

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

In re: FLUOROQUINOLONE PRODUCTS
LIABILITY LITIGATION

MDL No. 15-2642 (JRT)

This Document Relates to All Actions

**PRETRIAL ORDER NO. 9
ON FACT DEPOSITION
DISCOVERY**

The Court finds that the parties have met and conferred with regard to an Order addressing fact deposition discovery. This discovery Order does not address depositions of the parties' experts which, absent agreement or further order of the Court, are not to begin until the completion of fact discovery and further order of this Court. The parties having stipulated thereto, the Court orders that:

FACT DEPOSITION DISCOVERY OF DEFENDANTS, PLAINTIFFS AND NON-PARTY WITNESSES

A. The Parties: For purposes of this Order, Defendants Bayer Corporation, Bayer Healthcare Pharmaceuticals, Inc., and Merck & Co., Inc. shall collectively be referred to as the "Bayer Defendants." Defendants Johnson & Johnson, Janssen Pharmaceuticals, Inc., and Janssen Research & Development LLC shall collectively be referred to as the "Janssen Defendants." Defendant McKesson Corporation shall be referred to as "McKesson." The Bayer Defendants, Janssen Defendants and McKesson shall collectively be referred to as "Defendants."

B. Governing Law: Unless otherwise provided, fact discovery depositions of Defendants, Plaintiffs and non-parties shall be governed by applicable Federal Rules of Civil Procedure and Local Rules, except as otherwise provided herein or in any other Pretrial Order.

C. Fact Discovery Protocol: This Order applies to fact discovery depositions of all Defendants, Plaintiffs and non-parties, including prescribing and treating physicians, but not to experts retained by the parties.

1. Number of Depositions of Defendants: Absent a showing of good cause, Plaintiffs in this MDL shall be entitled to take the following number of depositions for each Defendant:

J&J/Janssen:	40
Bayer & Merck:	40

The number of depositions applies to depositions of individual fact witnesses as well as to depositions of corporative representatives designated pursuant to Federal Rule of Civil Procedure 30(b)(6). If Plaintiffs believe they have good cause to conduct additional depositions, Plaintiffs shall meet and confer with Defendants to determine if an agreement can be reached on the number of additional depositions. If the parties are unable to agree on the number of additional depositions, the dispute shall be submitted promptly to the Court for resolution.

2. Deposition Scheduling Procedures:

(a) **Deposition Point Persons.** Depositions and matters related to Depositions shall be coordinated by Point Persons designated for Plaintiffs and each Defendant. The parties will cooperate to expand notifications as necessary and convenient, but for a communication concerning the notice or scheduling of a deposition to be effective, it must be made by email to the deposition Point Person(s). Point Persons for Plaintiffs and each Defendant must be designated within fifteen (15) days after entry of this Order.

(b) Plaintiffs shall provide the appropriate Point Person(s) with the names of any individual fact witness they seek to depose or, in the case of a 30(b)(6) deposition request, with the subject matters for which a deposition is requested.

(c) Within ten (10) business days of receipt of the list of requested deponents, the Point Person(s) will notify Plaintiffs whether Defendants object to the deposition of any person on the list.

(d) For those witnesses for whom there is no objection, the Point Persons shall cooperate on the scheduling of the deposition(s) consistent with Section C.9(b) herein. Once the Point Persons have agreed upon a date for a deposition, the noticing party may serve the deposition notice as set forth herein.

(e) For any listed witness to whom Defendants object, the parties will meet and confer in good faith to attempt to resolve the objection. In the event the parties cannot resolve the objection, the dispute shall be submitted to the Court for resolution. Any such submission must be made within ten (10) days of the parties' agreement that the meet and confer process has been exhausted.

3. Deposition Notices. In addition to the information required by applicable Rule, each deposition notice shall state whether the deposition is to be videotaped and, if so, the number of cameras to be used and the name and address of the videographer's agency.

