

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 ACTIONS**

~~[JOINT PROPOSED]~~ **SECOND AMENDED
CASE MANAGEMENT ORDER NO. 16
Amending CMO 14 and Superseding CMO 15
(Pretrial Scheduling Order for BHR & THA Track Cases)**

The parties hereby submit this Second Amended Case Management Order (CMO) 16 to extend various deadlines in light of the interruptions created by the COVID-19 virus, and with the understanding that it is difficult to predict the extent to which the virus and related stay-at-home orders will affect these deadlines and that further extensions to the dates set forth in this CMO may be necessary in the future. The Court understands the parties have been working cooperatively to complete as many depositions as reasonably practicable, primarily by remote means, by the existing August 3, 2020, deadline for Core Discovery in BHR Track Discovery Pool cases. The Court and the parties have evaluated the progress toward completion of depositions in the seventeen (17) BHR Track Discovery Pool cases and the Court has determined that some adjustments to the schedule are needed with regard to completion of Core Discovery and selection of BHR Track Trial Pool cases. The Court appreciates that the challenges associated with remote depositions and the ongoing pandemic may require further adjustments to the schedule in this CMO, including to the deadline for completion of case-specific discovery, and agrees to evaluate the parties' progress periodically to that end. As with CMO 16 (D.E. 2073), the definitions used

in CMO 14 apply equally to this Order unless otherwise stated. Provisions of CMO 14 not addressed herein remain in full effect, unchanged and applicable to all cases in this MDL.

I. Trial Dates

The first and second cases tried will be selected from the BHR Track Trial Pool as defined in CMO 14 with the first trial commencing on **May 25, 2021** and the second trial commencing on **July 26, 2021**. For each trial date, there will be selected a designated trial case and a back-up trial case. For the May 25, 2021 trial date, these cases are referred herein as “BHR Trial Case #1” and “BHR Trial Case #2,” respectively. For the July 26, 2021 trial date, these cases are referred to herein as “BHR Trial Case #3” and “BHR Trial Case #4,” respectively. It is the Court’s intention is to have BHR Trial Cases ## 1, 2, 3 and 4 identified no later than **November 16, 2020**. The third trial is tentatively reserved for a THA Track case and will commence on a date to be later selected by the Court. The selection of THA Track cases for trial and a *Lexecon* waiver, if any, with respect to them, as well as all other pretrial scheduling dates for THA Track cases, are deferred to a later order.

II. BHR Track Pretrial Deadlines

1. Fact Discovery

- A. The close of general liability fact discovery for all BHR Track cases is **July 15, 2020**.
- B. The deadline for completion of Core Discovery in BHR Track Discovery Pool cases is **August 17, 2020**, and any additional case-specific fact discovery beyond the Core Discovery will be completed by **October 30, 2020** for each of the six (6) BHR Track Trial Pool cases selected pursuant to subsection 2 below. The deadline for serving requests for admission of

fact (“RFAs”) in the BHR Track Trial Pool cases is **October 30, 2020**.

- C. The deadline for serving RFAs for the authenticity of documents in BHR Trial Cases #1 through 4 is **February 2, 2021**.

2. Selection of Trial Pool Cases

- A. On **August 17, 2020**, Defendant and Plaintiffs’ Lead Counsel shall each select three (3) cases from the BHR Track Discovery Pool cases in which Core Discovery is completed as of August 17, 2020 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. Selections will be made simultaneously by e-mail exchange between lead counsel at 5 p.m. EDT on August 17, 2020.

3. Expert Discovery on General Liability and Causation

- A. Plaintiffs’ expert disclosures related to issues concerning general liability and causation, pursuant to Fed. R. Civ. P. 26(a)(2), and at least two (2) dates of availability for the deposition of each expert in the early half of the period between August 3 and October 30, 2020, shall be served by **July 15, 2020**.
- B. Defendant’s expert disclosures related to issues concerning general liability and causation, pursuant to Fed. R. Civ. P. 26(a)(2), and at least two (2) dates of availability for the deposition of each expert in the latter half of the period between August 3 and October 30, 2020, shall be served by **August 28, 2020**.
- C. Rebuttal expert reports related to issues concerning general liability and

causation, if any, along with dates for depositions between October 5 and October 30, 2020, shall be served by **September 25, 2020**.

- D. Depositions of plaintiffs' experts will be taken before depositions of defendant's experts, except by agreement of the Parties. The Parties will work cooperatively to set depositions of plaintiffs' experts who will not be issuing rebuttal reports earlier in the deposition period. Depositions of Plaintiffs' experts who issue rebuttal reports will be taken after the depositions of the Defendant's expert(s) whose opinions they are rebutting.
- E. Defendants' general liability experts may offer different or additional opinions at deposition from those contained in their expert reports, in order to address testimony of Plaintiffs' general liability experts given at deposition.
- F. All expert discovery on general liability and causation for BHR Track cases shall be completed by **October 30, 2020**.

