UNITED STATES JUDICIAL PANEL
on
MULTIDISTRICT LITIGATION

IN RE: SMITH & NEPHEW BIRMINGHAM HIP RESURFACING (BHR) HIP IMPLANT PRODUCTS LIABILITY LITIGATION

MDL No. 2775

TRANSFER ORDER

Before the Panel: Defendant Smith & Nephew, Inc., moves under 28 U.S.C. § 1407(c) to transfer the *Bucalo*, *Lafountain*, and *McAnneny* actions listed on Schedule A to the District of Maryland for inclusion in MDL No. 2775. Plaintiffs in the *Tipsord* action listed on Schedule A similarly move to transfer that action to MDL No. 2775. Also before the Panel is the motion under Panel Rule 7.1 of plaintiff in the *Proudfoot* action listed on Schedule A to vacate our order that conditionally transferred *Proudfoot* to MDL No. 2775. Plaintiffs in the three actions subject to Smith & Nephew's transfer motions oppose transfer of those actions to the MDL. In contrast, Smith & Nephew does not oppose plaintiffs' motion to transfer *Tipsord* to the MDL. Finally, Smith & Nephew opposes the motion to vacate the conditional transfer order in *Proudfoot*.

The transfer motions in *Bucalo*, *Lafountain*, and *Tipsord* involve the same argument regarding the scope of MDL No. 2775. In each of these actions, plaintiffs allege that they underwent a total hip replacement procedure employing the R3 acetabular metal liner. No party disputes that the R3 metal liner is, notwithstanding its appellation, a component of the Birmingham Hip Resurfacing (BHR) System.[1] The opposing plaintiffs argue that their claims pertain to the R3 Acetabular System for total hip replacements, not the BHR System, which is intended for use in hip resurfacing procedures. These arguments are not persuasive. In January, we clarified that MDL No. 2775 encompasses any action asserting a claim that a BHR component contributed to the failure of plaintiffs' hip implants due to the metal-on-metal nature of the implants. *See* Transfer Order at 1-2, MDL No. 2775 (J.P.M.L. Jan. 31, 2018), ECF No. 231. In that order, we transferred two actions in which a BHR Acetabular Cup was used with non-BHR components in total hip replacement procedures. These three actions similarly allege that a BHR component was used with non-BHR components in total hip replacement procedures. They thus fall within the scope of the MDL.

[1] According to Smith & Nephew, the R3 metal liner was approved by the U.S. Food and Drug Administration for use with the BHR System via a supplemental premarket approval application. *See also Shuker v. Smith & Nephew*, PLC, 885 F.3d 760, 768 (3d Cir. 2018) ("[T]he R3 metal liner . . . underwent the rigorous premarket approval process as a supplemental component for . . . the [BHR] System.") (internal quotation marks and citation omitted). Indeed, plaintiffs in *Shuker*—which settled before it could be transferred to MDL No. 2775—alleged that the R3 metal liner was approved by the FDA *solely* for use with the BHR System, and was not approved for use with other R3 femoral components in full hip replacements. *Id.* at 769.

Furthermore, the transferee court has established a separate total hip arthroplasty (THA) track for actions in which plaintiffs allege that a BHR component was used with non-BHR components as part of a full hip replacement. *See* Case Mgmt. Order No. 7, *In re Smith & Nephew Birmingham Hip Resurfacing (BHR) Hip Implant Prods. Liab. Litig.*, C.A. No. 1:17-md-02775 (D. Md. May 3, 2018), ECF No. 680. According to a census report recently filed by Smith & Nephew in the transferee court, there are fifty such THA track actions in the MDL. *See* Def.'s Notice of Filing Updated Listings of Pending BHR Track and THA Track Cases, *id.* (May 7, 2018), ECF No. 682. *Bucalo*, *Lafountain*, and *Tipsord* undoubtedly share common factual questions with these THA track actions and will benefit from centralized treatment.

Plaintiffs in both *Bucalo* and *Lafountain* additionally argue that transfer of their actions will result in delay and inconvenience. These arguments are readily dismissed with respect to *Bucalo*, a recently filed action in which little discovery has taken place. *Lafountain*, though, is a more procedurally advanced action. The Panel excluded *Lafountain* from the MDL in the initial transfer order because, on its face, the complaint did not appear to allege that plaintiff had been implanted with a BHR component.[2] As discussed, *Lafountain* in fact does involve a BHR component—the R3 metal liner.[3] Since the Panel's initial transfer order, *Lafountain* has progressed through fact discovery, and expert discovery has now commenced. Even so, there are sufficient efficiencies to be gained to merit transfer, particularly with respect to overlapping expert discovery and dispositive motions. Moreover, *Lafountain* is at a similar procedural posture as the *Tipsord* action, which was initially excluded from the MDL for similar reasons. Both plaintiffs in *Tipsord* and Smith & Nephew request transfer of that action to the MDL.

