UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Baltimore Division)

IN RE: SMITH & NEPHEW BIRMINGHAM HIP RESURFACING (BHR) HIP IMPLANT PRODUCTS LIABILITY LITIGATION	MDL No. 2775 Master Docket No. 1:17-md-2775 JUDGE CATHERINE C. BLAKE **THIS DOCUMENT RELATES TO BHR TRACK CASES**

SMITH & NEPHEW, INC.'S SUBMISSION REGARDING A SCHEDULING ORDER FOR BHR TRACK CASES

Pursuant to the Court's instructions at the March 28, 2018 status conference and the Memo to Counsel of April 20, 2018 (Dkt. No. 638), Defendant Smith & Nephew, Inc. ("S&N") files its Submission Regarding a Scheduling Order for BHR Track Cases, and attaches its proposed CMO as Exhibit A.

I. BACKGROUND AND INTRODUCTION

In advance of the March 28, 2018 status conference, the parties conferred on a plan for initial discovery activities in the BHR cases and agreed to an exchange of proposed discovery and scheduling CMOs on April 10, 2018.[1] S&N viewed the purpose of a scheduling CMO to outline the steps and deadlines to advance the BHR cases through discovery and toward trial. Indeed, this is consistent with the Court's instructions. March 28, 2018 Tr. at 7:14-18 ("So now that we are through the Motion to Dismiss, obviously my interest is in getting a discovery schedule that will move toward trial, if that's where we're going on some of the -- on the BHR

[1] The parties have separately submitted a Proposed Case Management Order for General Fact Discovery in BHR Track Cases (Dkt. No. 667), which outlines the parties' areas of agreement and identifies the remaining areas of disagreement for the Court on general fact discovery processes and certain deadlines (some of which are also contained in S&N's proposed scheduling CMO attached hereto as Exhibit A).

cases."); Court's April 20, 2018 Memo to Counsel (Dkt. No. 638) (the parties to provide "a proposal for a schedule including discovery, dispositive motions, and readiness for trial in the BHR cases"). The parties exchanged initial proposals on April 10, 2018, as agreed. S&N's proposed CMO outlined five phases of litigation leading to the selection of cases for trial in this District. Plaintiffs' proposal was provided in letter form with proposed deadlines working backwards from Maryland plaintiff trial dates and the remand of non-Maryland cases. *See* Ex. B (Letter from Mr. Ward dated April 10, 2018). Over the past two weeks, the parties have engaged in discussions to attempt to bridge the gap between the two strikingly different approaches. S&N revised its proposed CMO to try to provide more specificity and to attempt to address and incorporate some aspects of Plaintiffs' proposal and provided it to Plaintiffs on April 24, 2018. *See* Ex. A. Plaintiffs declined to propose or discuss additional changes, stating that the parties are too far apart and should just submit their competing proposals for the Court's consideration.

S&N's proposed CMO addresses the progress of the BHR Track Cases in a logical fashion, starting with general fact discovery and then proceeding to selection of discovery pool cases, expert discovery, case-specific discovery in discovery pool cases, and trial selection. Under S&N's proposal, the first BHR cases will be ready for trial in this District by April 2020. On the other hand, Plaintiffs propose that case-specific discovery in this MDL should only be taken of "Maryland Plaintiffs" without any regard to whether such plaintiffs are representative of others in the MDL. Ex. B at 1. Plaintiffs overlook and compress many of the interim steps necessary to prepare a case for trial, and instead, prematurely leapfrog to trial and remand to transferor courts. S&N's proposed CMO is consistent with the objectives of 28 U.S.C. § 1407 for transfer of cases to this MDL for "coordinated or consolidated pretrial proceedings," and provides a logical and reasonable progression toward trial, while acknowledging that it is

premature at this early stage in the MDL to provide detailed dates or a specific process for trial or remand. S&N respectfully submits that, for these reasons, as discussed further below, its proposed BHR Track Scheduling CMO should be adopted.

II. THE COURT SHOULD ADOPT S&N'S PROPOSED SCHEDULING ORDER

The parties' competing proposals raise two key areas of disagreement: *First*, the question of which cases should be tried in this District and how and when to make that determination; and *second*, how should the pretrial activities be phased and what is the realistic timing for the first trial in this District. S&N proposes a general fact discovery cut-off that allows for general expert discovery and motions practice to follow, while Plaintiffs appear to prefer that fact discovery remain open until shortly before trial and after the completion of expert discovery. Plaintiffs also propose that the first trial (of a Maryland plaintiff) commence on October 28, 2019, whereas S&N suggests that a more realistic date for the first trial in this District of a representative plaintiff is approximately April 2020.

