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 THE BHR TRACK ACTIONS IDENTIFIED IN EXHIBIT A**

SMITH & NEPHEW, INC.'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS CERTAIN TIME-BARRED CLAIMS

Defendant Smith & Nephew, Inc. ("S&N") respectfully submits this memorandum in support of its Motion to Dismiss Certain Time-Barred Claims.

The claims of the Plaintiffs who filed the fifty-five (55) BHR Track Complaints identified in Exhibit A should be dismissed pursuant to Federal Rule 12 as untimely under applicable state law.[1] Dismissal of these time-barred claims will enhance efficiencies in this MDL by eliminating the need to expend judicial resources on the further litigation of these claims. Dismissal will also help maintain the integrity of the MDL process. As one MDL court explained, "Some lawyers seem to think that their case will be swept into the MDL where a global settlement will be reached, allowing them to obtain a recovery without the individual merit of their case being scrutinized as closely as it would if it proceeded as a separate, individual action." *In re Mentor Corp. Obtape Transobturator Sling Prods. Liab. Litig.*, No. 4:08-md-2004, 2016 WL 4705827, at *1 (M.D. Ga. Sept. 7, 2016). Indeed, many Plaintiffs whose claims are at issue in this Motion waited to file a lawsuit until *after* this MDL was created,

[1] This Motion addresses BHR track cases filed and served on S&N by June 5, 2018.

long after their revision surgeries, and all filed after the applicable statutes of limitations had run. The allegations in their Master Amended Consolidated Complaint [D.E. 124] ("MACC") and their individual Short Form Complaints, on their face, show that all or virtually all of their claims are untimely and therefore should be dismissed.

BACKGROUND

For purposes of this Motion, the dispositive facts are both few and undisputed. The allegations in each Plaintiff's individual Short Form Complaint reflect the date of their implantation surgery, the date of their revision surgery, and the state law applicable to their claims. Each Plaintiff's Short Form Complaint incorporates the allegations in the MACC for BHR track cases. *See* Short Form Complaint [D.E. 120-1] ¶ 14. In turn, Plaintiffs allege in the MACC that they "experienced severe personal injuries, medical complications, and damages from the implantation of the Smith & Nephew BHR." MACC ¶ 6. They further allege that "[r]evision of a failed BHR typically requires a conversion to a total hip replacement, including implantation of a traditional stem," and that "[p]remature revision of the acetabular cup requires removal of the old cup, re-reaming of the acetabulum, and implantation of the revision cup." *Id.* ¶ 16. The revision surgery described in the MACC is a significant medical response to a patient's already existing alleged injury; each revision surgery was done in response to a Plaintiff's complaint of "complications, injuries, and/or indications."[2] *See also* MACC ¶ 15 (alleging that BHR components "cause physiological reactions in patients, often beginning with swelling and pain," and that metal wear "continues causing damage to surrounding tissue and

[2] *See, e.g.,* Ex. B at B-002 ¶ 12 (Short Form Complaint for Joseph Maize) ("Plaintiff Joseph Maize suffered the following complications, injuries, and/or indications, some or all of which made revision surgery medically necessary: Pain from failed right hip resurfacing arthroplasty secondary to metal reaction . . . ."); *id.* at B-019–020 ¶ 12 (Short Form Complaint for Stephen Brightbill) ("Plaintiff suffered the following complications, injuries, and/or indications, some or all of which made revision surgery medically necessary: Including but not limited to, physical injuries, pain, metallosis, swelling, inflammation, difficulty standing, difficulty walking, gait issues, and lack of mobility.").

bone resulting in … ultimately device failure requiring a revision surgery"). Under the law of each state at issue in this Motion, the date of each Plaintiff's revision surgery is the latest possible date on which that Plaintiff's claims accrued and the statute of limitations began to run.

Plaintiffs filed their lawsuits years *after* their revision surgeries and, as relevant here, *after* the applicable state statute of limitations had run.[3] Accordingly, all or virtually all of the claims of the Plaintiffs in the 55 Complaints identified in Exhibit A should be dismissed because they fail to state grounds upon which relief may be granted.[4]

GOVERNING LAW

Under Fourth Circuit law, "'where facts sufficient to rule on an affirmative defense are alleged in the complaint, the defense may be reached by a motion to dismiss filed under Rule 12(b)(6).'" *Walker-Pitman* v. *Maryland Dep't of Trans.*, No. Civ CCB-14-202, 2015 WL 419806, at *6 (D. Md. Jan. 29, 2015), *aff'd*, 671 F. App'x 873 (4th Cir. Dec. 21, 2016). "Rule 12(b)(6) motions to dismiss may properly raise statute of limitations defenses where the defense is apparent from the face of the complaint." *Douglas* v. *NTI-TSS, Inc.*, 632 F. Supp. 2d 486, 491 (D. Md. 2009) (granting motion to dismiss); *Gregoriou* v. *Explosives Experts Inc.*, Civil No. CCB-08-384, 2008 WL 3989183, at *2 (D. Md. 2008) (granting Rule 12(b)(6) motion where claims were untimely "[b]ased on the facts alleged in the complaint").