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[2] Plaintiff in *Lafountain*, as well as plaintiff in *McAnneny*, contend that transfer of their actions is prohibited by 28 U.S.C. § 1407(e), which provides that there "shall be no appeal or review of an order of the panel denying a motion to transfer." Smith & Nephew, though, is not seeking reconsideration of the Panel's decision to refuse transfer of those actions to MDL No. 2775 in the initial transfer order. Rather, it has moved anew to transfer these actions, based on different facts and the course of proceedings over the past year. The Panel regularly considers new motions to transfer, even if those motions encompass actions the Panel previously declined to centralized. *See, e.g.*, *In re Plavix Mktg., Sales Practices & Prods. Liab. Litig. (No. II),* 923 F. Supp. 2d 1376, 1378 (J.P.M.L. 2013) ("[W]e note that our denial of centralization in *Plavix I* did not foreclose [defendants] from filing this second motion for centralization. That earlier denial also does not preclude us from reaching a different result here."). Section 1407(e) thus is inapposite to Smith & Nephew's motions. Plaintiff's argument that the law of the case doctrine prohibits transfer is similarly unpersuasive.

[3] It was not apparent to the Panel at the time of centralization that the BHR System employed two types of acetabular cup: a one-piece component and a modular component that incorporated the R3 metal liner.

Like *Lafountain* and *Tipsord*, we excluded *McAnneny* from MDL No. 2775 in the initial transfer order, albeit for different reasons. At that time, it appeared that plaintiff attributed his alleged metallosis to non-BHR components and alleged only that the BHR components that were implanted were mislabeled with the wrong size. Discovery in *McAnneny* has since demonstrated that the alleged metallosis was caused, in part, by the BHR Acetabular Cup that was retained when plaintiff's hip resurfacing was converted to a full hip replacement. *McAnneny* thus shares common questions of fact with other THA track cases pending in MDL No. 2775. Plaintiff contends that *McAnneny* is too procedurally advanced to benefit from centralization. *McAnneny* is in a similar procedural posture as *Lafountain* and *Tipsord*, and will similarly benefit from centralized treatment of remaining pretrial proceedings, particularly with respect to expert discovery and dispositive motion practice, which likely will overlap with other THA track actions in the MDL.

Turning to the motion to vacate in *Proudfoot*, plaintiff alleges that he underwent a right hip resurfacing procedure using the BHR System, which subsequently was revised and converted to a full hip replacement that maintained the BHR Acetabular Cup. Plaintiff argues that transfer is inappropriate because his claims involve non-BHR components. This argument was foreclosed by our most recent transfer order, which clarified that an action need only involve a BHR component to fall within the scope of the MDL. *See* Transfer Order at 1-2, MDL No. 2775 (J.P.M.L. Jan. 31, 2018), ECF No. 231. *Proudfoot* shares common questions of fact with the actions pending in the MDL, particularly the THA track actions, and will benefit from coordinated pretrial proceedings.

Plaintiff in *Proudfoot* also contends that he will suffer delay and prejudice if transferred to the MDL. Transfer of an action is appropriate if it furthers the expeditious resolution of the litigation taken as a whole, even if some parties to the action might experience inconvenience or delay. *See In re Watson Fentanyl Patch Prods. Liab. Litig.*, 883 F. Supp. 2d 1350, 1351-52 (J.P.M.L. 2012) ("[W]e look to the overall convenience of the parties and witnesses, not just those of a single plaintiff or defendant in isolation.").

Accordingly, after considering the argument of counsel, we find that the actions listed on Schedule A involve common questions of fact with the actions transferred to MDL No. 2775, and that transfer under 28 U.S.C. § 1407 will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation. In our order centralizing this litigation, we held that the District of Maryland was an appropriate Section 1407 forum for actions sharing factual questions concerning the design, manufacture, marketing or performance of Smith & Nephew's BHR system. The actions in this MDL focus on complications arising from the use of a cobalt-chromium alloy in the manufacture of the BHR components.[4] *See In re Smith & Nephew BHR & R3 Hip Implant Prods. Liab. Litig.*, 249 F. Supp. 3d 1348, 1350 (J.P.M.L. 2017). Plaintiffs in these actions similarly allege that they suffered complications arising from the metal-on-metal nature of the BHR components.

[4] These complications include pain, adverse local tissue reaction, pseudotumors, bone and tissue necrosis, metallosis, or other symptoms, often necessitating revision surgery.

IT IS THEREFORE ORDERED that the actions listed on Schedule A are transferred to the District of Maryland and, with the consent of that court, assigned to the Honorable Catherine C. Blake for coordinated or consolidated pretrial proceedings.

PANEL ON MULTIDISTRICT LITIGATION

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IN RE: SMITH & NEPHEW BIRMINGHAM HIP RESURFACING (BHR) HIP IMPLANT PRODUCTS LIABILITY LITIGATION

MDL No. 2775

SCHEDULE A

District of Connecticut

LAFOUNTAIN v. SMITH & NEPHEW, INC., ET AL., C.A. No. 3:14-01598
MCANNENY v. SMITH & NEPHEW, INC., C.A. No. 3:17-00012
PROUDFOOT v. SMITH & NEPHEW, INC., C.A. No. 3:17-01106

Central District of Illinois

TIPSORD, ET AL. v. SMITH & NEPHEW, INC., C.A. No. 1:16-01339

Northern District of Illinois

BUCALO, ET AL. v. SMITH & NEPHEW, INC., C.A. No. 1:17-06911