4. Case-Specific Expert Discovery for BHR Trial Cases ## 1, 2, 3 and 4

- A. Plaintiffs' case-specific expert disclosures, provided pursuant to Fed. R. Civ. P. 26(a)(2), and at least two (2) dates of availability for the deposition of each expert in the early half of the period between January 4, 2021 and February 5, 2021, shall be served by **November 30, 2020**.
- B. Defendant's case-specific expert disclosures, provided pursuant to Fed. R. Civ. P. 26(a)(2), and at least two (2) dates of availability for the deposition of each expert in the latter half of the period between January

- 4, 2021, and February 5, 2021, shall be served by **December 24, 2020**.
- C. Rebuttal case-specific expert reports, if any, along with at least two (2) dates of availability for the deposition of each expert between January 15, 2021 and February 5, 2021, shall be served by **January 15, 2021**.
- D. Depositions of plaintiffs' experts will be taken before depositions of defendant's experts, except by agreement of the Parties. The Parties will work cooperatively to set depositions of plaintiffs' experts who will not be issuing rebuttal reports earlier in the deposition period. Depositions of Plaintiffs' experts who issue rebuttal reports will be taken after the depositions of the Defendant's expert(s) whose opinions they are rebutting.
- E. Defendants' case-specific experts may offer different or additional opinions at deposition from those contained in their expert reports in order to address testimony of Plaintiffs' case-specific experts given at deposition.
- F. All case-specific expert discovery for BHR Trial Cases ## 1, 2, 3 and 4 shall be completed by **February 5, 2021**.
- G. Should any case-specific expert appear in more than one case for a Party or if a general liability and causation expert appears as a case-specific expert, the Parties will meet and confer to determine reasonable limitations on any subsequent depositions. In the event the Parties are unable to reach agreement, the issue will be submitted to the Court for

decision.

5. Pretrial Briefing for BHR Track Trial Cases ## 1, 2, 3 and 4

- A. **General Liability and Causation *Daubert* Motions.** Motions to exclude or limit general liability and causation expert testimony or opinions pursuant to Fed. R. Evid. 702 or *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), will be filed by **November 30, 2020**. Responsive briefing shall be filed by **January 6, 2021**, and Reply briefs by **January 20, 2021**.
- B. **Case-Specific *Daubert* and Dispositive Motions.** Motions to exclude or limit case-specific expert testimony or opinions pursuant to Fed. R. Evid. 702 or *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and case-specific dispositive motions will be filed by **February 26, 2021** in BHR Trial Cases ## 1, 2, 3, and 4. Responsive briefing shall be filed by **March 12, 2021**, and reply briefs by **March 19, 2021**.
- C. Oral argument on *Daubert* motions for BHR general liability and causation experts will be in **late January or early February 2021** and oral argument for dispositive and case-specific *Daubert* motions in BHR Trial Cases ## 1, 2, 3 and 4 will be in **late March 2021**, at dates and times separately ordered by the Court.
- D. **Motions in Limine.** Motions in limine for BHR Trial Case ## 1 and 2 will be filed on **February 22, 2021**, with responsive briefing due on **March 15, 2021**, and replies due on **March 29, 2021**. A hearing on Motions in Limine for BHR Trial Case ## 1 and 2 will be held on **April 12, 2021**. Motions in limine for BHR Trial Case ## 3 and 4 will be filed

on **April 30, 2021**, with responsive briefing due on **May 19, 2021**, and replies due on **May 26, 2021**. A hearing on motions in limine for BHR Trial Case ## 3 and 4 will be held on **June 4, 2021**.

6. Other Deadlines

- A. The Court will issue a separate Scheduling Order to address additional pretrial deadlines for BHR Trial Cases ## 1, 2, 3 and 4, including witness lists, exhibit lists, and deposition designations.
- B. Additional trial dates for cases in the BHR Track, if any, will be addressed by a separate Scheduling Order.

III. THA Track Pretrial Deadlines

- 1. *Paragraph IV.E of CMO 14 regarding core discovery in the THA Track Discovery Pool cases is amended as follows:* Core Discovery shall be completed for each of the eight (8) initial THA Track Discovery Pool cases by **December 1, 2020**.
- 2. By **December 18, 2020**, Defendant and Plaintiffs' Lead Counsel shall each select two (2) cases from the THA Track Discovery Pool cases with completed Core Discovery as of December 1, 2020 to move to the THA Track Trial Pool for a total of four (4) cases.
- 3. *Paragraph V.C of CMO 14 regarding case-specific fact discovery for the THA Track Trial Pool cases is amended as follows:* Any additional case-specific fact discovery to ready the THA Track Trial Pool cases for trial shall be completed by **March 12, 2021**.
- 4. The Court will issue a separate Scheduling Order to address additional pretrial deadlines for THA Track cases.

SO ORDERED, this 30th day of July, 2020.

/s/

Catherine C. Blake
United States District Judge