



IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE DIGITEK® LITIGATION

Civil Action No. 08-C-5555

THIS DOCUMENT APPLIES TO ALL CASES

CONDUCT OF DISCOVERY ORDER

This Order substantially reflects Pretrial Order #22 (Conduct of Discovery) entered by the Honorable Joseph R. Goodwin from the United States District Court for the Southern District of West Virginia, *In Re Digitek® Products Liability Litigation*, MDL No. 1968 (“Digitek® MDL”). It is contemplated by the Court and the parties that discovery in the West Virginia State Digitek® Litigation and in the Digitek® MDL will be coordinated to the extent practicable in order to promote efficiency and to reduce duplication and cost.

DEPOSITION GUIDELINES

A. Deposition Notices

1. This Order applies to all deposition proceedings originally noticed in the West Virginia State Digitek® Litigation pursuant to W. Va. R. Civ. P. 30 and this Order. This Order also supplements the provisions relating to the cross-noticing, taking and use of depositions set forth in this Court’s “State and Federal Coordination Order” entered on January 23, 2009.

2. This Order, in its entirety, shall be attached to any non-party subpoena or deposition notice.

3. Each deposition notice shall include the name and, if known, the general occupational description of each deponent, and the date, time and place of the deposition.

4. In order for counsel to make arrangements for adequate deposition space in any case that is cross-noticed in the Digitek® MDL, counsel who intend to attend such deposition

noticed by Plaintiffs should, whenever feasible, provide notice to Plaintiffs' Liaison and Lead Counsel of their intention to attend. Counsel who intend to attend such deposition noticed by the Defendants should send notice of their intention to Defendants' Liaison and Lead Counsel. As to all parties, notice of intention to attend shall be provided within one week of the deposition date.

5. Deposition notices shall state whether the deposition is to be videotaped and, if so, the name, firm and address of the videotape recorders. All videotape depositions shall proceed pursuant to the provisions of Section J, *infra*.

B. Avoidance of Duplicative Depositions

As a general rule, absent good cause or the agreement of the parties, no witness should be deposed on the same subject more than once in these proceedings. Defendants' Liaison and Lead Counsel shall advise Plaintiffs' Liaison and Lead Counsel of all depositions that have been taken by Plaintiffs in other litigation related to Digitek® and shall provide the transcripts of such depositions to the Plaintiffs' Liaison and Lead Counsel so that the deposition transcripts are accessible to all Plaintiffs subject, however, to the payment of the proper fees as required by the provisions of Paragraph D.2 of the January 23, 2009 State and Federal Coordination Order.

C. Cooperation

Witnesses, parties and counsel must conduct themselves at depositions in a temperate, dignified, and responsible manner. Opposing counsel and the deponent must be treated with civility and respect. There shall be no smoking or use of other tobacco products in any room in which a deposition is being conducted, including before, during or after a deposition, or in the deposition room during deposition recesses.

D. Scheduling

Absent extraordinary circumstances, counsel shall consult in advance with opposing counsel and proposed deponents in an effort to schedule depositions at mutually convenient

times and locations. Counsel are expected to cooperate and coordinate the scheduling of depositions. Only one deposition of a current or former employee of the Defendants shall be taken per day until such time as there is a demonstrated need to multitrack depositions of the employees of the defendants. At that time the parties shall meet and confer on the establishment of a reasonable schedule for the multi-tracking of depositions of employees of the Defendants.

For depositions that are not case specific, each side shall be notified at least thirty (30) days in advance of a deposition, absent agreement by parties, time constraints due to this Court's "Case Management and Scheduling Order No. 1" ("CMO/Scheduling Order No. 1") entered on April 13, 2009, or by leave of Court.

No depositions shall be scheduled on secular or religious holidays.

E. Cross-Notices Between West Virginia State Digitek® Litigation and Digitek® MDL

In order to avoid duplicative discovery and to prevent the unnecessary expenditure of judicial resources and the resources of the parties, depositions of persons whose testimony will likely be relevant both in the West Virginia State Digitek® Litigation and in the Digitek® MDL shall be cross-noticed for use in all such cases. Parties in the West Virginia State Digitek® Litigation must show cause within 60 days of the taking of a deposition in the Digitek® MDL why the deposition taken in the Digitek® MDL should not be usable in this Court, subject to the right to conduct supplemental examination upon a showing of need.

