

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND**

<b>IN RE: SMITH &amp; NEPHEW BIRMINGHAM HIP RESURFACING (BHR) HIP IMPLANT PRODUCTS LIABILITY LITIGATION</b>	<b>MDL: 1:17-MD-2775-CCB  THIS DOCUMENT RELATES TO: ALL ACTIONS</b>
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**CASE MANAGEMENT ORDER NO. 2  
Common Benefit**

**I. SCOPE OF ORDER**

This Order is entered to provide for the fair and equitable sharing among Plaintiffs, and his/her counsel, of the burden of services performed and expenses incurred by attorneys acting for the common benefit of all Plaintiffs in this complex litigation.

**A. Governing Principles and the Common Benefit Doctrine**

The governing principles are derived from the United States Supreme Court's common benefit doctrine, as established in *Trustees v. Greenough*, 105 U.S. 527 (1881); refined in, *inter alia*, *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116 (1884); *Sprague v. Ticonic National Bank*, 307 U.S. 161 (1939); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980); and approved and implemented in the MDL context, in *inter alia*, *In re Air Crash Disaster at Florida Everglades on December 29, 1972*, 549 F.2d 1006, 1019-21 (5th Cir. 1977); and *In re MGM Grand Hotel Fire Litigation*, 660 F.Supp. 522, 525-29 (D. Nev. 1987). Common benefit work product includes all work performed for the benefit of all plaintiffs, including pre-trial matters, discovery, trial preparation, a potential settlement process, and all other work that advances this litigation to conclusion.

**B. Application of this Order**

This Order applies to all cases now pending, as well as to any case later filed in, transferred to, or removed to, this Court and treated as part of the coordinated proceeding known as *In Re: Smith & Nephew Birmingham Hip Resurfacing (BHR) Hip Implant Products Liability Litigation*, MDL 2775. This Order further applies to each attorney who represents a plaintiff with a case now pending in, later filed in, transferred to, or removed to, this Court, and to each attorney who represents a plaintiff with a case filed in a state court who benefits from common benefit work prepared in the litigation.

**C. Attorney Participation Agreement (Exhibit A)**

The Attorney Participation Agreement (hereafter “Participation Agreement”), attached hereto and incorporated herein as Exhibit A, is a voluntary agreement between plaintiffs’ attorneys who have cases pending in the MDL and/or in state court. The Participation Agreement is a private and cooperative agreement between plaintiffs’ attorneys only (“Participating Counsel”); and not Defendants or Defendant’s counsel. Participating Counsel shall automatically include all members of Plaintiffs’ Leadership Group (as designated in CMO No. 1), by virtue of his/her appointment by the Court to the Plaintiffs’ Executive Committee, any State-Federal Liaisons that this Court may appoint, any other attorneys appointed to the Plaintiffs’ Steering Committee, and plaintiff’s attorneys who execute the Participation Agreement (Exhibit A).

All plaintiffs’ attorneys who currently have cases pending in this Court shall, within 45 days of this Order, designate whether he/she is a Participating Counsel by signing the appropriate section of the Participation Agreement. Any plaintiffs’ attorney who does not yet have a Smith & Nephew Birmingham Hip Resurfacing (BHR) System (hereafter “BHR”) case

filed in any federal shall sign the Participation Agreement if he/she desires to be Participating Counsel: (a) within 45 days of the date their first case is filed in or otherwise docketed in this Court via direct filing, transfer or removal; or (b) within 45 days of the date their first case is filed in any state court, if that lawyer intends to voluntarily become a Participating Counsel. Failure to execute the Participation Agreement, indicating that an attorney will be a Participating Counsel within the time frame set forth in this paragraph, may result in higher percentages for common benefit assessment as a result of such delayed participation.

All Participating Counsel with cases in this MDL, and who therefore receive the common benefit work product, shall have both their federal and state court cases assessed.

Counsel only having BHR cases filed in state court, may also receive the common benefit work product by signing the Participation Agreement.