4. Telephone Depositions. By indicating in its notice of deposition that it wishes to conduct the deposition by telephone, a party shall be deemed to have requested a stipulation to do so under Fed. R. Civ. P. 29. Unless an objection to the use of a telephone deposition is served pursuant to Section C.7, the parties shall be deemed to have entered into such a stipulation. All persons present with the deponent testifying telephonically pursuant to

this paragraph shall be identified on the record in that deposition, and shall not by word, sign or otherwise coach or suggest answers to the deponent.

5. Cross-Notices Between State Court Cases and These Proceedings.

(a) In order to avoid duplicative discovery and to prevent the unnecessary expenditure of judicial resources and the resources of the parties, Plaintiffs' Point Person shall use his or her best efforts to coordinate the scheduling of depositions with state court plaintiffs so that each deponent shall only appear for a single deposition, and steps should be taken to encourage counsel in related state court proceedings to coordinate their depositions with MDL depositions. Defendants' Point Person shall provide Plaintiffs' Point Person and known state court plaintiffs' counsel with at least ten (10) days' notice of any cross-notice in these proceedings by Defendants of a deposition originally noticed in a state court.

(b) It is the intent of this Order that counsel for MDL Plaintiffs shall be the primary examiner in depositions coordinated with a state court proceeding. Plaintiffs' Point Person shall work cooperatively with respect to the division of time in Section C.12 with any participating state court plaintiff's counsel. Counsel for state court plaintiffs may examine a deponent limited to matters not previously covered by MDL Counsel, provided said counsel do not have any cases in the MDL and are not co-counsel in the state court case with counsel who has cases in the MDL. Upon conclusion of the examination by the primary examiner, other state court counsel may ask non-duplicative additional questions consistent with Section C.12. Nothing in this provision shall be construed as an injunctive or equitable order affecting state court proceedings. Rather, this provision is intended to reflect this Court's desire for voluntary state-federal coordination.

6. Cooperation. Counsel is expected to cooperate with, and be courteous to, each other and deponents during the course of any deposition. Counsel shall refrain from engaging in colloquy during depositions. Counsel shall recess from time to time during the deposition for meals and to permit periods of rest or refreshment reasonably required by the deponent, stenographers, videographers, and/or counsel conducting or defending the deposition.

7. Objections. Any objection to any deposition Notice shall be served no later than ten (10) days after the Notice is served.

8. Attendance.

(a) **Who May Be Present.** Unless otherwise ordered under Fed. R. Civ. P. 26(c), depositions may be attended by counsel of record, members and employees of their firms, attorneys specially engaged by a party for purposes of the deposition, named parties or, in the case of corporate parties, agents of that party, stenographers and videographers, the deponent and counsel for the deponent. Upon application, and for good cause shown, the Court may permit attendance by a person who does not fall within any of the categories set forth in the previous sentence. While the deponent is being examined about any confidential document or the confidential information contained therein, persons to whom disclosure is not authorized under the Protective Order shall be excluded.

(b) **Unnecessary Attendance.** 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 and/or the members of Plaintiffs' Liaison Counsel should elect not to attend.

(c) **Notice of Intent to Attend a Deposition.** In order for counsel to make arrangements for adequate deposition space, counsel who intends to attend a deposition should advise counsel for the noticed party or non-party no fewer than three (3) business days prior to the deposition, whenever feasible.

9. Conduct.

(a) **Examination.** Questioning of deponents ordinarily should be conducted by no more than two attorneys for all Plaintiffs in this MDL, designated by Plaintiffs' Co-Lead Counsel, and one attorney each for the Bayer Defendants, the Janssen Defendants, and McKesson. In the event that more than one attorney for Plaintiffs elects to question a witness, Plaintiffs agree that any such questioning will proceed in an organized fashion. The second Plaintiffs' attorney questioning the witness may only begin asking questions once the first Plaintiffs' attorney questioning the witness has concluded his examination, and the first Plaintiffs' attorney questioning the witness may not ask any additional questions thereafter except to the extent the first Plaintiffs' attorney is designated to ask rebuttal questions of the witness. Any such rebuttal questions must directly relate to the questions asked by the attorney defending the deposition, and cannot be duplicative of Plaintiffs' earlier questioning. The total time used by a side for questioning may not exceed that provided by Section C.12.