[3] As discussed below in Section II.D, 13 of the 55 Complaints assert breach of express warranty claims under state laws with arguably longer statute of limitations periods for these claims. For six of these Complaints, the breach of express warranty claims are untimely even under the longer statute of limitations. For the remaining seven Complaints, S&N does not seek dismissal of the breach of express warranty claims at this time but reserves the right to do so at a later date, including at summary judgment or at trial.

[4] The 55 untimely Complaints addressed in this Motion are identified in Exhibit A. Exhibit A includes: (1) the applicable limitations period under the state law alleged by each Plaintiff; (2) each Plaintiff's name, case number, and Short Form Complaint docket number; (3) the date of the Plaintiff's revision surgery; (4) the end of the limitations period measured from the revision date; and (5) the date the Plaintiff filed his or her lawsuit. The Short Form Complaints for these Plaintiffs are attached as Exhibit B. S&N reserves the right to contest the timeliness of other BHR Track Plaintiffs' claims at an appropriate time including at summary judgment or at trial.

ARGUMENT

I. DISMISSAL IS APPROPRIATE BECAUSE THE MACC AND SHORT FORM COMPLAINTS ESTABLISH THE UNTIMELINESS OF PLAINTIFFS' CLAIMS.

The facts alleged in the MACC and in Plaintiffs' individual Short Form Complaints establish that certain Plaintiffs' claims are time-barred and should be dismissed.

First, the MACC alleges that Plaintiffs suffered personal injury resulting from the implantation and revision of their S&N hip implants. *See* MACC ¶¶ 6, 16. In turn, each of the Short Form Complaints incorporates by reference the allegations set forth in the MACC with regard to injuries allegedly suffered by individual Plaintiffs, including injuries allegedly associated with premature revision surgeries. *E.g.*, *id.* ¶ 16.

Second, each of the Short Form Complaints identifies the date of both the implant surgery and revision surgery, followed by a listing of the claims and the alleged applicable state law governing those claims. *See* Ex. B. For purposes of this Motion, S&N does not dispute the applicable state law chosen by each Plaintiff to govern his or her claims, which most often is the state where the Plaintiff underwent the implantation or revision surgery. *See Choice Hotels Int'l, Inc. v. Madison Three, Inc.*, 83 F. Supp. 2d 602, 603 (D.Md. 2000) (applying Maryland law where "the parties agree that Maryland law applies"). As set forth in Exhibit A, the applicable statute of limitations as determined by the state laws alleged by Plaintiffs is one, two, or three years for their product liability claims.[5]

[5] As shown in Exhibit A, three complaints are subject to a one-year statute of limitations under Kentucky, Louisiana, or Tennessee law. *See* Ky. Rev. Stat. Ann. § 413.140(1)(a); La. Civ. Code Ann. art. 3492; Tenn. Code Ann. § 29–28–103, 104. Thirty-six complaints are subject to a two-year statute of limitations. *See* Ala. Code § 6-2-38; Alaska Stat. Ann. § 09.10.070(a); Ariz. Rev. Stat. Ann. § 12-542(1); Cal. Civ. Proc. § 335.1; Idaho Code Ann. § 5-219(4); Indiana Code Ann. § 34-20-3-1(b)(1); N.J. Stat. Ann. 2A14-2; Ohio Rev. Code Ann. § 2305.10(A); Or. Rev. Stat. § 30.905(2); 42 Pa. Cons. Stat. Ann. § 5524(2) & (7); Utah Code § 78B-6-706; and Va. Code Ann. § 8.01-243. And sixteen complaints are subject to a three-year statute of limitations. *See* Ark. Code Ann. § 16-116-203; Mass. Gen. Laws Ann. ch. 260, § 2A; Mich. Comp. Laws Ann. § 600.5805(10); N.Y. C.P.L.R. § 214(5); Wis. Stat. Ann. §893.54. The statutes of limitations for breach of express warranty claims in seven states are further addressed in Part II.D. *infra*.