Participating Counsel shall be entitled to receive all the common benefit work product of those counsel who have also signed the Participation Agreement. Counsel who choose not to execute the Participation Agreement are not entitled to receive common benefit work product and may be subject to an increased assessment on all BHR cases in which they have a fee interest, if they receive common benefit work product, or otherwise benefit by the work performed, by Participating Counsel.

The Court recognizes the jurisdictional rights and obligations of the state courts to conduct their state court litigation as they so determine and that the state court litigations may include counsel who are Participating Counsel. The Participation Agreement and this Order shall not be cited by a party to the Participation Agreement in any other court in support of a position that adversely impacts the jurisdictional rights and obligations of the state courts and state court Participating Counsel.

## **II. CAPITAL CONTRIBUTIONS AND COMMON BENEFIT EXPENSES**

### **A. Capital Contributions**

In order to fund the costs of the litigation as it moves forward, Plaintiffs' Executive Committee shall be empowered to seek capital contributions from Participating Attorneys on an "as needed" basis without further order of this Court. Such contributions will be deposited into a "BHR Litigation Account" and will be considered held costs.

Should any PSC member fail to timely pay his/her contribution, that PSC member agrees that he/she shall be dismissed from the PSC without further order of this Court.

These capital contributions may be used to pay for "qualified eligible expenses", as defined below.

### **B. Qualified Expenses Eligible for Reimbursement**

In order to be eligible for reimbursement of common benefit expenses, said expenses must meet the requirements of this section and the limitations set forth in the Participation Agreement. Specifically, said expenses must be: (a) for the common benefit; (b) appropriately authorized by Leadership; (c) timely submitted within the defined limitations set forth in this Order; and (d) verified by a partner or shareholder in the submitting firm.

Time and expense submissions are to be made on the 15th of each month, beginning no later than September 15, 2017. Each submission should contain all time and expenses incurred two months pre-dating the month of the submission (*i.e.*, the September 15, 2017 submission should include all time and expenses incurred during the month of July 2017; the October submission should include all time and expenses incurred during the month of August 2017, and so on). All time and expense submissions should be accompanied by contemporaneous records.

Untimely submissions may be rejected.

**C. Examples of Common Benefit Expenses**

Common Benefit Expenses may include, but are not limited to:

1. Capital contributions: The Court understands that the Leadership will be periodically assessing their PSC and committee members to fund an operating account to pay for shared expenses that will fund the operation of this MDL.
2. deposition and court reporter costs incurred for non-case specific depositions;
3. costs necessary for creation of a document depository, the operation and administration of the depository;
4. costs for the electronic storage, retrieval and searches of ESI;
5. certain Court filing and services costs for matters involving the MDL;
6. Leadership group administration matters such as meetings and conference calls;
7. reasonable travel expenses, including lodging and meals and expenses incurred in connections with Leadership approved meetings, events, and other common benefit tasks;
8. legal and accountant fees;
9. expert witness and consultant fees and expenses;
10. investigator fees and expenses;
11. printing, copying, coding, scanning (out of house or extraordinary firm cost);
12. research by outside third-party vendors / consultants / attorneys;
13. common witness expenses including travel;
14. translation costs;
15. bank or financial institution charges, provided that all such work was conducted for the Common Benefit of Plaintiffs; and
16. Special master and/or mediator charges.

**D. Expenses Limitations**

**1. Travel Limitations**

Except in extraordinary circumstances approved in advance by Plaintiffs' Executive Committee, all travel reimbursements are subject to the following limitations:

