

**UNITED STATES DISTRICT COURT  
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  
ALL CASES**

**CASE MANAGEMENT ORDER NO. 23  
(Process for Potential Resolution of Remainder Cases)**

The parties hereby submit this Case Management Order (CMO) 23 to propose a process that may lead to resolution of the BHR Track and THA Track cases in the MDL and any unfilled claims held by MDL counsel that are not subject to separate settlement agreements (collectively referred to herein as “Remainder Cases”). Defendant Smith & Nephew, Inc. (“Smith & Nephew”) has previously negotiated settlement agreements for discrete groups of cases held by certain Plaintiffs’ counsel, including Plaintiffs’ Co-Lead Counsel, Plaintiffs’ Liaison Counsel, and firms on the Plaintiffs’ Steering Committee (“Plaintiffs’ Leadership”). The parties have given extensive consideration to the method by which a substantially similar approach can be used to achieve resolution of the Remainder Cases, which are held by approximately 90 different plaintiffs’ firms, most of which represent only a small number of individuals each. This CMO is intended to establish a Settlement Committee to negotiate with Smith & Nephew, with the assistance of a mediator, toward an aggregate settlement of the Remainder Cases. The parties respectfully request the Court to enter this CMO and to establish the following process for this purpose.

**I. Creation of Settlement Committee.**

- A. Within 5 days of entry of this CMO, Plaintiffs' Lead Counsel will identify to Smith & Nephew's counsel up to four individuals it proposes to serve on a Settlement Committee to negotiate on behalf of plaintiffs an aggregate settlement of the Remainder Cases with Smith & Nephew and its counsel. Smith & Nephew and Plaintiffs' Lead Counsel will confer, and if there is no disagreement, the parties will jointly contact the Court to seek appointment of the proposed members of the Settlement Committee. If Smith & Nephew has any concerns about the proposed make-up of the Committee, the Court will consider those concerns before making appointments to the Settlement Committee. Lead MDL Counsel Jasper Ward and Genevieve Zimmerman will not be members of the Settlement Committee, but may consult with and assist the Settlement Committee. The Settlement Committee shall be allowed to share information with Lead MDL Counsel, and seek their input as needed.

**II. Census of Cases and Claims.**

- A. In order to determine which cases and claims will be included in the potential aggregate settlement, within ten (10) days of the date of this Order, the Settlement Committee and MDL Lead Counsel shall work to obtain a census of unfiled claims, and shall provide to Smith & Nephew within twenty-one (21) days of the date of this Order a census of every unfiled claim reported to the Settlement Committee and MDL Lead Counsel by such firms. The census results shall include, for each claim: the name, address, and gender of the claimant; whether it is a BHR or THA claim; if a BHR claim, the head size(s); the dates of implant,

revisions and any re-revisions for each hip at issue; the identity of the implanting and revising surgeon; and the Plaintiff lawyer and law firm who represents the claimant. However, an inability to provide all such information within 21 days does not exclude these claims from inclusion provided the necessary product identification and index and revision medical records are provided to Smith & Nephew at least thirty (30) days before the commencement of negotiations.

B. The Settlement Committee and/or MDL Lead Counsel shall also confer with each Plaintiff firm who holds an unfiled BHR or THA claim to determine if there are available medical records relating, at a minimum, to the index and revision surgeries (and any re-revisions, if applicable) and to establish product identification, and shall request that all such records be promptly supplied to Smith & Nephew, but no later than thirty (30) days in advance of any scheduled mediation. Smith & Nephew requires product identification and index and revision medical records in order to value unfiled claims for purposes of including them in any aggregate settlement. If the necessary records are not available, the Settlement Committee and/or MDL Lead Counsel shall confer with the relevant Plaintiffs' counsel in order to advise Smith & Nephew as to when, if ever, records may become available so that the parties can determine how to address those claims. Smith & Nephew reserves the right to exclude from the Remainder Cases any case or claim where required product identification and index and revision medical records are not available at least thirty (30) days prior to scheduled mediation.

C. Within ten (10) days of the date of this Order, Smith & Nephew shall supply to



MDL Lead Counsel and the Settlement Committee a list of the filed cases in the MDL not subject to prior settlement agreements as of the date the list is provided, including for each such case: the MDL case number; counsel of record; whether it is a BHR or THA Track case; the gender of the Plaintiff; if a BHR claim, the head size; and the dates of index, revision and any re-revisions. In addition, if Smith & Nephew lacks product identification or sufficient index and revision records to value the case, it will so indicate, and the parties will confer on how to address those cases.

### **III. Initial Period for Completion of Individual Settlement Discussions.**

- A. Smith & Nephew and any individual Plaintiffs' firms or lawyers who have previously begun negotiations with Smith & Nephew regarding resolution of cases or claims they control, and/or those who desire to begin such negotiations prior to commencement of the Settlement Committee aggregate settlement negotiations will attempt to complete those negotiations no later than thirty (30) days from the date of entry of this Order. An exception as to this timing will be made for: (i) cases or claims where necessary product identification or index or revision medical records are not yet available, but are expected to become available in the near future; (ii) cases or claims where agreement is likely, but the relevant parties require a limited amount of additional time to reach it; or (iii) cases or claims involving upcoming revision surgeries where negotiations must await completion of the surgeries. In these three instances, the relevant parties shall confer and if agreement is reached, will inform the Court of the agreement. If agreement cannot be reached, the parties will bring the disagreement to the

attention of the Court for a determination as to whether the case or claim should be placed into the group of Remainder Cases or otherwise set aside until a later date.

- B. All other MDL filed cases and unfiled claims identified in the Census shall become part of the Remainder Cases whose resolution shall be negotiated by the Settlement Committee.

