

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:* Plaintiff Lori Spellman moves under Panel Rule 7.1 to vacate our order that conditionally transferred the action listed on Schedule A (*Spellman*) to the District of Maryland for inclusion in MDL No. 2775. Defendant Smith & Nephew, Inc., opposes the motion.

In opposition to transfer, plaintiff argues that *Spellman* involves a claim not at issue in the MDL. Specifically, on March 26, 2018, the transferee court ruled on an omnibus dismissal motion in the MDL and dismissed, *inter alia*, plaintiffs' manufacturing defect claims pertaining to Smith & Nephew's BHR System. *See In re Smith & Nephew Birmingham Hip Resurfacing (BHR) Hip Implant Prods. Liab. Litig.*, 300 F. Supp. 3d 732 (D. Md. 2018). The Ninth Circuit, though, recently reversed the transferor court's dismissal of *Spellman* and held that plaintiff should be allowed to amend her complaint in order to sufficiently allege a manufacturing defect claim under Arizona law. *See Spellman v. Smith & Nephew, Inc.*, 726 F. App'x 629 (9th Cir. 2018) (non-precedential). Plaintiff argues that, in light of these rulings, inclusion of *Spellman* in the MDL will result in delay and prejudice to plaintiff.

Plaintiff's arguments are not persuasive. There is no dispute that plaintiff's failure to warn claim with respect to the BHR System is directly at issue in MDL No. 2775. Even if no other BHR action in the MDL alleges a manufacturing defect claim,¹ the presence of different legal theories is not a bar to centralization where common factual issues exist. *See In re Bank of New York Mellon Corp. Foreign Exch. Transactions Litig.*, 857 F. Supp. 2d 1371, 1372 (J.P.M.L. 2012). Furthermore, delay is not the inevitable result of transfer. The transferee court can employ various pretrial management techniques—such as scheduling discovery and other pretrial proceedings on any issues unique to a particular action or party on a separate track concurrently with the common pretrial proceedings—to avoid undue delay and to enhance the efficient conduct this litigation. *See In re Epipen (Epinephrine Injection, USP) Mktg., Sales Practices & Antitrust Litig.*, 268 F. Supp. 3d 1356,

* Judge Charles R. Breyer took no part in the decision of this matter.

¹ Smith & Nephew disputes this characterization. It contends that another BHR action was transferred to MDL No. 2775 after the Eleventh Circuit held that the plaintiff in that action had plausibly stated a manufacturing defect claim. *See Mink v. Smith & Nephew, Inc.*, 860 F.3d 1319, 1329-31 (11th Cir. 2017).

-2-

1359 (J.P.M.L. 2017). In any event, 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 action listed on Schedule A involves 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.² See *In re Smith & Nephew BHR & R3 Hip Implant Prods. Liab. Litig.*, 249 F. Supp. 3d 1348, 1350 (J.P.M.L. 2017). Plaintiff in *Spellman* similarly alleges that she suffered complications arising from the metal-on-metal nature of the BHR components used in her hip resurfacing procedures.

IT IS THEREFORE ORDERED that the action listed on Schedule A is 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



Sarah S. Vance
Chair

Marjorie O. Rendell
Ellen Segal Huvelle
Catherine D. Perry

Lewis A. Kaplan
R. David Proctor

² These complications include pain, adverse local tissue reaction, pseudotumors, bone and tissue necrosis, metallosis, or other symptoms, often necessitating revision surgery.

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

MDL No. 2775

SCHEDULE A

District of Arizona

SPELLMAN v. SMITH & NEPHEW INCORPORATED, C.A. No. 3:16-08080