- i. Airfare: Only the price of a coach seat for a reasonable itinerary will be eligible for reimbursement. First Class Airfare will *not* be fully reimbursed, except for international flights, which requires prior approval by Plaintiffs' Executive Committee to be considered for reimbursement. Use of a private aircraft will not be reimbursed. If First Class Airfare is used on domestic flights, then the difference between the First Class Airfare must be shown on the travel reimbursement form, and only the equivalent coach fare will be reimbursed.
- ii. Hotel: Hotel room charges for the average available room rate of a business hotel, including the Hyatt, Westin, and Marriott hotels, in the city in which the stay occurred will be eligible for reimbursement. Luxury hotels will not be fully reimbursed but will be reimbursed at the average available rate of a business hotel (rate at Hyatt, Hilton, Sheraton, Westin, and/or Marriott must be documented).
- iii. Meals: Meal expenses must be reasonable.
- iv. Cash Expenses: Miscellaneous cash expenses for which receipts generally are not available (tips, luggage handling, pay telephone, etc.) will be eligible for reimbursement up to \$50.00 per trip, as long as the expenses are properly itemized.
- v. Rental Automobiles: Luxury automobile rentals will not be eligible for full reimbursement, unless only luxury automobiles were available. If luxury automobiles are selected when non-luxury vehicles are available, then the difference between the luxury and non-luxury vehicle rates must be shown on the travel reimbursement form, and only the non-luxury rate may be claimed, unless such larger sized vehicle is needed to accommodate several counsel.
- vi. Mileage: Mileage claims must be documented by stating origination point, destination, total actual miles for each trip, and the rate per mile paid by the member's firm. The maximum allowable rate will be the maximum rate allowed by the IRS (currently 53.5 cents per mile).

## **2. Non-Travel Limitations**

- i. Shipping, Courier, and Delivery Charges: All claimed expenses must be documented with bills showing the sender, origin of the package, recipient, and destination of the package.
- ii. Postage Charges: A contemporaneous postage log or other supporting

documentation must be maintained and submitted. Postage charges are to be reported at actual cost.

- iii. In-House Photocopy: A contemporaneous photocopy log or other supporting documentation must be maintained and submitted. The maximum copy charge is 15¢ per page.
- iv. Computerized Research – Lexis/Westlaw: Claims for Lexis or Westlaw, and other computerized legal research expenses will be reimbursed at \$100 per hour with supporting documentation of actual time used.

## **E. Shared and Held Common Benefit Costs**

### **1. Shared Costs**

“Shared Costs” are costs incurred for the common benefit of the litigation. Shared Costs are costs that will be paid out of a “BHR Litigation Account” established by Leadership, and be funded by periodic capital contributions as described above. Shared Costs eligible for reimbursement will include, but will not be limited to: expert witness fees, conference costs, maintaining the virtual document depository, vendor bills, and other such items necessary for the day-to-day running of the litigation. All Shared Costs must be approved by Leadership prior to payment, and shall be paid timely as they are incurred.

### **2. Held Costs**

“Held Costs” are expenses that will be carried by each law firm, and reimbursed from the S&N BHR Common Benefit Account (as defined below). Held Costs can also include reasonable, unreimbursed and authorized Shared Costs. Held Costs are those that do not fall into the above Shared Costs categories but are incurred for the benefit of all Plaintiffs, in general. Examples of Held Costs include, but are not limited to, the expenses and costs associated with: airfare; lodging and meals at depositions; ancillary costs attendant to meetings with expert witnesses; and costs attendant to participating in Court hearings for common benefit work. All

expenses of a substantial nature that meet these requirements and fall under the following categories shall be considered Held Costs and qualify to be submitted for consideration by Leadership and the Court for future reimbursement from the S&N BHR Common Benefit Account, or such other account, as may be appropriate. No specific client-related expenses shall be considered as Held Costs except, expenses incurred for the common benefit as part of the bellwether trial process in the MDL. Those expenses may be considered for treatment as Held Costs.

### **3. Authorization and Submission**

The Participation Agreement sets forth the guidelines for authorizing and submitting expenses for the common benefit which shall be followed.

#### **F. Verification**

The forms detailing expenses shall be certified by a partner in each firm attesting to the accuracy of the submissions. Attorneys shall keep receipts for all expenses. Credit card receipts are an appropriate form of verification, except for hotels and meals, unless accompanied by a declaration from counsel that the expenses were for the common benefit. For hotels and meals, the actual hotel invoice and meal receipt must be submitted.

