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December 13, 2017

**VIA ECF**

Lyle W. Cayce, Clerk  
United States Court of Appeals  
for the Fifth Circuit  
F. Edward Hebert Building  
600 South Maestri Place  
New Orleans, Louisiana 70130

RE: No. 17-10030 *Aoki v. DePuy Orthopaedics, et al.*  
Rule 28(j) letter

Dear Mr. Cayce:

Per Judge Smith’s invitation to provide the check and an explanation (Rec. Tr. at 38:36), I attach a copy of my firm’s 12/5/15 check to St. Rita Catholic School sent five weeks before the 1/11/16 trial.

The charitable contribution occurred when Morrey expressly had no intent to testify. Although inartfully expressed at oral argument, I still believe the early date helpful and important. The date confirms the contribution was a “thank you” for time spent with us rather than a promise by me to make a charitable contribution in exchange for Dr. Morrey’s testimony. Approximately seven weeks later, when he agreed to testify, the contribution had long been made, and Dr. Morrey was neither asking for, nor expecting, any payment. The St. Rita payment was not “compensation to be paid for the study or testimony in the case,” and Rule 26(a)(2)(B)(vi) did not require disclosure. A Rule 26 payment was the context before the court when I declared Morrey unpaid. The issue was whether Morrey was “retained” for report purposes.

Lyle W. Cayce, Clerk  
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The early date also refutes Appellants' argument that Dr. Morrey or counsel intentionally misrepresented Morrey's compensation to the jury. Dr. Morrey never testified about compensation. There were only three references to his compensation before the jury (all attached). In these references counsel stated:

- "Bernard Morrey wasn't compensated," ROA.17-10030.12787;
- Dr. Morrey charged "no expense coming to this courtroom, not a paid witness," ROA.17-10030.16912; and
- Regarding the conversation between Dr. Morrey and his son about MoM that happened a decade before trial, "That's not bought testimony. That's not conjured. That's not rehearsed. That's real life." ROA.17-10030.16954.

The last two statements are entirely correct. When I spontaneously made the first statement during a trial objection, I was focused on compensation to Dr. Morrey for trial testimony, not a charitable contribution made *five weeks* prior to trial. Telling the jury Dr. Morrey refused payment and instead a contribution was made to a Christian school would have helped his jury appeal, not hurt.

There was no intentional or harmful misrepresentation and no intent to deceive.

Respectfully submitted,

*/s/ W. Mark Lanier*

W. Mark Lanier

**CHECK**

**The Lanier Law Firm, P.C.**

<i>Vendor Name</i> St. Rita Catholic School		<i>Vendor No.</i> 565		<i>Date</i> 12/04/2015		Frost National Bank 510020346	
<i>Invoice No.</i>	<i>Ref.Doc.No.</i>	<i>Credit</i>	<i>Discount</i>	<i>Amount</i>	<i>Total</i>		
151203	29651-DePuy Pinnacle			10,000.00	10,000.00		
<i>Account Number</i>		<i>Check Number</i> O-11802		<i>Check Amount</i> 10,000.00			

The Lanier Law Firm, P.C.  
 P.O. Box 691448  
 Houston TX 77269-1448  
 713-659-5200


Frost National Bank  
 P.O. Box 1315  
 Houston, TX 77251

O-11802

*Date* 12/04/2015    \$    *Amount* \*10000.00\*

Pay: Ten Thousand Dollars

To The Order Of: St. Rita Catholic School  
 712 Weiler Blvd  
 Fort Worth TX 76112



THIS CHECK CONTAINS MULTIPLE SECURITY FEATURES. SEE BACK FOR DETAILS.

⑈011802⑈ ⑆114000093⑆ ⑈510020346⑈

# **RECORD EXCERPTS**

1 that you've done and in testifying?

2 A. Yes. Like all experts on either side, I'm compensated  
3 for my time that I spend on these cases.

4 MR. LANIER: Your Honor, I object. Dr. Matt Morrey  
5 wasn't compensated. Bernard Morrey wasn't compensated.  
6 Philip Cann wasn't compensated.

7 For him to say --

8 THE COURT: I get that objection.

9 MR. SARVER: Your Honor, I object. That's a speech.

10 THE COURT: I get the objection.

11 Sustain the objection part of it.

12 THE WITNESS: I apologize. I -- I wasn't aware of  
13 that. I apologize.

14 I get compensated as an expert for the time I spend on  
15 these cases.

16 BY MR. SARVER;

17 Q. And what is your hourly rate?

18 A. I charge \$600 an hour for consultation and examination.

19 Q. All right. And have you been compensated by DePuy for  
20 the work you have done on this case and other cases?

21 A. Yes, I have.

22 Q. All right. And for how long have you been performing  
23 this kind of work?

24 A. It's been two and a half or three years.

25 Q. Okay. How much have you been paid or invoiced DePuy for

1 Mr. Cannon will address you on the damage issues.

2 Question number 1 is called in the law strict liability.  
3 It's called that in the law because it's not a question of  
4 what you intended to do, it's not a question of did you have  
5 the best intentions in the world, it's not a question of did  
6 you know. It's just a simple question: was there a design  
7 defect in the hip at the time it left possession, and that's  
8 in surgery when the salesperson opens it and hands it, that  
9 was a producing cause of the injuries.

10 "A design defect is a condition of the product that  
11 renders it unreasonably designed."

12 Now, I marched through this very question, the use of the  
13 product and the risk, the safer alternative design. I marched  
14 through this with a number of witnesses, and I hope you  
15 remember their testimony.

16 I marched through it with Dr. Burstein. I marched  
17 through it with Dr. Morrey, I marched through it with Dr. Matt  
18 Morrey and Dr. Kearns. Each of those witnesses came, and they  
19 were very unequivocal of what they had to say.

20 Each one, Dr. Morrey senior, no expense coming to this  
21 courtroom, not a paid witness. "It was in my opinion" is the  
22 way he would answer that.

23 "Explain to the jury why. Talk to them in your words.

24 "The key component of that legal definition is really the  
25 last sentence. If there was a problem and we have to try to

1 If President Bush could talk to the surgeon and pick him,  
2 he's good enough for me. And to pick a metal-on-poly hip,  
3 good enough for me. That's who did the surgery. That's the  
4 kind of hip that he put in.

5 And the reason that he was here is I called his son and  
6 said what happened here. He said I don't use this kind of  
7 hip. why not? My dad told me not to.

8 That's not bought testimony. That's not conjured.  
9 That's not rehearsed. That's real life. That's the way they  
10 lived. They did not use that because they did not believe in  
11 it, and they don't have to make excuses -- oh, I forgot to  
12 tell you about that million dollars, somebody gave it to me.  
13 I didn't earn it so that doesn't count. I got a million  
14 dollars but somebody gave me that. You're telling the story  
15 when you say that I got a million dollars. Somebody gave it  
16 to me. You had to sit and listen to that, and I apologize.

17 The Judge has been supremely patient. His staff is kind.  
18 I certainly appreciate -- appreciate the treatment that we've  
19 gotten here and the comfort that comes from it.

20 when you are considering these other people's damages  
21 too, Christopher, you'll -- you'll remember what they said and  
22 you'll remember Pete and the limitations that it has brought  
23 upon him.

24 Pete, to finish your story, the way he dealt with what  
25 happened to him over there defending us was to come home and