motley Rice LLC 55 Cedar Street Suite 100 Providence, RI 02903 401/457-7700 Fax: 401/457-7708 Email: jorent@motleyrice.com kmenard@motleyrice.com Counsel for Plaintiff Collin G. Ward, et al v. Johnson & Johnson, et al, Case No. 5:17-cv-00142 (M.D. FL)	Robert Elliott Price Levin, Papantonio, Thomas, Mitchell, Rafferty & Proctor, PA 316 S Baylen St - Ste 600 PO Box 12308 Pensacola, FL 32502 850-435-7076 Fax: 850-436-6075 Email: rprice@levinlaw.com Counsel for Plaintiff Clint Levack v. Johnson & Johnson, et al, Case No. 5:17-cv-00220 (M.D. FL)	Daniel James Thornburgh Douglass A. Kreis Nathan Charles Bess Aylstock, Witkin, Kreis & Overholtz, PLLC 17 E Main St Ste 200 Pensacola, FL 32502- 5998 850-202-1010 Fax: 850-916-7449 Email: DThornburgh@awkolaw. com dkreis@awkolaw.com nbess@awkolaw.com Counsel for Plaintiff Lynn Henry Hauman, Jr. v. Johnson & Johnson, et al, Case No. 5:17-cv-00224 (M.D. FL)
D. Todd Mathews Todd Matthew Gori Julian & Associates, P.C. 156 N. Main St. Edwardsville, IL 62025 618/659-9833 Fax: 618/659-9834 Email: todd@gorijulianlaw.com Counsel for Plaintiff Diana Jane Picolla v. Johnson & Johnson, et al, Case No. 8:17-cv-00694 (M.D. FL)	Daniel James Thornburgh Douglass A. Kreis Nathan Charles Bess Aylstock, Witkin, Kreis & Overholtz, PLLC 17 E Main St Ste 200 Pensacola, FL 32502- 5998 850-202-1010 Fax: 850-916-7449 Email: DThornburgh@awkolaw. com dkreis@awkolaw.com nbess@awkolaw.com Counsel for Plaintiff	Douglass A. Kreis Aylstock, Witkin, Kreis & Overholtz, PLLC 17 E Main St Ste 200 Pensacola, FL 32502- 5998 850-202-1010 Fax: 850-916-7449 Email: dkreis@awkolaw. com Counsel for Plaintiff Mary P. Johnson v. Johnson & Johnson, et al, Case No. 3:17-cv-00344 (N.D. FL)

	Diana Jane Picolla v. Johnson & Johnson, et al, Case No. 8:17-cv-00694 (M.D. FL)	
Anna Yarovich Lenchus The Law Office of Anna Lenchus 2385 NW Executive Center Drive Suite 100 Boca Raton, FL 33130 561-981-6118 Fax: 561-962-2710 Email: alenchus@gmail.com Counsel for Plaintiff Marilyn Macneney v. Johnson & Johnson, et al, Case No. 2:17-cv-14140 (S.D. FL); Michael Elinson v. Johnson & Johnson, et al, Case No. 9:17-cv-80363 (S.D. FL);	Richard W. Schulte Wright & Schulte LLC 865 S. Dixie Drive Suite A Vandalia, OH 45377 937-435-7500 Fax: 937-435-7511 Email: rschulte@yourlegalhelp.com Counsel for Plaintiff Mary Miller v. Johnson & Johnson, et al, Case No. 3:17-cv-00516 (S.D. IL); Tina Burr v. Johnson & Johnson, et al, Case No. 3:17-cv-00089 (S.D. OH); Carla Nichols v. Johnson & Johnson, et al, Case No. 1:17-cv-00137 (E.D. TN)	Sarah Shoemake Doles Carey, Danis and Lowe - St. Louis 8235 Forsyth Suite 1100 St. Louis, MO 63105 314-725-7700 Fax: 314-721-0905 Email: sdoles@careydanis.com Counsel for Plaintiff Gary Goodson v. Johnson & Johnson, et al, Case No. 3:17-cv-00540 (S.D. IL)
Maria B Glorioso Glorioso Law Firm 2716 Athania Pkwy Metairie, LA 70002 504-569-9999 Fax: 504-569-9022 Email: maria@gtorts.com Counsel for Plaintiff Teresa Drummond v. Johnson & Johnson, et al, Case No. 3:17-cv-00679 (W.D. LA)	Joseph A Gregorio 1100 Benton Rd Bossier City, LA 71111 318-747-0384 Fax: 318-746-5222 Email: josephg@suddenlinkmail.com Counsel for Plaintiff Phillip Wayne Maxey v. Johnson & Johnson, et al, Case No. 5:17-cv-00576	Michael Paul Smith Smith Gildea and Schmidt LLC 600 Washington Ave Ste 200 Towson, MD 21204 14108210070 Fax: 14108210071 Email: mpsmith@sgs-law.com Counsel for Plaintiff Charles Racine v. Ethicon, Inc., et al, Case

	(W.D. LA)	No. 1:17-cv-01029 (MD)
Gary S. Logsdon Gary S. Logsdon & Associates, PSC P.O. Box 382 101 Main Cross Street Brownsville, KY 42210 270-597-2134 Fax: 270-597-2859 Email: gary@garylogsdonlaw.co m Counsel for Plaintiff Sherri Thomas v. Johnson & Johnson, et al, Case No. 1:17-cv-00094 (W.D. KY); Thomas Hinton v. Johnson & Johnson, et al, Case No. 1:17-cv-00095 (W.D. KY); Linda O'Bannon v. Johnson & Johnson, et al, Case No. 4:17-cv-00068 (W.D. KY); Richard Sears v. Johnson & Johnson, et al, Case No. 4:17-cv- 00069 (W.D. KY)	Liz J. Shepherd Tyler S. Thompson Dolt, Thompson, Shepherd & Conway PSC 13800 Lake Point Circle Louisville, KY 40223 502-244-7772 Fax: 502-244-7776 Email: lshepherd@kytrial.com tthompson@kytrial.com Counsel for Plaintiff Sherri Thomas v. Johnson & Johnson, et al, Case No. 1:17-cv-00094 (W.D. KY); Thomas Hinton v. Johnson & Johnson, et al, Case No. 1:17-cv-00095 (W.D. KY); Linda O'Bannon v. Johnson & Johnson, et al, Case No. 4:17-cv-00068 (W.D. KY); Richard Sears v. Johnson & Johnson, et al, Case No. 4:17-cv-00069 (W.D. KY)	Annie L. Malka John T. Hester Martin A. Pohl Hessig & Pohl PLLC 239 S. Fifth Street, Suite 711 Louisville, KY 40202 502-583-5782 Fax: 502-583-5785 Email: anniemalkalaw@gmail.c om johntomhester@msn.com martin@hessigandpohl.c om Counsel for Plaintiff Terry Henderson v. Johnson & Johnson, et al, Case No. 3:17-cv-00302 (W.D. KY);