### **III. COMMON BENEFIT WORK**

#### **A. Qualified Common Benefit Work Eligible for Reimbursement**

Only Participating Counsel are eligible for reimbursement for time and efforts expended for the common benefit. Participating Counsel shall be eligible for reimbursement for time and efforts expended for common benefit work if said time and efforts are: (a) for the common benefit; (b) appropriately authorized by Leadership; (c) timely submitted; and (d) verified by a partner or shareholder in the submitting firm.



**B. Compensable Common Benefit Work Defined**

“Common Benefit Work” shall include only work specifically assigned, or approved, by Leadership. As the litigation progresses, and common benefit work product continues to be generated, the Plaintiffs’ Executive Committee may assign Participating Counsel with common benefit work. Examples of common benefit work include, but are not limited to: maintenance and working in the document depository; document review and coding; expert retention and development authorized by Plaintiffs’ Executive Committee; preparing for and conducting authorized depositions of Defendants, third-party witnesses, and experts; and activities associated with preparation for trial and the trial of any cases designated as “common benefit trials” by Plaintiffs’ Executive Committee.

**IV. PLAINTIFFS’ COMMON BENEFIT ACCOUNT**

**A. Establishing the Fund**

At an appropriate time, Plaintiffs’ Executive Committee will direct the establishment of the “S&N BHR Common Benefit Account” (hereafter “Account”). The Account will be held subject to the direction of this Court.

**B. Payments into the Fee and Expense Fund**

**1. General Standards**

All Plaintiffs and their attorneys who are subject to this Order and who agree to settle, compromise, dismiss, or reduce the amount of a claim, with or without trial, recover a judgment for monetary damages or other monetary relief, including such compensatory and punitive damages, with respect to Smith & Nephew Birmingham Hip Resurfacing (BHR) System claims, are subject to an assessment of the gross monetary recovery, as provided herein.

**2. Gross Monetary Recovery**

Gross monetary recovery includes all amounts paid to Plaintiffs' counsel by Defendants through a settlement or pursuant to a judgment. In measuring the "gross monetary recovery," the parties are to (a) exclude court costs that are to be paid by Defendant; (b) include any payments to be made by Defendant on an intervention asserted by third-parties, such as to physicians, hospitals, or other healthcare providers in subrogation related to treatment of a plaintiff, and any governmental liens or obligations (e.g., Medicare/Medicaid); and (c) include the present value of any fixed and certain payments to be made in the future. The assessment shall apply to all plaintiffs' attorneys whose cases are subject to this Order, whether as sole counsel or co-counsel, including cases pending in the MDL, pending in state court, unfiled, or tolled.

### **3. Assessment Amount**

The assessment amount will be a total of seven percent (7%) of the gross monetary recovery for timely submitted Participation Agreements. Of that amount, five percent (5%) shall be deducted from the attorneys' fees and two percent (2%) from the clients' shares of the gross monetary recovery. Leadership estimates that the 2% held back from the clients' share will provide necessary funding for the expenses and costs associated with common benefit work.

These proposed assessment amounts are provisional and are subject to Court review and approval, upon petition by Plaintiffs' Leadership, or upon its own initiative. Leadership may seek a reallocation of the total assessment between fees and expenses from the Court at the time the application for disbursement is made, or for modifications of the assessment amount, for good cause shown. Otherwise, the common benefit assessment will represent a hold back (*In re Zyprexa Prods. Liab. Litig.* 267 F.Supp.2d 256 (E.D.N.Y. 2006) and shall not be altered.

However, if any counsel fails to execute the Participation Agreement timely, such counsel and members of his/her firm may be subject to an increased assessment.

Upon Motion and further MDL Orders, this Court shall address matters concerning: the establishment of the Account as the repository for common benefit funds; the appointment of an administrator of said Account; the administration of said Account; applications for reimbursement from the Account; and other related matters.

