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December 14, 2017

Lyle W. Cayce
Clerk of Court
U.S. Court of Appeals for the Fifth Circuit
F. Edward Hebert Building
600 S. Maestri Place
New Orleans, LA 70130-3408

Re: *Margaret Aoki v. Johnson & Johnson Svc, Inc., et al.*, No. 17-10030

Dear Mr. Cayce:

Defendants-Appellants respectfully submit this letter in response to yesterday's Rule 28(j) letter by Plaintiffs. That letter, filed at the Court's request, submitted a check that confirms beyond all doubt that the \$10,000 donation to Dr. Bernard Morrey's chosen charity was consummated just weeks *before* trial began and before repeated representations that Dr. Morrey "wasn't compensated" and is "not a paid witness." ROA.17-10030.12787; ROA.17-10030.16912; *see also* ROA.17-10030.4075, ROA.17-10030.4076, ROA.17-10030.13080; ROA.17-10030.13212; ROA.17-10030.16954.

While the check speaks for itself, the 28(j) letter includes an extended effort by Plaintiffs' counsel to elaborate on his theory, first offered at oral argument, why the pre-trial date on the check is affirmatively helpful and compatible with multiple contrary representations. But as counsel for Defendants-Appellants, members of this Court, and even Mr. Lanier's own co-counsel all recognized at oral argument, the fact that the check to Dr. Morrey's charity of choice had already been cut *before* trial is devastating. *See* O.A. Recording at 31:44-31:58; 35:08-35:49; 39:00-39:19. There is a reason, after all, that Plaintiffs' own appellate briefs went to considerable lengths to suggest, based on Dr. Morrey's deposition testimony, that the contribution was not made until *after* trial. *See* Red.Br.26, 27, 37.

Plaintiffs now attempt to draw a distinction between the now-undeniably-compensated pre-trial meeting and "compensation to be paid for the study or testimony in the case." Letter.1. But the check stub itself includes the notation "DePuy Pinnacle," Letter.4, and Plaintiffs' categorical statements below drew no such subtle distinctions. Moreover, Plaintiffs previously described the pre-trial meeting as a discussion about "the history of metal-on-metal implants," Reply.Br.6—the exact topic of Dr. Morrey's trial testimony, *see* Red.Br.13-14.

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Finally, the suggestion that timely disclosure would have only enhanced Dr. Morrey in the jury's eyes ignores that prompt disclosure would have required timely compliance with Rule 26, made Dr. Morrey the highest compensated expert on an hourly basis, and disabled Plaintiffs' deliberate strategy to contrast Dr. Morrey with Defendants' experts. Simply put, by confirming that a \$10,000 check was cut just weeks *before* trial, Plaintiffs' counsel confirms the appropriateness, indeed the necessity, of relief under Rule 60(b)(3).

Respectfully submitted,

A handwritten signature in black ink, appearing to read "P. D. Clement", written in a cursive style.

Paul D. Clement
*Counsel for Defendants-Appellants Johnson
& Johnson and DePuy Orthopaedics, Inc.*

CERTIFICATE OF SERVICE

I hereby certify that on December 14, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/Paul D. Clement

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