Lauren E. Godshall Betsy J. Barnes Morris Bart, LLC (New Orleans) 601 Poydras St. 24th Floor New Orleans, LA 70130 504-599-3373 Fax: 504-524-8703 Email: lgodshall@morrisbart.com bbarnes@morrisbart.com Counsel for Plaintiff Laura Lutz v. Johnson & Johnson, et al, Case No. 2:17-cv-02869 (E.D. LA); Alvaro Garza v. Johnson & Johnson, et al, Case No. 2:17-cv-02875 (E.D. LA); Ronnie Burl v. Johnson & Johnson, et al, Case No. 2:17-cv-04739 (E.D. LA); Stephanie Delmore v. Johnson & Johnson, et al, Case No. 3:17-cv-00293 (M.D. LA); Bohanan v. Ethicon, Inc., et al, Case No. 1:17-cv-00608 (W.D. LA); Eldon Foux v. Ethicon, Inc., et al, Case No. 2:17-cv-00611 (W.D. LA); Irene Fisher v. Johnson & Johnson, et al, Case No. 5:17-cv-00566 (W.D. LA); Brandon Latimer v. Ethicon, Inc., et al, Case No. 5:17-cv-00609 (W.D. LA)	Timothy P. Smith Smith & Johnson Attorneys PC 603 Bay St. P.O. Box 705 Traverse City, MI 49685 (231) 946-0700 Email: tsmith@smith-johnson.com Counsel for Plaintiff Glenn Kaylor, et al v. Johnson & Johnson, et al, Case No. 1:17-cv-00275 (W.D. MI)	Stephen J Randall Pearson, Randall & Schumacher, P.A. 310 4th Ave S Suite 5010 Minneapolis, MN 55415 612-767-7500 Email: srandall@prslegal.com Counsel for Plaintiff Carol Dailey v. Johnson & Johnson, et al, Case No. 0:17-cv-00750 (MN)
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Michael G. Daly , Jr. POGUST AND BRASLOW, LLP 161 Washington Street Suite 1520 Conshohocken, PA 09428 610-941-4204 x116 Fax: 610-941-4245 Email: mdaly@pbmattorneys.com Counsel for Plaintiff Robert Asplin v. Ethicon, Inc., et al, Case No. 4:17- cv-01295 (E.D. MO); George W. Lind v. Johnson & Johnson, et al, Case No. 2:17-cv-00460 (W.D. WA)	David B. Krangle Andres F. Alonso Alonso Krangle LLP 445 Broad Hollow Road Suite 205 Melville, NY 11747 516-350-5555 Fax: 516-350-5554 Email: dkrangle@alonsokrangle. com aalonso@alonsokrangle.c om Counsel for Plaintiff Shawn Sweeney v. Johnson & Johnson, et al, Case No. 1:17-cv-00218 (W.D. NY)	Todd Michael Miller Mike J. Miller SOLBERG STEWART MILLER PO BOX 1897 FARGO, ND 58107- 1897 701-237-3166 Email: tmiller@solberglaw.com mmiller@solberglaw.co m Counsel for Plaintiff Ronald P. Keller v. Johnson & Johnson, et al, Case No. 3:17-cv-00076 (ND)
Carrie R. Capouellez Regina S. Johnson Lopez McHugh, LLP 214 Flynn Avenue Moorestown, NJ 08057 (856) 273-8500 Email: ccapouellez@lopezmchug h.com rjohnson@lopezmchugh.co m Counsel for Plaintiff Robert Mead, et al v. Johnson & Johnson, et al, Case No. 3:17-cv-00808 (M.D. PA)	R. Christopher Gilreath Gilreath & Associates, PC (Memphis) 200 Jefferson Avenue Suite 711 Memphis, TN 38103 (901) 527-0511 Fax: 901-527-0514 Email: chrisgil@sidgilreath.com Counsel for Plaintiff Carla Nichols v. Johnson & Johnson, et al, Case No. 1:17-cv-00137 (E.D. TN); Robert Burdge v. Johnson & Johnson, et al, Case No. 2:17-cv-02355 (W.D. TN)	Benjamin A. Gastel James Gerard Stranch , IV Branstetter, Stranch & Jennings, PLLC The Freedom Center 223 Rosa L. Parks Avenue Suite 200 Nashville, TN 37203 (615) 254-8801 Fax: (615) 255-5419 Email: beng@bsjfirm.com gerards@bsjfirm.com Counsel for Plaintiff Rebecca Dirks v. Johnson & Johnson, et al, Case No. 3:17-cv-00628

		(M.D. TN)
Gary S. Logsdon Logsdon & Associates P O Box 382 Brownsville, KY 42210 (270) 597-2134 Fax: (270) 968-1465 Email: gary@garylogsdonlaw.com Counsel for Plaintiff Rebecca Dirks v. Johnson & Johnson, et al, Case No. 3:17-cv-00628 (M.D. TN)	Joseph A. Osborne Babbitt, Johnson, Osborne & Le Clainche, P.A. 1641 Worthington Road Suite 100 West Palm Beach, FL 33409 (561) 684-2500 Email: josborne@oa-lawfirm.com Counsel for Plaintiff Rebecca Dirks v. Johnson & Johnson, et al, Case No. 3:17-cv-00628 (M.D. TN)	Charles Silvestri Higgins BURCH PORTER & JOHNSON 130 N. Court Avenue Memphis, TN 38103- 2217 703-342-9448 Email: chiggins@bpjlaw.com Counsel for Plaintiff Mary Ann Dollar, et al v. Johnson & Johnson, et al, Case No. 2:17-cv-02363 (W.D. TN)
John Thomas Kirtley , III Ferrer Poirot & Wansbrough 2603 Oak Lawn Ave Suite 300 Dallas, TX 75219 214-521-4412 Fax: 214-526-6026 Email: jkirtley@lawyerworks.com Counsel for Plaintiff Lizzey Annett v. Johnson & Johnson, et al, Case No. 4:17-cv-00188 (E.D. TX)	George M. Fleming Gregory Donald Brown Kelsey Louise Stokes Fleming, Nolen & Jez, L.L.P. 2800 Post Oak Blvd Suite 4000 Houston, TX 77056- 6109 713-621-7944 Fax: 713-621-9638 Email: george_fleming@fleming-law.com gregory_brown@fleming-law.com kelsey_stokes@fleming-law.com Counsel for Plaintiff	Justin Ryan Goodman Lubel Voyles LLP 675 Bering Dr. Ste 850 Houston, TX 77057 713-284-5200 Fax: 713-284-5250 Email: jgoodman@lubelvoyles.com Counsel for Plaintiff Matreia Gentry v. Johnson & Johnson, et al, Case No. 4:17-cv-01463 (S.D. TX)