A. Identification of Representative Cases for Case-Specific Discovery/Trial

From S&N's standpoint, the PFS and medical record collection process is critical for evaluation of individual BHR cases and a necessary precursor to the selection of cases for additional case-specific discovery and depositions (*i.e.*, discovery pool cases), and ultimately, for trial. Without the information provided by the PFS and medical records regarding Plaintiffs' claims, it is impossible to determine the appropriate number of cases, the characteristics of those cases, or the specific cases that are best suited for the discovery pool, from which cases would ultimately be selected for trial. Given the timeframe necessary for finalizing the PFS form and process, providing responses (Plaintiffs propose sixty (60) days from the date of entry of a PFS CMO), and then collecting and digesting medical records (estimated to take three to four

months), this process will likely run through the end of 2018. For this reason, S&N proposes that the parties meet and confer in January 2019, on discovery pool case selection.

Unlike Plaintiffs, S&N believes that after necessary discovery, one or more trials in this District will be of assistance to both sides in evaluating the strengths and weaknesses of their positions, provided those cases are representative of others in this MDL. *See* Manual for Complex Litigation (4th) § 22.315 (2004) ("If individual trials . . . are to produce reliable information about other mass tort cases, the specific plaintiffs and their claims should be representative of the range of cases . . . . The more representative the test cases, the more reliable the information about similar cases will be."). Therefore, the goal of the discovery pool selection process will be to identify cases (involving Maryland plaintiffs or otherwise) that are likely to be representative for further case-specific workup and potential consideration as trial candidates, and to avoid devoting upfront resources to the discovery of cases that are not representative. Developing and/or implementing a discovery pool selection process prematurely, without the benefit of the PFS and medical record information, would put S&N at a disadvantage, as Plaintiffs would have unilateral knowledge regarding the specific details of their cases. Indeed, only through PFS and medical record collection can S&N determine which plaintiffs are likely to be representative on various issues such as injuries suffered, potential causes of injuries, reasons for revision surgeries, damages alleged, the applicability of statute of limitations[2] and other possible defenses.

For exactly these reasons, courts overseeing product liability MDLs have ordered PFS completion prior to implementing a process for selection of discovery pool/trial cases and

[2] S&N notes that dozens of cases currently in the MDL appear on their face to be untimely, and S&N anticipates filing a motion to dismiss in the near future. In addition, through the PFS process, it is likely that additional cases will be discovered to be time-barred. It would be a waste of resources to conduct further discovery or engage in expert work on cases that will not survive due to noncompliance with applicable statutes of limitations.

commencement of additional case-specific discovery. *See, e.g., In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 460 F.3d 1217, 1224, 1234 (9th Cir. 2006) ("The PFS was the starting point for defendants' assessment of plaintiffs' claims and the precondition for proceeding with further discovery, including depositions . . . . [W]ithout this [PFS] device, a defendant . . . had no information about the plaintiff or the plaintiff's injuries outside the allegations of the complaint"); *In re Stryker Rejuvenate & ABG II Hip Implant Prods. Liab. Litig.*, MDL No. 0:13-2441 (D. Minn.), Amended Pretrial Order No. 8 (Dkt. No. 363) at 1 (ordering all plaintiffs to submit preliminary disclosure forms and plaintiff fact sheet), Pretrial Order No. 17 [Dkt. No. 285] at 3 (subsequently grouping plaintiffs into 5 categories, from each of which 3 cases were to be "selected for discovery and trial").[3]

Plaintiffs apparently agree that a PFS process and records collection should occur, but they fail to build the time necessary to complete it into their proposal, and they do not see it as a precursor to later activities, including selection of discovery pool cases and trial candidates. Rather, in the apparent belief that bellwether trials would be of no assistance here, and discovery of non-Maryland cases should not occur in this MDL, they propose that only Maryland cases be subject to case-specific discovery and all other cases be sent back to the transferor courts without benefit of discovery and without waiting to see if the initial bellwether trials are of benefit in resolving the issues in this MDL. This proposal is entirely inconsistent with 28 U.S.C. § 1407 and the purpose of a MDL to conduct "coordinated or consolidated pretrial proceedings." Moreover, the proposal runs counter to the reasons that Plaintiffs purportedly sought this MDL in the first place. *See* Reply to S&N Response to Motion for Transfer (J.P.M.L. Dkt. No. 57) at 3-5 (Plaintiffs purportedly sought an MDL to (i) "avoid duplicative discovery and prevent

[3] Available at http://www.mnd.uscourts.gov/MDL-Stryker/orders-minutes.shtml.

inconsistent pretrial rulings," (ii) prevent inefficiencies resulting from the presence of "approximately 35 different law firms representing plaintiffs," (iii) address the "confusing and inefficient web of claims and motions" that would be presented by cases in different courts, and (iv) eliminate "the risk of inconsistent rulings and inefficient use of judicial resources" that would result from decentralized litigation). All of these purported concerns would remain if Plaintiffs' proposed remand of non-Maryland cases, without case-specific discovery, is effectuated.