(b) **Scheduling.** Unless otherwise provided, depositions should ordinarily be noticed twenty (20) calendar days in advance of the date on which the deposition is to take place. Counsel shall use their best efforts to cooperate in scheduling depositions at mutually convenient times and places. No more than one deposition of any witnesses from the same Defendant may take place in this MDL at the same time, except by agreement of the parties.

(c) **Location.**

(i) Unless otherwise agreed by the parties, any deposition of Plaintiffs, healthcare providers, case-specific fact witnesses or other non-party witnesses shall take place within the federal district in which that deponent works or resides. Depositions of Defendants' current employees and officers residing in the United States shall take place in the federal district of that deponent's place of business. Defense counsel will make reasonable efforts to obtain the agreement of a Defendant's U.S.-based former employees and officers to appear at the same location as that Defendant's current employees and officers. Absent such agreement, the deposition of that Defendant's former employees and officers will take place either within the federal district in which the deponent currently resides or at a location mutually agreeable to the deponent and the parties.

(ii) Depositions of a Defendant's current or former employees or officers residing outside of the United States will take place outside the United States at a location to be determined by mutual agreement by the parties' respective Point Persons.

(iii) The location of any deposition shall be as consistent as possible within each city, so that stenographic and video equipment, if being used, can be left in place.

(d) **Postponements.** Once a deposition has been scheduled, it shall not be taken off the calendar, rescheduled or relocated fewer than seven (7) calendar days in advance of the date it is scheduled to occur, except upon agreement between the primary examiner designated by the party noticing the deposition and the attorney representing the deponent, or by leave of Court for good cause.

10. Documents.

(a) **Production of Documents.** Witnesses subpoenaed to produce documents should ordinarily be served at least thirty (30) calendar days before the scheduled deposition. The parties acknowledge that requests requiring significant collection or production efforts may require more than thirty (30) days' notice to complete the production before the deposition, and that the party seeking the production of such documents should time the service of its subpoena accordingly.

(b) **Protective Order.** A copy of the applicable Protective Order in this MDL (Dkt. # 149) (the "Protective Order") shall be provided to the deponent before the deposition commences if the deponent is to produce or may be asked about documents that may contain confidential information.

(c) **Copies.** Extra copies of documents about which deposing counsel expects to examine a deponent should ordinarily be provided to opposing counsel and the deponent at the deposition. Deponents and their counsel should be shown a copy of the document at the deposition before being examined about it, except when counsel seek to impeach or test the deponent's recollection. The protocol governing native documents in Paragraph 4(a)(ii) of the Protective Order shall be followed when using documents produced in native format at a deposition.

11. Videotaped Depositions. By so indicating in its notice of a deposition, a party, at its expense, may record a deposition by videotape pursuant to Fed. R. Civ. P. 30(b)(2) and (3), subject to the following rules:

(a) **Real-time Feed.** All videotaped depositions will be stenographically recorded by a court reporter with "real-time" transcription capabilities.

(b) **Video Operator.** The professional legal videographer of record 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.

(c) **Attendance.** Each deponent, attorney and other person attending the deposition shall be identified on the record at the commencement of the deposition. Only the deponent and any deposing attorney may be videotaped.

(d) **Standards.** Unless physically incapacitated, the deponent shall be seated at a table, across from the deposing attorney, except when reviewing or presenting demonstrative materials for which a change in position is needed. To the extent practicable, all depositions 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, in the sole discretion of the professional legal videographer of record, to record accurately the natural body movements of the deponent or to portray exhibits and materials used during the deposition. Similarly, sound levels will be altered only as necessary, in the sole discretion of the professional legal videographer of record, to record satisfactorily the voices of counsel and the deponent.