	Frederick R. Basile v. Johnson & Johnson, et al, Case No. 3:17-cv-00103 (S.D. TX)	
Benjamin David Evans Craig D. Cherry Haley & Olson P.C. 100 Ritchie Road, Suite 200 Waco, TX 76712 254-776-3336 Fax: 254-776-6823 Email: bevans@haleyolson.com ccherry@haleyolson.com Counsel for Plaintiff Lori Dickson v. Ethicon, Inc., et al, Case No. 6:17-cv- 00103 (W.D. TX)	Martin D McLean Hagens Berman Sobol Shapiro LLP (WA) 1918 Eight Ave. Suite 3300 Seattle, WA 98101 206-623-7292 Fax: 206-623-0594 Email: martym@hbsslaw.com George W. Lind v. Johnson & Johnson, et al, Case No. 2:17-cv-00460 (W.D. WA)	Andrew Judson Hill, III Henry G. Garrard, III James B. Matthews, III Josh B. Wages Patrick Hammond Garrard Blasingame, Burch, Garrard & Ashley, P.C.- Athens Suite 320 440 College Ave. Athens, GA 30601 706-354-4000 Fax: . Email: ajh@bbgbalaw.com Counsel for Plaintiff Henry Lee Brown, Jeffrey Leyton Winfrey, Marvin Franklin, Connie Franklin
Fred Thompson , III Motley Rice, LLC-SC 28 Bridgeside Boulevard Mt. Pleasant, SC 29464 843-216-9000 Fax: 843-216-9440 Nancy Shelton/Eddie Shelton Counsel for Plaintiffs Eddie and Nancy Shelton v. Johnson & Johnson, et al, Case No. 2:17-cv-614	Gary Steve Logsdon Gary S. Logsdon & Associates, PCC P.O. Box 382 101 Main Cross Street Brownsville, KY 42210- 0382 270-597-2134 Fax: 877-350-4028 Counsel for Plaintiff Robert B. Carrillo v. Johnson & Johnson, et al, Case No. 17-cv-2082	Anna Yarovich Lenchus The Law Office of Anna Lenchus Suite 100 2385 NW Executive Center Drive Boca Raton, FL 33130 561-981-6118 Fax: 561-962-2710 Counsel for Plaintiffs Joanne Quinn v. Ethicon, Inc., et al, Case No. 6:16- cv-1663

Daniel James Thornburgh Douglass A. Kreis Nathan Charles Bess Aylstock, Witkin, Kreis & Overholtz, PLLC Suite 200 17 E. Main Street Pensacola, FL 32502 850-202-1010 Fax: 850-916-7449 Email: dkreis@awkolaw.com Counsel for Plaintiffs David Middleton Carr, et al v. Johnson & Johnson, et al, Case No. 6:17-cv- 393; Counsel for Plaintiff Sarah Ann Gilman v. Johnson & Johnson, et al, Case No. 8:16-cv-03502; David A. Sunter v. Johnson & Johnson, et al, Case No. 17-cv-2087	James Beckett Thompson , Jr. Thompson, Goodis, Thompson, Groseclose & Richardson, PA Suite 500 700 Central Avenue St. Petersburg, FL 33731 727-823-0540 Fax: 727-823-0230 Counsel for Plaintiff Patricia Miller v. Johnson & Johnson, et al, Case No. 8:17-cv-396	Jeffrey Marc Goodis Goodis, Thompson & Miller, PA Suite 1500 150 2nd Avenue N. St. Petersburg, FL 33701 727-823-0540 Fax: 727-823-0230 Counsel for Plaintiff Patricia Miller v. Johnson & Johnson, et al, Case No. 8:17-cv-396
Andrew J. Cross Carey Danis & Lowe -MO Suite 1100 8235 Forsyth St. Louis, MO 63105 314-725-7700 Fax: 314-721-0905 Counsel for Plaintiff Doreen Worrell v. Johnson & Johnson, et al, Case No. 3:17-cv-000172	Sarah Shoemake Doles Carey & Danis & Lowe Suite 1100 8235 Forsyth St. Louis, MO 63105- 3786 314-725-7700 Fax: 314-721-0905 Counsel for Plaintiff Doreen Worrell v. Johnson & Johnson, et al, Case No. 3:17-cv-000172	Andrew Allen Norden Osborne & Associates Law Firm, P.A. Suite 271 433 Plaza Real Boca Raton, FL 33432 561-293-2600 Fax: 561-923-8100 Counsel for Plaintiff Lillian Graham v. Johnson & Johnson, et al, Case No. 3:17-cv-00229

Joseph A. Osborne Osborne & Associates Law Firm, P.A. Suite 271 433 Plaza Real Boca Raton, FL 33432 561-293-2600 Fax: 561-923-8100 Email: josborne@oa-lawfirm.com Counsel for Plaintiff Lillian Graham v. Johnson & Johnson, et al, Case No. 3:17-cv-00229	Aimee Hall Wagstaff Andrus Wagstaff, P.C. 7171 West Alaska Drive Lakewood, CO 80226 720-208-9414 Fax: 720-208-9434 Counsel for Plaintiffs Alison Keefer, et al v. Johnson & Johnson, et al, Case No. 17-cv-2100; Counsel for Plaintiffs Valeri Barakova, et al v. Johnson & Johnson, et al, Case No. 17-cv-2101	Christopher Bryan Fears Fears Nachawati, PLLC Suite 715 4925 Greenville Avenue Dallas, TX 75206 214-890-0711 Fax: 214-890-0712 Counsel for Plaintiffs Alison Keefer, et al v. Johnson & Johnson, et al, Case No. 17-cv-2100
Paul Telhiard Boudreaux Richardson, Richardson Boudreaux 7447 S. Lewis Avenue Tulsa, OK 74136 918-492-7674 Fax: 918-493-1925 Counsel for Plaintiff Gabrielle Cox v. Ethicon, Inc., et al, Case No. 4:16-cv-00729	David B. Krangle Alonso Krangle LLP Suite 205 445 Broad Hollow Road Melville, NY 11747 516-350-5555 Counsel for Plaintiff David Ramey v. Johnson & Johnson, et al, Case No. 17-cv-2145	Ronald P. Keller Pro Se
Lizzey Annett Pro Se	Peter H. Burke Burke, Harvey & Frankowski, LLC 2151 Highland Ave, S. Suite 120 Birmingham, AL 35205 205-930-9091 Email: pburke@bhflegal.com Counsel for Plaintiff Emily Walker v. Johnson & Johnson, et al, Case	

	No. 2:17-cv-00256
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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE: ETHICON PHYSIOMESH : MDL DOCKET NO. 2782
FLEXIBLE COMPOSITE : CIVIL ACTION NO.
HERNIA MESH PRODUCTS : 1:17-MD-02782-RWS
LIABILITY LITIGATION :
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This document relates to: :

Civil Action No.: _____

**PLAINTIFFS' MEMORANDUM TO PRECLUDE DEFENDANTS' EX
PARTE COMMUNICATIONS WITH PLAINTIFFS' TREATING
PHYSICIANS FOR PURPOSES OF RETAINING EXPERT WITNESSES**

Plaintiffs, by and through counsel, hereby submit this brief in support of their motion to prohibit Defendants' *ex parte* communications with Plaintiffs' treating physicians for the purpose of retaining Plaintiffs' treating physicians as "consultants" or experts." In support thereof, Plaintiffs state as follows:

INTRODUCTION AND LEGAL ARGUMENT

This litigation involves men and woman who were implanted with Defendants' Physiomesb Flexible Composite device ("Physiomesb") for hernia repair. Plaintiffs' claims involve defective design and/or manufacture of the Physiomesb, which creates an unreasonable risk of severe adverse reactions to the mesh or mesh components including severe injuries and other complications, as well as claims regarding Defendants' failure to warn. All parties recognize that this

litigation will involve several experts from a variety of medical and scientific disciplines.