Nothing in this provision shall be construed as an injunctive or equitable order affecting the Digitek® MDL proceedings. Rather, this provision is intended to reflect this Court's desire for voluntary state-federal coordination.

F. Postponements

Once a deposition has been scheduled, it shall not be taken off calendar, postponed, rescheduled, or relocated less than five (5) calendar days in advance of the date it is scheduled to

occur, except upon agreement of counsel or by leave of Court for good cause.

G. Deposition Length and Day

A deposition day shall begin as early as practicable and shall terminate no later than 5:30 p.m. local time (except Friday when depositions shall end no later than 1:00 p.m.). All parties shall work together and in good faith to make reasonable exceptions to the length of the deposition day as necessary.

A deposition shall last no longer than fourteen (14) hours total examination time, except upon agreement of counsel or by leave of Court. This time includes examinations performed by all parties and does not include regular and reasonable breaks taken during the deposition.

H. Continuance of Deposition

If a deposition is not concluded during the time allotted in the deposition notice, and time still remains for the examining party under section G above, then the deposition shall be continued on a newly-noticed date or an agreed date. In such circumstances, a ten (10) day notice will be sufficient to notice a continued deposition.

I. Locations for Taking Depositions

1. The parties will work together to cooperate in the location and circumstances of all scheduled depositions.

2. Unless otherwise agreed, depositions of plaintiffs will take place in each plaintiff's home county.

3. Unless otherwise agreed by the parties prior to the noticing of an expert, treating physician and/or prescribing physician deposition, the deposition of such witness shall take place in the home county of the witness.

4. The location of the deposition shall be as consistent as possible within each city, so that videotape equipment, if being used, can be left in place.

5. To the extent reasonably possible, depositions of current and former employees of defendants will take place in the federal judicial district of such employee's place of business. Defense counsel will make reasonable efforts to obtain the agreement of former employees of defendants to appear at the same location as current employees of the same defendant. Absent such agreement, that deposition will take place either within the federal judicial district in which the former employee resides or at a location mutually agreeable to the former employee and parties.

J. Attendance

Unless otherwise agreed to by the parties, depositions may be attended only by the parties, the deponent, the deponent's attorney, the examining attorneys, attorneys of record in the West Virginia State Digitek® Litigation or the Digitek® MDL, in-house counsel for the parties, court reporters, videographers, and any person who is assisting in the litigation and whose presence is reasonably required by counsel. Experts who have signed the Protective Order may attend expert depositions of the other parties' experts but may not participate in the depositions. 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 a deponent is being examined about any document that the parties have agreed is confidential, or the Court has determined to be confidential, attendance at that portion of the deposition by persons to whom disclosure is not authorized by agreement of the parties or by order of the Court shall be prohibited. Any portion of the deposition transcript containing documents or information subject to the Protective Order entered in this case shall be sealed in accordance with the terms of the Protective Order.

Unnecessary attendance by counsel is discouraged and may not be compensated in any fee application to the Court.

Telephonic participation shall be addressed on a witness by witness basis.

K. Conduct of Depositions

Except by order of the Court, the following shall apply at all depositions:

1. Examination

For any deposition that is cross-noticed in the Digitek® MDL, Plaintiffs' Lead Counsel in the West Virginia State Digitek® Litigation shall designate one plaintiff attorney in the West Virginia State Digitek® Litigation to participate in the deposition and conduct non-duplicative questioning.

If counsel cannot agree on the order of questioning at a deposition, these rules shall apply: if the deposition was originally noticed in the West Virginia State Digitek® Litigation, whether or not later cross-noticed in the Digitek® MDL, the West Virginia State Digitek® Litigation counsel shall go first in the deposition; if the deposition was originally noticed in the Digitek® MDL, whether or not later cross-noticed in the West Virginia State Digitek® Litigation, the Digitek® MDL counsel shall go first in the deposition.

Counsel should cooperate in the allocation of time in order to comply with the time limits set by the Court.

2. Objections and Directions Not to Answer

Unless otherwise agreed by the parties, and noted on the record, the following stipulations shall apply to all discovery depositions in this action:

- a) Objections must be limited to (1) those that would be waived if not made pursuant to W. Va. R. Civ. P. 32(d)(3); and (2) those necessary to assert a privilege, enforce a limitation on evidence directed by the Court or present a

motion under W. Va. R. Civ. P. 30(d)(3). No other objections can be raised during the course of the deposition. In the event privilege is claimed, examining counsel may make appropriate inquiry about the basis for asserting privilege.

b) Speaking objections that refer to the facts of the case or suggest an answer to the deponent are improper and must not be made in the presence of the deponent.

c) Asking redundant, repetitive, multiple asked-and-answered questions in an effort to alter or amend a deponent's testimony is improper and must not be done in the deponent's presence.