(e) **Filing.** The professional legal videographer of record shall preserve custody of the original videotape in its original condition until further order of the Court.

(f) **Number of Cameras.** Plaintiffs or Defendants may elect, at their own expense, to employ two (2) cameras to videotape the testimony of the deponent at the deposition—one camera to film the deponent, and the other to film the examining attorney. Should the noticing party elect not to use a second camera to film the examining attorney, any

other party may, at its own expense, employ a second camera for such purposes. Any party may also, at its own expense, elect to employ a third video camera for purposes of filming any demonstrative materials or other exhibits shown to the deponent during the course of the deposition, subject to the right of any other party to object, either on the record during the deposition or during any later court proceeding to the materials being filmed or the method of filming. For purposes of using videotaped depositions at trial or in any other hearing, the deposition footage shall be edited so that the footage of the questioning—and, if applicable, any footage of the exhibits shown to the witness—is synchronized with the deponent’s testimony.

12. Length of Examination. The examination by the party noticing the deposition shall be no more than seven (7) hours of actual examination time, inclusive of any time reserved for re-direct or rebuttal, absent agreement of the parties or further order of this Court upon a showing of good cause.

To the extent the party defending the deposition questions its own deponent, such time shall not count against the seven-hour examination time limit. In the event the party defending the deposition questions its own deponent for more than forty-five (45) minutes, the PSC shall be entitled to additional time to conduct its rebuttal questioning of the deponent; specifically, for every one (1) minute of questioning by defending counsel above and beyond forty-five (45) minutes, the PSC shall be entitled to thirty (30) seconds of additional rebuttal time. For example, if the party defending the deposition questions its own witness for fifty-five (55) minutes, the PSC is entitled to up to five (5) additional minutes of time for rebuttal questioning beyond the seven-hour limit.

To the extent the party defending the deposition anticipates that its questioning of its own witness will exceed forty-five minutes, it will provide notice at least forty-eight (48) hours before the scheduled deposition.

The Court expects that if a deposition requires additional time the parties will make a good faith effort to agree on an extension before coming to the Court for resolution. Should a deposing party reasonably believe its examination will require more than seven (7) hours to complete, it will provide at least five (5) business days' notice to opposing counsel to allow scheduling for the efficient completion of the deposition, or for the deposing party to file a motion seeking additional time.

13. Questions Regarding Deposition Preparation. Plaintiffs agree that Plaintiffs' counsel shall not be entitled to any pre-deposition disclosures or to ask any Defendant's fact witness any questions regarding what documents the deponent reviewed in preparation for the deposition, including whether the deponent reviewed any particular document in preparation for the deposition.

14. Continuance of Deposition. Subject to the time limitations set forth in Section C.12, and to the availability of the deponent, if a deposition is not completed by 5:00 p.m., counsel for the witness may determine, in his or her discretion, to continue past 5:00 p.m. to allow for the completion of the deposition. Should the deposition not complete in a single day, the deposition will continue on a date to be agreed upon by counsel or, if agreement cannot be reached, a date specified in a notice of continued deposition.

15. Objections and Directions Not to Answer During Depositions. Unless otherwise agreed by the parties, and noted on the record, the following stipulations shall apply to all depositions in this action:

(a) Any objection made at a deposition shall be deemed to have been made on behalf of all other parties who wish to join in the objection. Nothing in this provision shall be read to support any later argument by any party that any other party who does not wish to join in the objection either joined in the objection or agreed that the objection was proper.

(b) All objections are reserved until trial or other use of the deposition, except those objections regarding the form of the questions or the existence of a privilege.