I. **DEFENDANTS AND COUNSEL FOR DEFENDANTS SHOULD BE PRECLUDED FROM ANY *EX PARTE* COMMUNICATIONS WITH PLAINTIFFS' TREATING PHYSICIANS FOR PURPOSES OF RETAINING EXPERT WITNESSES**

Ex parte communications between defense counsel and Plaintiffs' treating physicians are generally prohibited in MDL proceedings. Such *ex parte* communications undermine the physician-patient relationship; sanction the release of confidential information without safeguards; place defense counsel and physicians in a potential conflict of interest; and encourage doctors to become experts against their patients.

Federal and state courts have routinely prohibited or at least restricted defendants' counsel's ability to communicate "ex parte" with a plaintiff's physician based on the confidential physician-patient relationship and/or the HIPAA Privacy Rule, 45 C.F.R. § 164.512¹. For example, in another hernia mesh product liability

¹ A 2003 article in the American Journal of Trial Advocacy noted that "[n]ationally, the clear majority view is that such *ex parte* communications are disfavored in the law." D. Wirtes, et al., *An Important Consequence of HIPAA: No More Ex Parte Communications Between Defense Attorneys and Plaintiff's Treating Physicians*, 27:1 Am. J. Trial Advoc., at 5-6 (2003). This article catalogued the cases: in all, thirty-six states either banned *ex parte* interviews by defense counsel or had placed "such significant restrictions on them that they cannot truly be called *ex parte* communications." *Id.* (collecting citations).

MDL, *In re: Kugel Mesh Hernia Repair Patch Litig.*, 2008 WL 2420997, *1 (D.R.I. 2008), the court rejected the defendants' motion to communicate "ex parte" with plaintiffs' doctors, holding that "the just option...is to protect the relationship between a doctor and patient by restricting defendants from conducting *ex parte* communications with plaintiffs' treating physicians but allowing plaintiffs' counsel to engage in *ex parte* interviews with those doctors who have not been named as defendants."² The court in *In re: Kugel* relied expressly on Judge Fallon's earlier decision in *In re: Vioxx Prods. Liab. Litig.*, 230 F.R.D. 473, 477 (E.D. La. 2005), wherein Judge Fallon recognized that the defendant has various means to access information from the plaintiffs' doctors, such as medical records, "Plaintiff Profile Forms," and depositions. Furthermore, these Defendants have had extensive access to and relationships with these Plaintiffs' doctors through their sales and marketing and physician training departments, many of which continue to date. Through their marketing and training representatives, these Defendants have had the opportunity to provide these doctors with significant amounts of information about these products "ex parte." While Plaintiffs have no way to know what Defendants may or may not have told these doctors about these products, Judge Fallon noted in *In re:*

² It should be noted here that the *Kugel* MDL involved polypropylene mesh devices sold for hernia repair by C.R. Bard, Inc., the Defendant who brought this letter motion.

Vioxx, supra, that “[a]s a practical matter, the Defendants already have information, including documentation, regarding what its representatives told the treating physicians about [the subject devices]. Therefore, the Defendants don’t need the doctors to tell them in *ex parte* conferences what they already know.” 230 F.R.D. at 476.

Here, Plaintiffs contend that Defendants should not be allowed to communicate with Plaintiffs’ physicians for purposes of identifying potential experts. On August 26, 2008, Judge Alice B. Gibney, Presiding Justice of the Rhode Island Superior Court, was faced with a virtually identical motion filed by the plaintiffs in the then-existing hernia mesh litigation, consisting of over 1000 individuals who alleged injury as a result of the defective and dangerous condition of the Kugel hernia Patch that was designed, distributed and manufactured by defendants, Davol, Inc. and C.R. Bard, Inc. Specifically, the plaintiffs filed a motion to preclude the defendants from retaining plaintiffs’ treating physicians as consulting experts. *See In re: All Individual Kugel Mesh Cases*, 2008 R.I. Super LEXIS 101 at *1 (R.I. Super. August 26, 2008). Plaintiffs’ motion was premised upon their concerns that (1) any *ex parte* communication between defense counsel and plaintiffs’ treating physicians presented a grave risk of unauthorized disclosure of confidential patient information; (2) the defendants’ retention of plaintiffs’ treating physicians would result in a physician-patient conflict due to the fact that many of

Plaintiffs' treating physicians were likely to become fact witnesses at trial; and (3) that any such communication was in violation of the court's prior order prohibiting *ex parte* communications.³ *Id.* at *2.

The defendants objected to the plaintiffs' motion on several grounds. The defendants argued that such *ex parte* communication would not violate any prior order of the court nor would it violate the physician-patient privilege because defendants were not intending to inquire as to the healthcare or treatment specific to any individual plaintiff—rather, defendants' contacts would purportedly be limited to the issue of general causation. *Id.* at *2-3. Defendants also argued that as a practical matter, such an order would effectively bar defendants from retaining experts in this litigation due to the “high-volume hernia experts in the country who may have used the Kugel Patch...[and who] have likely treated as patients one or more of the Plaintiffs in this litigation.” *Id.* at *3.

The court, in no uncertain terms, rejected each of the defendants' arguments as “disingenuous.” *Id.* at *4, 9. Judge Gibney noted that in order to provide any helpful information to the defendants regarding the physician's experiences with the Kugel Patch, the physicians would likely have to disclose information about

³ Judge Gibney also granted plaintiffs' motion for a protective order prohibiting defense counsel from having any *ex parte* communications with plaintiffs' treating physicians. See Protective Order Prohibiting Ex Parte Communication, *Abbott et al. v. Davol Inc. et al.* (R.I. Super. Ct. April 28, 2008) (Gibney, J.) (attached as Exhibit 1).

individual plaintiffs. The court emphasized its concern that such information may prove “highly prejudicial to plaintiffs” and “presents a conflict should these physicians be called to testify at trial.” *Id.* at *5. Judge Gibney emphasized the importance of the level of trust inherent in a physician-patient relationship, noting that “a patient is entitled to the assurance that his or her physician will not discuss his or her medical condition, however generically, with representatives of the opposition.” *Id.* at *6. Accordingly, the court held that the defendants’ “‘Scout’s Honor’ promise not to inquire as to individual [plaintiff] cases” was “utterly disingenuous”, and further, that any “potential inconvenience” to the defendants in retaining expert witnesses was “significantly outweighed” by the risk of unauthorized medical disclosures. *Id.* at *4-6.