#### **IV. Negotiation Process.**

- A. The Remainder Cases shall be negotiated as an aggregate settlement. It is the intention of the parties to attempt to settle all claims relating to revised hips and any unrevised contralateral hips. In the case of plaintiffs or claimants who do not have any revised hips or scheduled revisions, they will be recommended for placement on a term sheet for separate consideration at a later date.
- B. The Settlement Committee shall negotiate with Smith & Nephew using the assistance of a mediator, whom the parties agree shall either be John Perry or a mutually-agreeable mediator from Perry Dampf Dispute Solutions, the cost of which shall be split evenly between Plaintiffs and Smith & Nephew. The parties shall identify the proposed mediator to the Court within thirty (30) days of the date of this Order, and shall submit a short motion that includes his or her qualifications and fees, along with a proposed order for his or her appointment as mediator for the Remainder Cases.
- C. An initial mediation must occur within 45 days after the date of the Court Order appointing the proposed mediator or 90 days from the date of this Order, whichever is later, absent Court approval of alternate timing upon good cause

shown for deviation from the agreed timing. Notwithstanding the timing of mediation, settlement discussions, including settlement proposals by both sides, may be exchanged in advance of mediation and without a mediator's involvement.

- D. If an aggregate settlement amount is agreed upon, Plaintiffs agree to utilize the mediator or his or her firm as a Special Master or Settlement Administrator to allocate a portion of the aggregate settlement to individual Plaintiffs or Claimants. The Settlement Committee may utilize a separate firm for lien resolution (including Medicare/Medicaid and any other liens). However, all liens must be resolved by a single, insured lien resolution provider that will be responsible for ensuring all liens are paid before remaining allocated settlement amounts are paid to counsel for individual Plaintiffs or Claimants. The Special Master or Settlement Administrator will be responsible for, among other things, allocating a portion of the aggregate settlement to individual Plaintiffs or Claimants, resolving any medical (including Medicare/Medicaid) and other liens (unless addressed by a separate lien resolution firm), addressing any issues created by probate or estate issues or by bankruptcies of plaintiffs or claimants, and meeting with individual Plaintiffs or Claimants and/or their counsel as needed to assist in their consideration of whether to accept the allocated amount. Plaintiffs are responsible for paying the Settlement Administrator/Special Master and lien administrator costs. Smith & Nephew shall fund any aggregate settlement via a Qualified Settlement Fund (QSF), with the appropriate percentages paid into the Common Benefit Fund per CMO 2, as amended, and Smith & Nephew shall have no



responsibility with respect to allocation, resolution of liens or other situations, costs, distributions or otherwise after the QSF is funded.

- E. The inclusion of any case or claim in the Remainder Cases to be negotiated by the Settlement Committee does not mean that any Plaintiff or Claimant is required to settle. Further, for purposes of their work on the Remainder Case negotiations, the Settlement Committee and MDL Plaintiffs' Leadership, including Lead Counsel, the PSC, and the PEC, are acting on behalf of the group as a whole, not for any individual Plaintiff or Claimant. Individual Plaintiff and Claimant counsel remain bound by the terms of their own representation and fee agreements with their clients. Each lawyer representing a client in the Remainder Cases is responsible, among other things, for cooperating with and providing any additional information required by the Settlement Administrator, determining whether to recommend the allocation made by the Settlement Administrator, conveying to the Settlement Administrator the Plaintiff's or Claimant's decision regarding acceptance of the Settlement, advising their clients regarding the settlement, obtaining a signed release from his or her clients, and agreeing to dismissal of the case after the release is signed. Neither the Settlement Committee nor any member of Plaintiffs' Leadership will be signatories on any individual Settlement and Release agreement, except to the extent a Settlement Committee or Plaintiffs' Leadership member is also the lawyer for the individual client signing the release. The Settlement Committee (including MDL Lead Counsel's role in effectuating this Case Management Order and assisting the Settlement Committee) is a procedural tool to efficiently and fairly facilitate resolution of the Remainder

Cases.

- F. Smith & Nephew reserves the right at its sole discretion to withdraw from any negotiated aggregate settlement at any time prior to funding if fewer than 100% of the Plaintiffs and Claimants agree to participate. Smith & Nephew can waive the 100% participation requirement at its sole discretion with respect to any individual cases or claims, and can separately agree to negotiate, mediate, or litigate those cases or claims. If Smith & Nephew agrees to permit any opt-outs, the aggregate settlement amount will be reduced by the amount(s) allocated by the Settlement Administrator and/or Special Master to those particular opt-out cases or claims.
- G. The Settlement Committee and MDL Lead Counsel may seek common benefit time for work relating to the Remainder Case negotiations and any achieved settlement, but will not receive fees from individual case settlements or the aggregate settlement absent a previous attorney-client relationship or fee-sharing agreement.

**V. Stay of Litigation.**

- A. Except for activities relating to settlement, including filing of dismissals and work performed by the Settlement Committee and Smith & Nephew in connection with the Remainder Cases, litigation in this MDL is hereby stayed for a period of ninety (90) days from the date of this Order to allow the parties to focus on settlement. This period may be extended as needed in the discretion of the Court, with input of the parties. Notwithstanding, should Smith & Nephew exercise its right to withdraw from a settlement involving less than 100% participation



pursuant to Section IV. F above, the parties will promptly notify the Court, which will decide whether to lift the stay and/or other next steps in the litigation.

- B. The Court will set one or more telephonic status conferences during the stay period to learn of the status and progress of settlement negotiations, and the parties can request a call with the Court at any other time if it would be helpful or if there is any information the parties desire to report.

SO ORDERED, this 29th day of June, 2022.



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Catherine C. Blake  
United States District Judge