(c) Counsel shall not direct or request that a deponent refuse to answer a question, unless that counsel has objected to the question on the ground that the question seeks privileged information, information that the Court has previously ordered is not discoverable, or a deponent seeks to present a motion to the Court for termination of the deposition on the grounds that it is being conducted in bad faith or in such a manner as to annoy, embarrass, or harass the party or the deponent. When a privilege is claimed, the deponent shall nevertheless answer 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 were made, any other person to whom the contents of the statement has been disclosed, and the general subject matter of the communication.

(d) Private conferences between deponents and their attorneys are improper while a question is pending, except for the purpose of determining whether a privilege should be asserted.

16. Disputes During Depositions. Disputes arising during depositions that cannot be resolved by agreement and that, if not immediately resolved, will significantly disrupt the discovery schedule or require rescheduling of the deposition, or might result in the need to

conduct a supplemental deposition, shall be presented to the Court by telephone by calling the Court's Chambers. In the event the Judge is not available, the deposition shall continue as to matters not in dispute with full reservation of rights to continue the examination objected to pending a ruling at the earliest possible time.

If the nature of the dispute would not require the continuance of the deposition pending resolution thereof, the parties may elect to either present the matter to the Court by telephone at a time when the parties and the Court are available, or to present the dispute to the Court in writing. If the parties elect to present the dispute to the Court in writing, each side must submit a one (1) page summary of its position and any authority relevant to the dispute. The Court will issue a prompt ruling, as its schedule permits.

17. Marking of Deposition Exhibits. Any documents previously produced by Defendants or third parties used as exhibits in a deposition shall be referred to by any Bates number(s) appearing on the face of the documents and the deposition exhibit designation. Documents not previously marked as exhibits shall be marked with a sequential number and a designation indicating which party marked the exhibit (*e.g.* "Plaintiffs exhibit ____," "Bayer's exhibit ____," "Janssen's exhibit ____," or "(deponent name) exhibit ____"). The same documents presented as an exhibit at subsequent depositions shall continue to be referred to as originally marked, and counsel shall avoid marking the same document with a different exhibit number at any subsequent deposition.

18. Objections as to Authenticity. Any objection to the authenticity of an exhibit used in the deposition must be made by the objecting party on the record during the deposition, or within thirty (30) days of the deposition, or the document marked as an exhibit will be deemed authentic. If a party subsequently obtains information it believes may call into

question the authenticity of a document marked as an exhibit, that party will promptly notify the party that used that document, and all parties shall cooperate as necessary so that the Court may issue a ruling on any objection to such document(s) prior to trial or prior to remand of any cases for trial in the transferor courts. The parties agree that any such ruling on the document's authenticity shall be based solely on the subsequently obtained information concerning the document's authenticity, and shall not depend on the timing of any party's obtaining such information and making its objection.

19. Depositions Pursuant to Rule 30(b)(6). In those instances when the Plaintiffs serve a deposition notice pursuant to Fed. R. Civ. P. 30(b)(6), the following shall apply (in addition to the foregoing general procedures governing depositions):

(a) Depositions taken pursuant to Fed. R. Civ. P. 30(b)(6) shall be taken pursuant to the Federal Rules of Civil Procedure and applicable case law.

(b) The party wishing to take the deposition will in good faith describe with reasonable particularity the categories on which the party is requesting examination. Within fourteen (14) days after receiving the notice, the party to be deposed will in good faith attempt to inform the discovering party: (1) if it believes that multiple witnesses will be necessary to respond to the requested categories of information; (2) to which category each witness will be produced to respond; and (3) noticed subjects for which it will not prepare a witness, and why.

20. 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, together with an index of all exhibits marked or referred to during the deposition, 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 transcript shall also contain the name of any attorney and any other person attending the deposition together with the name of his or her firm or organization, business address and, if applicable, the name of the person or corporation he or she represents. The court reporter shall be requested to furnish the transcript in electronic form in text-readable form and hard copy in Min-U-Script format to the examining attorney(s) and the defending attorney.