The court also rejected the defendants’ contention that an order prohibiting defendants’ *ex parte* communications for the purpose of retaining consulting or expert witnesses would create an insurmountable barrier in securing expert witnesses in that litigation. In so holding, the court opined that it “simply cannot accept that every knowledgeable physician in the country has performed surgery on one or more of the Plaintiffs in this matter. Once again this argument is disingenuous.” *Id.* at *8. The Court noted that the defendants would have “ample” opportunity to defend their cases through ordinary discovery procedures, including depositions of the plaintiffs’ treating physicians. *Id.* at *7-8. Accordingly, the court granted the plaintiffs’ motion,

reiterating its previous protective order which prohibited *ex parte* communications between defendants' and plaintiffs' treating physicians, for any purpose. *Id.* at *9. The court held that in order to protect the plaintiffs' privileged medical information, the defendants may only retain consulting experts who were not treating physicians in the litigation. *Id.*

Judge Gibney's order and the reasoning outlined therein was subsequently adopted by United States Magistrate Judge Lincoln D. Almond, who along with former Senior United States District Judge for the District of Rhode Island, Mary M. Lisi, was in charge of overseeing the multi-district hernia mesh litigation in the District Court for the District of Rhode Island. In his September 19, 2008 Memorandum and Order denying the defendants' motion to permit communications with consulting surgeon experts who are also treating physicians, Magistrate Almond noted that the defendants' motion "requires the Court to balance the trust and confidentiality embodied in the physician-patient relationship against a litigant's right to reasonably garner a defense." See Memorandum and Order, *In Re: Kugel Mesh Hernia Repair Patch Litig.*, MDL No.07-1842 (D.R.I. Sept. 19, 2008) (attached as Exhibit 2). Magistrate Almond rejected as "unsupported and unpersuasive" the defendants' argument that the large number of plaintiffs in the then-existing hernia-mesh MDL (approximately 1,800 individual cases at the time this order was entered) would preclude the defendants from retaining any consultants

who are not also the plaintiffs' treating physicians. *Id.* at pp. 2-3. The court noted that the defendants were wholly unable to provide any evidence that the potential pool of consulting expert physicians was limited. In fact, the court reasoned that the defendants' claims of prejudice were belied in light of the fact that these cases had been pending in the MDL for "quite some time" and "only one surgeon to date has fallen into the consultant/treating physician category." *Id.* at p. 3. Accordingly, Magistrate Almond denied the defendants' motion and ordered that "[a]ll ex parte communication with Plaintiffs' treating physicians – for any purpose – is hereby prohibited." *Id.*

Courts overseeing similar product MDLs have also noted the dangers inherent in allowing defense counsel to engage in *ex parte* communications with plaintiffs' treating physicians for the purposes of retaining consulting experts. *See In re: Seroquel Products Liability Litigation*, 2008 U.S. Dist. LEXIS 34631 at *12 (M.D. Fla. March 21, 2008) (acknowledging "the potential for misuse of [ex parte physician contact for purposes of retaining physician experts], the danger of inappropriate communications and the possibility of conflicts and complexities as the cases develop and the varying roles of physicians intertwine."); *see also* Order and Reasons in *Xarelto (Rivaroxaban) Products Liab. Litig.*, MDL No. 2592 at p. 17 (E.D. La. March 9, 2016) (Fallon, J.) ("The Court is aware that service as a physician-expert, even in cases unrelated to the physician's patients, may complicate the relationship

between the physician-expert and his or her patients. A patient may feel betrayed, or at the very least uncomfortable, if his or her physician represents a company that the patient is suing in a products liability case. Courts must be sensitive when considering *ex parte* contacts that may jeopardize the physician-patient relationship.”) (Order attached as Exhibit 3).

Accordingly, for the reasons articulated above, Plaintiffs request that Defendants be precluded from retaining any consultants or experts who are also physicians of Plaintiffs’ in this litigation.

CONCLUSION

For the reasons discussed herein, Plaintiffs respectfully seek an Order from this Honorable Court that prohibits Defendants from having have any *ex parte* contact with Plaintiffs’ treating physicians for the purpose of retaining Plaintiffs’ treating physicians as “consultants” or experts.” Plaintiffs have submitted a proposed Order herewith.

Respectfully submitted this 1st day of November 2017,

/s/ Donald Migliori

Donald Migliori

SC Bar #102549

Motley Rice, LLC

28 Bridgeside Blvd

Mt. Pleasant, SC 29464

Attorney for Plaintiffs

FONT CERTIFICATION

Pursuant to Local Rule 7.1 D, I hereby certify that the foregoing document was prepared using Times New Roman 14 point type as provided in Local Rule 5.1.

/s/ Donald A. Migliori

Donald A. Migliori

CERTIFICATE OF SERVICE

I certify that on the 1st day of November, 2017, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which will automatically send e-mail notification of such filing to the following attorneys of record:

Jon Collins Conlin Mitchell Theo Theodore CORY WATSON ATTORNEYS 2131 Magnolia Avenue Birmingham, AL 35205 205-328-2200 Fax: 205-324-7896 Email: jconlin@corywatson.com mtheodore@corywatson.com Counsel for Plaintiff Patricia Wright v. Johnson & Johnson, et al, Case No. 1:17-cv-00526 (N.D. AL); George Holloway v. Johnson & Johnson, et al, Case No. 4:17-cv-00527 (N.D. AL);	Ryan Ladd Thompson Shelly Sanford Watts Guerra LLP - Austin, TX 811 Barton Springs Rd., Ste. 725 Austin, TX 78704 512-479-0500 Fax: 512-479-0502 Email: rthompson@wattsguerra.com Counsel for Plaintiff Daniel R. Ryder v. Ethicon, Inc., et al, Case No. 2:17-cv-01374 (AZ)	Mitchell Lloyd Berry Mitchell Law Firm 415 N McKinley St. Suite 1177 Little Rock, AR 72205 (501) 661-1000 ext. 2139 Email: mberry@dhgw.net Counsel for Plaintiff Valerie Sundberg v. Johnson & Johnson, et al, Case No. 4:17-cv-04014 (W.D. AR)
Arthur Mark Handel Arthur M Handel APLC 970 Meadowlark Drive Laguna Beach, CA 92651 949-637-1389 Email: handelplc@yahoo.com Counsel for Plaintiff Heather Haug, et al v. Johnson & Johnson, et al, Case No. 8:17-cv-00817 (C.D. CA)	Anita C. Pryor Terrell Hogan, PA 8th Floor 233 E Bay St Jacksonville, FL 32202 904/632-2424 Fax: 904/632-0549 Email: pryor@terrellhogan.com Counsel for Plaintiff Collin G. Ward, et al v. Johnson & Johnson, et al, Case No. 5:17-cv-00142 (M.D. FL)	Donald A. Migliori Lance V. Oliver Motley Rice, LLC 28 Bridgeside Blvd Mount Pleasant, SC 29464-4399 843/216-9000 Fax: 843/216-9450 Email: dmigliori@motleyrice.com loliver@motleyrice.com Counsel for Plaintiff Collin G. Ward, et al v. Johnson & Johnson, et al, Case No. 5:17-cv-00142 (M.D. FL)

