

**IN THE 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 ALL
ACTIONS**

**CASE MANAGEMENT ORDER NO. 14
Discovery and Trial Pool Process for BHR and THA Track Cases**

Plaintiffs and Defendant Smith & Nephew, Inc. (“Defendant”) (collectively, the “Parties”) have submitted a Proposed Order regarding the identification and handling of cases for inclusion in a BHR Track or THA Track Discovery Pool, and the selection of cases for trial. It is approved as follows.

I. Selection of BHR Track Discovery Pool Cases

A. From the group of BHR Track cases with substantially complete Plaintiff Fact Sheets (as defined in Case Management Order No. 8 [D.E. 814]) as of the date of CMO 14 entry, Defendant and Plaintiffs’ Lead Counsel shall each designate nine (nine) cases within thirty (30) days of the date of CMO 14 entry for inclusion in the initial “BHR Track Discovery Pool.” At least two (2) of the nine (9) cases selected by each Party shall be cases with proper venue in this District as agreed upon by the Parties (“Maryland Plaintiff BHR Track Case”). Each Party will strive to select cases involving plaintiffs with different genders, varying BHR head/cup sizes and involving different states’ laws.

II. Selection of THA Track Discovery Pool Cases

A. From the group of THA Track cases with substantially complete Plaintiff Fact Sheets (as defined in Case Management Order No. 8 [D.E. 814]) within ninety (90) days of the date of CMO 14 entry, Defendant and Plaintiffs' Lead Counsel shall each designate four (4) cases, for a total of eight (8) cases, within one hundred and twenty days (120 days) of the date of CMO 14 entry for inclusion in the initial "THA Track Discovery Pool." Three (3) of the cases selected by each Party will involve an initial index surgery with a BHR Acetabular Cup and femoral hip stem in a metal-on-metal total hip arthroplasty construct, and one (1) of the cases selected by each Party will involve the R3 acetabular shell and metal liner. At least one (1) of the cases selected by each Party shall be cases with proper venue in this District, to the extent available and as agreed upon by the Parties ("Maryland Plaintiff THA Track Case").

III. Plaintiffs' *Lexecon* Waiver for Discovery Pool Cases

A. Plaintiffs' Lead Counsel shall obtain any necessary waiver of *Lexecon* from the plaintiffs in the nine (9) cases they designate pursuant to Section I.A and the four (4) cases they designate pursuant to Section II.A, prior to such designation. For the cases selected by Defendant in Section I.A and II.A, Plaintiffs will recommend a *Lexecon* waiver and will use good faith efforts to obtain a *Lexecon* waiver. Plaintiffs will advise Defendant of *Lexecon* waiver for each defense-pick case within fourteen (14) days of the selection in Section I.A and II.A. If a plaintiff does not waive *Lexecon*, his/her case will be removed from the initial Discovery Pool, and Defendant shall designate a replacement case within ten (10) days of the notice from Plaintiffs' Lead Counsel. The process in this paragraph shall continue until a total of eighteen (18) cases with any necessary Plaintiffs' *Lexecon* waivers are included in the initial BHR Track Discovery Pool (nine (9) designated by each side), and a total of eight (8) cases

with any necessary Plaintiffs' *Lexecon* waivers are included in the initial THA Track Discovery Pool (four (4) designated by each side).

B. If a case is selected by Defendant pursuant to Section I.A or II.A, and the plaintiff does not wish to proceed with his/her case, plaintiff will file a stipulation voluntarily dismissing the case with prejudice pursuant to FRCP 41 within fourteen (14) days of the selection, and Defendant shall designate a replacement case within ten (10) days of the filing of the stipulation of dismissal. The *Lexecon* waiver process will proceed per Section III.A above.

IV. Core Discovery in Discovery Pool Cases

A. Initial case-specific discovery ("Core Discovery") shall begin on September 13, 2019 in the BHR Track Discovery Pool cases and on January 3, 2020, in the THA Track Discovery Pool cases, and shall not be delayed by the *Lexecon* waiver process in Section III.

B. Core Discovery for Discovery Pool cases shall consist of the following: Within thirty (30) days of identifying a case for the Discovery Pool, all documents requested in the PFS, including those set forth in Section XII, and DFS shall be produced to the extent those documents are in the Party's possession, custody, or control and have not been previously produced in this MDL. Each Party shall produce to the other Party copies of all plaintiff's medical records obtained by authorization or otherwise that have not already been produced, without the need for a formal request. Examination of any available explanted devices under the Protocol for Explanted Devices (CMO 9) is understood to be Core Discovery. Plaintiffs shall allow Defendant access to the plaintiff's explanted device(s), per CMO 9, within thirty (30) days from the date of selection of the Discovery Pool cases but no later than thirty (30) days before the deposition of the plaintiff. Depositions shall include (1) plaintiff; (2) the relevant sales representative (or district manager, if any, if the sales representative is unavailable); (3)

plaintiff's implanting surgeon(s); and (4) plaintiff's revising surgeon(s). The deposition of plaintiff shall occur before any other Core Discovery depositions. The deposition of the sales representative (or district manager, if the sales representative is unavailable) shall precede the deposition of the implanting physician(s), unless the Parties agree otherwise or for good cause shown to the Court. If either Party believes additional depositions are required as part of Core Discovery, the Parties will meet and confer, and if no agreement can be reached, will present the issue to the Court for decision. The Parties agree to flexibly address scheduling and scheduling constraints as the circumstances, including witness availability, in each case require.