21. Correction and Signing Depositions. Unless waived by the deponent, the transcript of a deposition, or any portion thereof, shall be submitted to the deponent for correction and signature within thirty (30) days after the completion of the deposition or any portion thereof. A deposition transcript, or a transcript of a portion thereof, may be signed by the deponent before a notary within thirty (30) days after the transcript, or any portion thereof, is submitted to the deponent. If no corrections are made within the time set forth in this paragraph, the transcript will be presumed accurate.

22. Depositions of Defendants' Current and Former Employees and Officers. Defendants shall make available current employees and officers requested by Plaintiffs for deposition, subject to the Defendants' right to object to the taking of any particular employee or officer's deposition for good cause shown. Defendant shall take reasonable steps to make available requested former employees and officers, to the extent possible. If Defendants are unable, despite their best good faith efforts, to produce former employees and officers, then Defendants shall provide the former employee or officer's last known address, and shall cooperate in any effort to obtain the assistance of this Court or another court of appropriate jurisdiction to compel the former employee or officer's attendance at the deposition. Plaintiffs'

right to contact former employees of Defendant shall be governed by the applicable Rules of Professional Conduct.

23. Depositions of Plaintiffs. Defendants shall have priority of examination in the deposition of any Plaintiff in this MDL.

24. Depositions of Plaintiffs' Healthcare Providers.

(a) **Priority of Examination.** Priority of examination at the depositions of Plaintiffs' healthcare providers, including Plaintiffs' prescribing and primary treating physicians, shall alternate between the parties. The parties agree to coordinate the details of this alternating schedule once the Court has established a protocol governing case-specific discovery in this MDL.

(b) **Ex Parte Communications with Plaintiffs' Healthcare Providers by Plaintiffs' Counsel.** Unless otherwise precluded by law or by future order of the Court, there shall be no restrictions on pre-deposition contacts by Plaintiffs' counsel with Plaintiffs' healthcare providers, including providing and/or reviewing documents produced by the Defendants in this MDL with Plaintiffs' healthcare providers. Prior to Plaintiffs' providing and/or reviewing any documents produced by the Defendants and marked Confidential with the healthcare provider, the healthcare provider must first sign a copy of the Non-Disclosure Agreement attached as Exhibit A to the Protective Order applicable in this MDL.

(c) **Ex Parte Communications with Healthcare Providers by Defense Counsel.** Contact with a Plaintiff's healthcare provider by defense counsel shall be governed by the relevant law in the jurisdiction in which the healthcare provider resides.

(i) **Authorizations.** To the extent ex parte communication with healthcare providers by defense counsel is permitted by relevant law, the parties stipulate

that Defendants may demand and shall receive authorizations for ex parte communications with a Plaintiff's physicians by defense counsel. In such cases, Defendants may demand authorizations to interview particular healthcare providers in the form attached as Exhibits A and B, and Plaintiff shall provide such duly executed authorizations within ten (10) days of receipt of any such demand. The parties shall meet and confer to determine the states and plaintiffs for which such authorizations shall be provided. This paragraph is inapplicable in any matter in which counsel certifies in writing that Plaintiffs, Plaintiffs' counsel, and their agents and employees have not had and will not have any contact with the healthcare provider regarding this MDL, the individual Plaintiff's lawsuit, or Plaintiffs' allegations.

(d) **Required Disclosures.** All documents provided to, or shown to, any healthcare provider witness by any party (other than the provider's own treatment records relating to the patient) shall be disclosed to the other parties at least seventy-two (72) hours before any deposition of the healthcare provider. The disclosure shall include any documents, cover letters, and all other correspondence with the healthcare provider. If the copies shown to or provided to the healthcare provider had markings, highlighting or tabs affixed to them when shown or given to the healthcare provider, those markings, highlighting or tabs shall be set forth clearly in the disclosure.

DATED: July 5, 2016
at Minneapolis, Minnesota.

s/John R. Tunheim
JOHN R. TUNHEIM
Chief Judge
United States District Court