Jonathan D. Orent Kate E. Menard Motley Rice LLC 55 Cedar Street Suite 100 Providence, RI 02903 401/457-7700 Fax: 401/457-7708 Email: jorent@motleyrice.com kmenard@motleyrice.com Counsel for Plaintiff Collin G. Ward, et al v. Johnson & Johnson, et al, Case No. 5:17-cv-00142 (M.D. FL)	Robert Elliott Price Levin, Papantonio, Thomas, Mitchell, Rafferty & Proctor, PA 316 S Baylen St - Ste 600 PO Box 12308 Pensacola, FL 32502 850-435-7076 Fax: 850-436-6075 Email: rprice@levinlaw.com Counsel for Plaintiff Clint Levack v. Johnson & Johnson, et al, Case No. 5:17-cv-00220 (M.D. FL)	Daniel James Thornburgh Douglass A. Kreis Nathan Charles Bess Aylstock, Witkin, Kreis & Overholtz, PLLC 17 E Main St Ste 200 Pensacola, FL 32502- 5998 850-202-1010 Fax: 850-916-7449 Email: DThornburgh@awkolaw. com dkreis@awkolaw.com nbess@awkolaw.com Counsel for Plaintiff Lynn Henry Hauman, Jr. v. Johnson & Johnson, et al, Case No. 5:17-cv-00224 (M.D. FL)
D. Todd Mathews Todd Matthew Gori Julian & Associates, P.C. 156 N. Main St. Edwardsville, IL 62025 618/659-9833 Fax: 618/659-9834 Email: todd@gorijulianlaw.com Counsel for Plaintiff Diana Jane Picolla v. Johnson & Johnson, et al, Case No. 8:17-cv-00694 (M.D. FL)	Daniel James Thornburgh Douglass A. Kreis Nathan Charles Bess Aylstock, Witkin, Kreis & Overholtz, PLLC 17 E Main St Ste 200 Pensacola, FL 32502- 5998 850-202-1010 Fax: 850-916-7449 Email: DThornburgh@awkolaw. com dkreis@awkolaw.com nbess@awkolaw.com Counsel for Plaintiff	Douglass A. Kreis Aylstock, Witkin, Kreis & Overholtz, PLLC 17 E Main St Ste 200 Pensacola, FL 32502- 5998 850-202-1010 Fax: 850-916-7449 Email: dkreis@awkolaw. com Counsel for Plaintiff Mary P. Johnson v. Johnson & Johnson, et al, Case No. 3:17-cv-00344 (N.D. FL)

	Diana Jane Picolla v. Johnson & Johnson, et al, Case No. 8:17-cv-00694 (M.D. FL)	
Anna Yarovich Lenchus The Law Office of Anna Lenchus 2385 NW Executive Center Drive Suite 100 Boca Raton, FL 33130 561-981-6118 Fax: 561-962-2710 Email: alenchus@gmail.com Counsel for Plaintiff Marilyn Macneney v. Johnson & Johnson, et al, Case No. 2:17-cv-14140 (S.D. FL); Michael Elinson v. Johnson & Johnson, et al, Case No. 9:17-cv-80363 (S.D. FL);	Richard W. Schulte Wright & Schulte LLC 865 S. Dixie Drive Suite A Vandalia, OH 45377 937-435-7500 Fax: 937-435-7511 Email: rschulte@yourlegalhelp.com Counsel for Plaintiff Mary Miller v. Johnson & Johnson, et al, Case No. 3:17-cv-00516 (S.D. IL); Tina Burr v. Johnson & Johnson, et al, Case No. 3:17-cv-00089 (S.D. OH); Carla Nichols v. Johnson & Johnson, et al, Case No. 1:17-cv-00137 (E.D. TN)	Sarah Shoemake Doles Carey, Danis and Lowe - St. Louis 8235 Forsyth Suite 1100 St. Louis, MO 63105 314-725-7700 Fax: 314-721-0905 Email: sdoles@careydanis.com Counsel for Plaintiff Gary Goodson v. Johnson & Johnson, et al, Case No. 3:17-cv-00540 (S.D. IL)
Maria B Glorioso Glorioso Law Firm 2716 Athania Pkwy Metairie, LA 70002 504-569-9999 Fax: 504-569-9022 Email: maria@gtorts.com Counsel for Plaintiff Teresa Drummond v. Johnson & Johnson, et al, Case No. 3:17-cv-00679 (W.D. LA)	Joseph A Gregorio 1100 Benton Rd Bossier City, LA 71111 318-747-0384 Fax: 318-746-5222 Email: josephg@suddenlinkmail.com Counsel for Plaintiff Phillip Wayne Maxey v. Johnson & Johnson, et al, Case No. 5:17-cv-00576	Michael Paul Smith Smith Gildea and Schmidt LLC 600 Washington Ave Ste 200 Towson, MD 21204 14108210070 Fax: 14108210071 Email: mpsmith@sgs-law.com Counsel for Plaintiff Charles Racine v. Ethicon, Inc., et al, Case

	(W.D. LA)	No. 1:17-cv-01029 (MD)
Gary S. Logsdon Gary S. Logsdon & Associates, PSC P.O. Box 382 101 Main Cross Street Brownsville, KY 42210 270-597-2134 Fax: 270-597-2859 Email: gary@garylogsdonlaw.co m Counsel for Plaintiff Sherri Thomas v. Johnson & Johnson, et al, Case No. 1:17-cv-00094 (W.D. KY); Thomas Hinton v. Johnson & Johnson, et al, Case No. 1:17-cv-00095 (W.D. KY); Linda O'Bannon v. Johnson & Johnson, et al, Case No. 4:17-cv-00068 (W.D. KY); Richard Sears v. Johnson & Johnson, et al, Case No. 4:17-cv- 00069 (W.D. KY)	Liz J. Shepherd Tyler S. Thompson Dolt, Thompson, Shepherd & Conway PSC 13800 Lake Point Circle Louisville, KY 40223 502-244-7772 Fax: 502-244-7776 Email: lshepherd@kytrial.com tthompson@kytrial.com Counsel for Plaintiff Sherri Thomas v. Johnson & Johnson, et al, Case No. 1:17-cv-00094 (W.D. KY); Thomas Hinton v. Johnson & Johnson, et al, Case No. 1:17-cv-00095 (W.D. KY); Linda O'Bannon v. Johnson & Johnson, et al, Case No. 4:17-cv-00068 (W.D. KY); Richard Sears v. Johnson & Johnson, et al, Case No. 4:17-cv-00069 (W.D. KY)	Annie L. Malka John T. Hester Martin A. Pohl Hessig & Pohl PLLC 239 S. Fifth Street, Suite 711 Louisville, KY 40202 502-583-5782 Fax: 502-583-5785 Email: anniemalkalaw@gmail.c om johntomhester@msn.com martin@hessigandpohl.c om Counsel for Plaintiff Terry Henderson v. Johnson & Johnson, et al, Case No. 3:17-cv-00302 (W.D. KY);