3. Objections to Documents

Objections as to the relevance of documents are not waived, and are reserved for later ruling by the Court or by the trial judge. No objections to the use of any document are necessary.

4. Disputes During Depositions

Disputes between the parties in depositions noticed in the Digitek® MDL and cross-noticed in the West Virginia State Digitek® Litigation will be addressed by the Digitek® MDL Court in accordance with the provisions of Pretrial Order # 22 (Conduct of Discovery) entered in the Digitek® MDL.

Disputes arising during depositions originally noticed in the West Virginia State Digitek® Litigation 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 this Court by

telephone. In the event the Court is not available, the deposition shall continue with full reservation of rights of the interrogation for a ruling at the earliest possible time.

If the nature of the dispute would not stop the deposition from going forward, the parties may elect either to present the matter to the Court by telephone, 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.

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 Section 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.

L. 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 W. Va. R. Civ. P. 30(e) (submission to the witness) and 30(f) (filing, exhibits). A copy of all deposition exhibits shall be included with the original deposition transcript.

Before commencement of the deposition, each witness, attorney, and any other person attending the deposition shall submit to the court reporter in writing his or her name, the name of his or her firm, business address, and the name of the client he or she represents. The list of these people shall be included at the beginning of the deposition transcript.

M. Videotaped Depositions

The provisions of this Order regarding examination of deponents apply to videotaped depositions. Any deposition may be videotaped at the request of any party pursuant to the following terms and conditions:

1. Simultaneous Stenographic Recording

All videotaped depositions shall be simultaneously stenographically recorded in accordance with Section L, above.

2. Cost of the Deposition

The party requesting videotaping of the deposition shall bear the expense of the videotaping. Requests for the taxation of these costs and expenses may be made at the conclusion of the litigation in accordance with applicable law.

3. Videotape Operator

The operator(s) of the videotape recording equipment shall be subject to the provisions of W. Va. 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. Attendance

At the commencement of the deposition, each witness, attorney and any other person attending the deposition shall be identified on camera.

5. Interruptions

No attorney or party shall direct instructions to the video operator as to the method of operating the equipment. 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. Standards

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.

The parties reserve the right to seek an Order from the Court that the examiner as well as the witness be recorded, and that if a second camera is necessary to accomplish such recording, such party agrees to bear such expense.

To the extent that technology permits, the parties reserve the right to format documents and other tangible materials so that a videotape deponent who makes reference to such exhibits can be displayed contemporaneously with such exhibit.

7. Index

The videotape operator shall use a counter on the recording equipment and after completion of the deposition shall prepare a log, cross-referenced to counter numbers, that identifies the depositions on the tape at which examination by different counsel begins and ends, at which objections are made and examination resumes, at which exhibits are identified, and at which any interruption of continuous tape-recording occurs, whether for recesses, “off-the-record” discussions, mechanical failure, or otherwise.

8. Filing

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 and Lead Counsel for Plaintiffs and Defendants.

9. Technical Data

Technical data, such as recording speeds and other information needed to replay or copy the tape, shall be included on copies of the videotaped deposition.

N. Obtaining Copies of Transcripts and Videotapes

Any party may at its own expense obtain a copy of the videotape and the stenographic transcript by contacting the Liaison and Lead Counsel for the party noticing the deposition or the court reporter.

O. Correction and Signing Depositions

A deponent will be given the opportunity to review their deposition and make corrections consistent with W. Va. R. Civ. P. 30(e).

OTHER DISCOVERY

P. Effect on Other Discovery

With regard to other forms of discovery, including Interrogatories, Requests to Produce Documents, Requests to Admit and Right to Entry and Inspection, nothing contained herein shall limit or abridge the parties rights or prerogatives under previously entered orders of this Court, the West Virginia Rules of Civil Procedure and the West Virginia Rules of Evidence.

IT IS SO ORDERED.

ENTER: July 2, 2009

/s/ Alan D. Moats
Lead Presiding Judge