S&N believes that case-specific discovery of the Maryland cases in isolation (as Plaintiffs propose) is illogical because it is unlikely that this handful of cases are representative.[4] The sensible approach is to obtain enough information on all of the cases via the PFS and medical record collection process, and then determine which cases and how many are appropriate for the discovery pool. Obviously, this Court can try any case as to which it has jurisdiction in this District, but S&N anticipates that other cases will be appropriate for the discovery pool and that it ultimately may agree to waive its rights under *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998) to allow one or more trials of such representative cases here. However, that determination cannot be made blind, and S&N lacks sufficient information to make that decision at this time. S&N also believes that case-specific discovery of non-Maryland cases should be conducted in the MDL, and it is inconsistent with 28 U.S.C. § 1407 to send large numbers of cases back to the transferor courts after several years in the MDL with no case-specific discovery having been completed.

[4] To S&N's knowledge, based primarily on the short-form complaints, there are currently eight (8) plaintiffs in BHR cases in the MDL who allege that Maryland law applies to their claims, but not all of them reside in Maryland or had their implant surgeries here. (The eight are Blandford, Evangelista, Felton, Hook, Sedgwick, Steinwandt, Twigg, and Williams.) Only one case (Williams) had proceeded through initial written discovery and some document production at the time the MDL was established, but discovery was incomplete and no depositions had been taken. These cases represent only 3% of the BHR cases currently pending in this MDL.

B. Phased Discovery and Trial Date

S&N's CMO proposes that the litigation proceed in logical phases toward trial, with some overlapping of dates so as to keep both general discovery and case-specific discovery moving forward. These phases include: (1) finalizing PFS and DFS, as well as authorizations; (2) completion of general fact discovery, including written discovery, document production and depositions; (3) after S&N has received information about each Plaintiff through the PFS and medical record collection, development of a process for selection of discovery pool cases and commencement of case-specific discovery in those cases; (4) development of a schedule and process for general expert discovery and *Daubert* motions; and (5) selection of cases for trial, along with setting expert and motions deadlines for these cases.

Plaintiffs' proposal, on the other hand, starts with a presumptive October 28, 2019 trial date for a Maryland plaintiff and works backwards, overlooking many of the steps and reasonable time frames necessary to complete discovery and pretrial activities. For example, Plaintiffs propose a mere fourteen (14) days between the completion of generic expert depositions and the filing of generic *Daubert* motions, four (4) days between the submission of *Daubert* replies and a *Daubert* hearing, and the close of general fact discovery only ninety (90) days prior to the first trial after the completion of general expert depositions and concurrently with dispositive motions and pretrial submissions. *See* Ex. B and Dkt. No. 667 at 9.

Moreover, S&N believes that Plaintiffs' proposed trial date of October 28, 2019 for a Maryland plaintiff is overly ambitious. S&N will endeavor to move as expeditiously as possible and proposes that the parties periodically evaluate and report to the Court on their progress to ensure that the BHR track cases are proceeding in a timely fashion. S&N understands the

Court's and Plaintiffs' desire to hold the first trial as soon as possible, but believes that discovery has to unfold in a sensible fashion, and as a result, a 2020 trial date is more realistic.

CONCLUSION

Plaintiffs' push for an October 2019 trial of a Maryland plaintiff appears to be based on the faulty notion that that the results of other manufacturers' metal-on-metal hip trials and settlements, involving entirely different metal-on-metal products, informs the parties and the Court about the BHR cases. However, the BHR track cases present different regulatory, safety and performance issues from other metal-on-metal devices, and S&N is entitled to its day in court to defend its product that remains on the market today. S&N should be permitted time for basic PFS discovery of the cases that Plaintiffs have centralized in this MDL in order to make informed decisions about the process for identifying representative cases, whether of Maryland plaintiffs or otherwise, for further discovery and potential trial. The goals of this MDL are served by this process, and not through prematurely leap-frogging to trial and by the premature remand of cases as proposed by Plaintiffs.

Accordingly, S&N respectfully requests that its proposed Scheduling Order be entered.

Dated: April 30, 2017

Respectfully Submitted,

/s/ Sara J. Gourley

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CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2018, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all attorneys of record.

/s/ Sara J. Gourley
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