Lauren E. Godshall Betsy J. Barnes Morris Bart, LLC (New Orleans) 601 Poydras St. 24th Floor New Orleans, LA 70130 504-599-3373 Fax: 504-524-8703 Email: lgodshall@morrisbart.com bbarnes@morrisbart.com Counsel for Plaintiff Laura Lutz v. Johnson & Johnson, et al, Case No. 2:17-cv-02869 (E.D. LA); Alvaro Garza v. Johnson & Johnson, et al, Case No. 2:17-cv-02875 (E.D. LA); Ronnie Burl v. Johnson & Johnson, et al, Case No. 2:17-cv-04739 (E.D. LA); Stephanie Delmore v. Johnson & Johnson, et al, Case No. 3:17-cv-00293 (M.D. LA); Bohanan v. Ethicon, Inc., et al, Case No. 1:17-cv-00608 (W.D. LA); Eldon Foux v. Ethicon, Inc., et al, Case No. 2:17-cv-00611 (W.D. LA); Irene Fisher v. Johnson & Johnson, et al, Case No. 5:17-cv-00566 (W.D. LA); Brandon Latimer v. Ethicon, Inc., et al, Case No. 5:17-cv-00609 (W.D. LA)	Timothy P. Smith Smith & Johnson Attorneys PC 603 Bay St. P.O. Box 705 Traverse City, MI 49685 (231) 946-0700 Email: tsmith@smith-johnson.com Counsel for Plaintiff Glenn Kaylor, et al v. Johnson & Johnson, et al, Case No. 1:17-cv-00275 (W.D. MI)	Stephen J Randall Pearson, Randall & Schumacher, P.A. 310 4th Ave S Suite 5010 Minneapolis, MN 55415 612-767-7500 Email: srandall@prslegal.com Counsel for Plaintiff Carol Dailey v. Johnson & Johnson, et al, Case No. 0:17-cv-00750 (MN)
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Michael G. Daly , Jr. POGUST AND BRASLOW, LLP 161 Washington Street Suite 1520 Conshohocken, PA 09428 610-941-4204 x116 Fax: 610-941-4245 Email: mdaly@pbmattorneys.com Counsel for Plaintiff Robert Asplin v. Ethicon, Inc., et al, Case No. 4:17- cv-01295 (E.D. MO); George W. Lind v. Johnson & Johnson, et al, Case No. 2:17-cv-00460 (W.D. WA)	David B. Krangle Andres F. Alonso Alonso Krangle LLP 445 Broad Hollow Road Suite 205 Melville, NY 11747 516-350-5555 Fax: 516-350-5554 Email: dkrangle@alonsokrangle. com aalonso@alonsokrangle.c om Counsel for Plaintiff Shawn Sweeney v. Johnson & Johnson, et al, Case No. 1:17-cv-00218 (W.D. NY)	Todd Michael Miller Mike J. Miller SOLBERG STEWART MILLER PO BOX 1897 FARGO, ND 58107- 1897 701-237-3166 Email: tmiller@solberglaw.com mmiller@solberglaw.co m Counsel for Plaintiff Ronald P. Keller v. Johnson & Johnson, et al, Case No. 3:17-cv-00076 (ND)
Carrie R. Capouellez Regina S. Johnson Lopez McHugh, LLP 214 Flynn Avenue Moorestown, NJ 08057 (856) 273-8500 Email: ccapouellez@lopezmchug h.com rjohnson@lopezmchugh.co m Counsel for Plaintiff Robert Mead, et al v. Johnson & Johnson, et al, Case No. 3:17-cv-00808 (M.D. PA)	R. Christopher Gilreath Gilreath & Associates, PC (Memphis) 200 Jefferson Avenue Suite 711 Memphis, TN 38103 (901) 527-0511 Fax: 901-527-0514 Email: chrisgil@sidgilreath.com Counsel for Plaintiff Carla Nichols v. Johnson & Johnson, et al, Case No. 1:17-cv-00137 (E.D. TN); Robert Burdge v. Johnson & Johnson, et al, Case No. 2:17-cv-02355 (W.D. TN)	Benjamin A. Gastel James Gerard Stranch , IV Branstetter, Stranch & Jennings, PLLC The Freedom Center 223 Rosa L. Parks Avenue Suite 200 Nashville, TN 37203 (615) 254-8801 Fax: (615) 255-5419 Email: beng@bsjfirm.com gerards@bsjfirm.com Counsel for Plaintiff Rebecca Dirks v. Johnson & Johnson, et al, Case No. 3:17-cv-00628

		(M.D. TN)
Gary S. Logsdon Logsdon & Associates P O Box 382 Brownsville, KY 42210 (270) 597-2134 Fax: (270) 968-1465 Email: gary@garylogsdonlaw.com Counsel for Plaintiff Rebecca Dirks v. Johnson & Johnson, et al, Case No. 3:17-cv-00628 (M.D. TN)	Joseph A. Osborne Babbitt, Johnson, Osborne & Le Clainche, P.A. 1641 Worthington Road Suite 100 West Palm Beach, FL 33409 (561) 684-2500 Email: josborne@oa-lawfirm.com Counsel for Plaintiff Rebecca Dirks v. Johnson & Johnson, et al, Case No. 3:17-cv-00628 (M.D. TN)	Charles Silvestri Higgins BURCH PORTER & JOHNSON 130 N. Court Avenue Memphis, TN 38103- 2217 703-342-9448 Email: chiggins@bpjlaw.com Counsel for Plaintiff Mary Ann Dollar, et al v. Johnson & Johnson, et al, Case No. 2:17-cv-02363 (W.D. TN)
John Thomas Kirtley , III Ferrer Poirot & Wansbrough 2603 Oak Lawn Ave Suite 300 Dallas, TX 75219 214-521-4412 Fax: 214-526-6026 Email: jkirtley@lawyerworks.com Counsel for Plaintiff Lizzey Annett v. Johnson & Johnson, et al, Case No. 4:17-cv-00188 (E.D. TX)	George M. Fleming Gregory Donald Brown Kelsey Louise Stokes Fleming, Nolen & Jez, L.L.P. 2800 Post Oak Blvd Suite 4000 Houston, TX 77056- 6109 713-621-7944 Fax: 713-621-9638 Email: george_fleming@fleming-law.com gregory_brown@fleming-law.com kelsey_stokes@fleming-law.com Counsel for Plaintiff	Justin Ryan Goodman Lubel Voyles LLP 675 Bering Dr. Ste 850 Houston, TX 77057 713-284-5200 Fax: 713-284-5250 Email: jgoodman@lubelvoyles.com Counsel for Plaintiff Matreia Gentry v. Johnson & Johnson, et al, Case No. 4:17-cv-01463 (S.D. TX)