#### **4. Defendant Obligations**

Plaintiffs' Liaison Counsel shall provide Defendant's counsel and the Court, or its designee, with a list of cases and/or counsel who have entered into written agreements with the PEC and PSC by executing the Participation Agreement. This same list shall be made available to all plaintiffs' counsel with cases pending in this MDL, as well as any other plaintiffs' counsel who signs the Participation Agreement, upon request. In the event there is a dispute as to whether a case should be on the list, Plaintiffs' Executive Committee shall seek to informally resolve the matter with the particular plaintiff's counsel, and if that is unsuccessful, upon motion to the Court.

Defendant and its counsel shall not distribute any settlement proceeds to any plaintiff's counsel in this MDL or to any other plaintiff's counsel to whom this Order applies, per the preceding paragraph (or directly to any plaintiff), until after: (1) Defendant's counsel notifies Plaintiffs' Liaison Counsel, in writing, of the existence of a settlement and the name of the individual plaintiff's attorney (without disclosing the amount of the settlement); and (2) Plaintiffs' Liaison Counsel has advised Defendant's counsel, in writing, whether or not the individual plaintiff's attorney's case(s) is/are subject to an assessment, and the amount (stated as

a percentage of the recovery) of the assessment, pursuant to this Order. Plaintiffs' Liaison Counsel shall share this information with Plaintiffs' Executive Committee, who shall otherwise keep this information confidential. For cases subject to an assessment, Defendant is directed to withhold an assessment from any and all amounts paid to Plaintiffs and their counsel, and to pay the assessment directly into the Account as a credit against the settlement or judgment. No orders of dismissal of any Plaintiff's claim, subject to this Order, shall be entered unless accompanied by a certificate of Plaintiff's and Defendant's counsel that the assessment, if applicable, will be withheld and will be deposited into the Account at the same time the settlement proceeds are paid to settling counsel. If, for any reason, the assessment is not or has not been so withheld, Plaintiff and his/her counsel are jointly responsible for promptly paying the assessment into the Account.

A Court approved Certified Public Accountant (CPA), and/or the PSC, shall provide, at least quarterly, to the Court or its designee, notice of the names and docket numbers of the cases for which an assessment has been paid into the Account since the last such report. A report is not due if there are no payments made into the Account by Defendant during that quarter. Details of any individual settlement agreement, individual settlement amount, and individual amounts deposited into escrow shall be confidential and shall not be disclosed by the CPA to Plaintiffs' Executive Committee, the PSC, the Court, or the Court's designee, unless the Court requests that it receive that information. Monthly statements from the CPA shall, however, be provided to Plaintiffs' Executive Committee, Plaintiffs' Liaison Counsel, and the Court, showing only the aggregate of the: monthly deposits; disbursements; interest earned; financial institution charges, if any; and current balance.

**V. DISTRIBUTIONS**

**A. Court Approval**

The amounts deposited into the S&N BHR Common Benefit Account shall be available for distribution to Participating Counsel who have performed professional services or incurred expenses for the common benefit. No amounts will be disbursed without review and approval by the Court, or such other mechanism as the Court may order. Specifically, such sums shall be distributed only upon Order of this Court. This Court retains jurisdiction over any common benefit amount, fee award, and expense distribution.

**B. Application for Distribution**

Each Participating Counsel who does common benefit work has the right to present his/her claim(s) for compensation and/or reimbursement prior to any distribution approved by this Court. Any attorney who does not sign the Participation Agreement shall not be eligible to receive common benefit payments for any work performed or expenses incurred.

At the appropriate time, the Court shall request that Plaintiffs' Executive Committee provide it with recommendations for distributions to Participating Counsel who have performed common benefit work. The majority vote of the Plaintiffs' Executive Committee shall dictate the recommended distribution for common benefit work. Plaintiffs' Executive Committee shall determine, on its own, the most fair and efficient manner by which to evaluate all of the time and

expense submissions in making its recommendation to this Court. This Court will give due consideration to the recommendation of the Plaintiffs' Executive Committee.

SO ORDERED, this 23rd day of August 2017.

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Catherine C. Blake  
Chief Judge, United States District Court