C. For purposes of surgeon depositions, in Plaintiff pick cases, Defendant's counsel questions the implanting surgeon first, and Plaintiffs' counsel questions the revising surgeon first. In Defendant pick cases, Plaintiff's counsel questions the implanting surgeon first, and Defendant's counsel questions the revising surgeon first. In the event the implanting and revising surgeon is the same surgeon in a given case, the Party assigned to go first during the implanting surgeon deposition will be the Party allowed to question the witness first.

D. CMO 11 (Deposition Protocol) applies to all depositions in this MDL, including in Discovery Pool and Trial Pool cases. The Parties will meet and confer to discuss additional case-specific deposition considerations not specifically addressed by CMO 11, such as time allotments and cost sharing for surgeon depositions, and will separately propose an amendment to CMO 11 to include such additional provisions, if any. The Parties agree that deposition time will be evenly divided between the Parties for each surgeon deposition.

E. Core Discovery shall be completed in each of the eighteen (18) initial BHR Track Discovery Pool cases by March 1, 2020, and by July 1, 2020 for each of the eight (8) initial THA Track Discovery Pool cases.

V. Selection and Discovery of Trial Pool Cases

A. **BHR Track:** Within fourteen (14) business days of completion of Core Discovery in the initial BHR Track Discovery Pool cases, Defendant and Plaintiffs' Lead Counsel shall each select three (3) cases from the BHR Track Discovery Pool to move to the BHR Track Trial Pool for a total of six (6) cases. This must include at least one (1) Maryland Plaintiff BHR Track Case per Party.

B. **THA Track:** Within fourteen (14) business days of completion of Core Discovery in the initial THA Track Discovery Pool cases, Defendant and Plaintiffs' Lead Counsel shall each select two (2) cases from the THA Track Discovery Pool to move to the THA Track Trial Pool for a total of four (4) cases.

C. **Additional Case-Specific Discovery in Trial Pool Cases:** Any additional case-specific fact discovery pertaining to the Trial Pool cases necessary to ready them for trial shall be completed by June 1, 2020 for BHR Track Trial Pool cases and by September 30, 2020 for THA Track Trial Pool cases. The depositions of the implanting and revising surgeons shall not ordinarily be retaken for discovery purposes except by agreement of the Parties or for good cause, such as a change in medical condition or subsequent surgery. The Parties shall meet and confer regarding necessary additional discovery, and, if any disputes arise that cannot be resolved, shall bring them to the Court's attention for decision. Nothing herein shall prohibit a Party from noticing a *de bene esse* deposition in advance of trial of any Party or non-party.

VI. BHR Track Scheduled Trial Cases & Defendant's *Lexecon* Waiver

A. The process for choosing and the number of cases selected for the first trials in the BHR Track will be decided at a later date, but the Court's intention is to have the first trial cases identified by no later than June 15, 2020.

B. Defendant hereby agrees to waive *Lexecon* with regard to up to two non-Maryland Plaintiff cases among the BHR Track Scheduled Trial Cases selected for the first trials, provided that no such cases are jointly tried as multi-plaintiff cases. Plaintiffs do not waive the right to request multi-Plaintiff trials, and Defendant does not waive its right to object to multi-Plaintiff trials, whether involving Maryland cases or not.

C. The Court will issue a separate Scheduling Order to address the remaining pretrial deadlines for the BHR Track and THA Track Scheduled Trial Cases, including requests for admissions, case-specific and general liability expert discovery, dispositive motions, *Daubert* motions, and motions in limine.

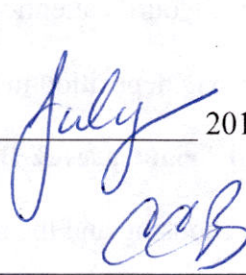
VII. THA Track Scheduled Trial Cases & Defendant's *Lexecon* Waiver

A. The selection of THA Track Cases for trial and a *Lexecon* waiver, if any, with respect to them is deferred to a later order.

VIII. Selection of Additional Discovery Pool Cases

A. The Parties agree to meet and confer regarding a schedule for the completion of Core Discovery for all BHR Track and THA Track cases in additional groupings and to submit their proposed schedule, whether agreed or not, to the Court for consideration on such date as the Court may later require.

IT IS SO ORDERED, this 3rd day of July 2019.



HON. CATHERINE C. BLAKE
UNITED STATES DISTRICT JUDGE