	Frederick R. Basile v. Johnson & Johnson, et al, Case No. 3:17-cv-00103 (S.D. TX)	
Benjamin David Evans Craig D. Cherry Haley & Olson P.C. 100 Ritchie Road, Suite 200 Waco, TX 76712 254-776-3336 Fax: 254-776-6823 Email: bevans@haleyolson.com ccherry@haleyolson.com Counsel for Plaintiff Lori Dickson v. Ethicon, Inc., et al, Case No. 6:17-cv- 00103 (W.D. TX)	Martin D McLean Hagens Berman Sobol Shapiro LLP (WA) 1918 Eight Ave. Suite 3300 Seattle, WA 98101 206-623-7292 Fax: 206-623-0594 Email: martym@hbsslaw.com George W. Lind v. Johnson & Johnson, et al, Case No. 2:17-cv-00460 (W.D. WA)	Andrew Judson Hill, III Henry G. Garrard, III James B. Matthews, III Josh B. Wages Patrick Hammond Garrard Blasingame, Burch, Garrard & Ashley, P.C.- Athens Suite 320 440 College Ave. Athens, GA 30601 706-354-4000 Fax: . Email: ajh@bbgbalaw.com Counsel for Plaintiff Henry Lee Brown, Jeffrey Leyton Winfrey, Marvin Franklin, Connie Franklin
Fred Thompson , III Motley Rice, LLC-SC 28 Bridgeside Boulevard Mt. Pleasant, SC 29464 843-216-9000 Fax: 843-216-9440 Nancy Shelton/Eddie Shelton Counsel for Plaintiffs Eddie and Nancy Shelton v. Johnson & Johnson, et al, Case No. 2:17-cv-614	Gary Steve Logsdon Gary S. Logsdon & Associates, PCC P.O. Box 382 101 Main Cross Street Brownsville, KY 42210- 0382 270-597-2134 Fax: 877-350-4028 Counsel for Plaintiff Robert B. Carrillo v. Johnson & Johnson, et al, Case No. 17-cv-2082	Anna Yarovich Lenchus The Law Office of Anna Lenchus Suite 100 2385 NW Executive Center Drive Boca Raton, FL 33130 561-981-6118 Fax: 561-962-2710 Counsel for Plaintiffs Joanne Quinn v. Ethicon, Inc., et al, Case No. 6:16- cv-1663

Daniel James Thornburgh Douglass A. Kreis Nathan Charles Bess Aylstock, Witkin, Kreis & Overholtz, PLLC Suite 200 17 E. Main Street Pensacola, FL 32502 850-202-1010 Fax: 850-916-7449 Email: dkreis@awkolaw.com Counsel for Plaintiffs David Middleton Carr, et al v. Johnson & Johnson, et al, Case No. 6:17-cv- 393; Counsel for Plaintiff Sarah Ann Gilman v. Johnson & Johnson, et al, Case No. 8:16-cv-03502; David A. Sunter v. Johnson & Johnson, et al, Case No. 17-cv-2087	James Beckett Thompson , Jr. Thompson, Goodis, Thompson, Groseclose & Richardson, PA Suite 500 700 Central Avenue St. Petersburg, FL 33731 727-823-0540 Fax: 727-823-0230 Counsel for Plaintiff Patricia Miller v. Johnson & Johnson, et al, Case No. 8:17-cv-396	Jeffrey Marc Goodis Goodis, Thompson & Miller, PA Suite 1500 150 2nd Avenue N. St. Petersburg, FL 33701 727-823-0540 Fax: 727-823-0230 Counsel for Plaintiff Patricia Miller v. Johnson & Johnson, et al, Case No. 8:17-cv-396
Andrew J. Cross Carey Danis & Lowe -MO Suite 1100 8235 Forsyth St. Louis, MO 63105 314-725-7700 Fax: 314-721-0905 Counsel for Plaintiff Doreen Worrell v. Johnson & Johnson, et al, Case No. 3:17-cv-000172	Sarah Shoemake Doles Carey & Danis & Lowe Suite 1100 8235 Forsyth St. Louis, MO 63105- 3786 314-725-7700 Fax: 314-721-0905 Counsel for Plaintiff Doreen Worrell v. Johnson & Johnson, et al, Case No. 3:17-cv-000172	Andrew Allen Norden Osborne & Associates Law Firm, P.A. Suite 271 433 Plaza Real Boca Raton, FL 33432 561-293-2600 Fax: 561-923-8100 Counsel for Plaintiff Lillian Graham v. Johnson & Johnson, et al, Case No. 3:17-cv-00229

Joseph A. Osborne Osborne & Associates Law Firm, P.A. Suite 271 433 Plaza Real Boca Raton, FL 33432 561-293-2600 Fax: 561-923-8100 Email: josborne@oa-lawfirm.com Counsel for Plaintiff Lillian Graham v. Johnson & Johnson, et al, Case No. 3:17-cv-00229	Aimee Hall Wagstaff Andrus Wagstaff, P.C. 7171 West Alaska Drive Lakewood, CO 80226 720-208-9414 Fax: 720-208-9434 Counsel for Plaintiffs Alison Keefer, et al v. Johnson & Johnson, et al, Case No. 17-cv-2100; Counsel for Plaintiffs Valeri Barakova, et al v. Johnson & Johnson, et al, Case No. 17-cv-2101	Christopher Bryan Fears Fears Nachawati, PLLC Suite 715 4925 Greenville Avenue Dallas, TX 75206 214-890-0711 Fax: 214-890-0712 Counsel for Plaintiffs Alison Keefer, et al v. Johnson & Johnson, et al, Case No. 17-cv-2100
Paul Telhiard Boudreaux Richardson, Richardson Boudreaux 7447 S. Lewis Avenue Tulsa, OK 74136 918-492-7674 Fax: 918-493-1925 Counsel for Plaintiff Gabrielle Cox v. Ethicon, Inc., et al, Case No. 4:16-cv-00729	David B. Krangle Alonso Krangle LLP Suite 205 445 Broad Hollow Road Melville, NY 11747 516-350-5555 Counsel for Plaintiff David Ramey v. Johnson & Johnson, et al, Case No. 17-cv-2145	Ronald P. Keller Pro Se
Lizzey Annett Pro Se	Peter H. Burke Burke, Harvey & Frankowski, LLC 2151 Highland Ave, S. Suite 120 Birmingham, AL 35205 205-930-9091 Email: pburke@bhflegal.com Counsel for Plaintiff Emily Walker v. Johnson & Johnson, et al, Case	

	No. 2:17-cv-00256
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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE: ETHICON PHYSIOMESH : MDL DOCKET NO. 2782
FLEXIBLE COMPOSITE : CIVIL ACTION NO.
HERNIA MESH PRODUCTS : 1:17-MD-02782-RWS
LIABILITY LITIGATION :
:

This document relates to: :

_____: Civil Action No.: _____
_____:

ORDER

For good cause shown, Plaintiffs' Motion to Preclude Defendants' *Ex Parte* Communications with Plaintiffs' Treating Physicians For Purposes of Retaining Expert Witnesses is GRANTED. Accordingly, it is hereby ORDERED that Defendants and counsel for Defendants may not contact any treating physician of any Plaintiff in this litigation for purposes of retaining an expert or consulting expert.

It is so ORDERED.

Richard W. Story
United States District Judge