A representative example is the Short Form Complaint of Terry Botkin. [D.E. 260], Ex. B at B-095–099. That Complaint alleges that: (i) Mr. Botkin is a resident of Idaho, *id.* ¶ 2; (ii) S&N's BHR was implanted in Mr. Botkin's left hip on January 15, 2008 in Boise, Idaho, *id.* ¶¶ 8–9; (iii) Mr. Botkin's revision surgery occurred "on or about January 13, 2014" in Meridian, Idaho, *id.* ¶¶ 10, 11; (iv) Mr. Botkin "adopts the allegations of the [MACC]," *id.* ¶ 17; and (v) Mr. Botkin has asserted various causes of action governed by Idaho law, *id.* ¶ 22. Mr. Botkin's Short Form Complaint reflects that he filed suit on September 7, 2017, more than three and a half years after his revision surgery.[6]

All of the other Short Form Complaints at issue in this Motion follow the same pattern. They set forth all the necessary facts to establish that Plaintiffs' claims are time-barred. These allegations leave for this Court's resolution only the dispositive legal issue of whether Plaintiffs' claims accrued, at the latest, on the date of their respective revision surgery. As addressed in Section II, under the state laws alleged by Plaintiffs, the revision surgery is the latest possible accrual date, and therefore Plaintiffs' claims are untimely.

II. PLAINTIFFS' CLAIMS ARE TIME-BARRED BECAUSE THEY ACCRUED, AT THE LATEST, ON THE DATE OF THEIR REVISION SURGERY.

The timeliness of Plaintiffs' claims turns on the date upon which those claims accrued, *i.e.*, the date that the statute of limitations began to run. In each of the Complaints set forth in Exhibit A, Plaintiffs' claims accrued, at the latest, on the date of their revision surgery.

Plaintiffs allege that they "experienced severe personal injuries, medical complications, and damages from the implantation of the Smith & Nephew BHR," MACC ¶ 6, including "additional surgical procedures to repair and/or remove their BHR implant for replacement with

[6] S&N reserves the right to contest any and all allegations in the Complaints, as well as the individual Plaintiffs' assertions of applicable law, both for statute of limitations and questions of liability and damages. For purposes of this Rule 12 motion only, all allegations as to dates and choice-of-law in the Plaintiffs' Complaints are taken as true.

another, safer hip replacement device," *id.* ¶ 449; *id.* ¶ 373 ("Plaintiffs endured pain and suffering and ha[ve] required additional and debilitating surgeries"); *id.* ¶ 464 (same); *id.* ¶ 595 (same); *id.* ¶ 603 (same). They allege that revision of the BHR allegedly "requires a conversion to a total hip replacement, including implantation of a traditional stem," and that "any patient requiring a revision surgery and conversion to a total hip replacement required removal and revision of the acetabular cup." *Id.* ¶ 16. As alleged by Plaintiffs, their revision surgeries were thus a response to an already-existing, known injury, and specifically targeted the BHR that they allege caused their injury. As discussed below, under the laws applicable to the claims for the Plaintiffs in the 55 Complaints at issue, the statute of limitations began to run no later than the date of their revision surgeries because by that date Plaintiffs (i) had suffered their alleged injury, (ii) had knowledge of their alleged injury, and/or (iii) knew or reasonably should have known the factual cause of their alleged injury. *E.g.*, *Hollander* v. *Brown*, 457 F.3d 688, 692 (7th Cir. 2006) ("As a general rule, a cause of action for personal injury accrues when the plaintiff suffers the injury"); *Wade v. Danek Med., Inc.,* 182 F.3d 281, 285 (4th Cir. 1999) (under Virginia law, "the statute of limitations period begins to run, whenever any injury, however slight, is caused by the negligent act"). Plaintiffs' claims are untimely because they were filed outside the applicable limitations period as measured from the date of their respective revision surgery.

A. Under the Law of Five States, Plaintiffs' Claims Accrued at the Time of the Alleged Injury, That Is, No Later Than the Date of the Revision Surgery.

Under the laws of Alabama, California, Idaho, Michigan and Virginia, the claims in 22 Complaints are untimely because Plaintiffs' claims accrued on the alleged date of an injury (*i.e.*,

no later than the date of the revision surgery), even if the Plaintiff had not yet discovered the injury.[7]

- **Alabama:** *Moon v. Harco Drugs, Inc.*, 435 So.2d 218, 220 (Ala. 1983) ("This Court has repeatedly held that a cause of action accrues when the injury occurs, and in so doing, this Court has refused to accept the so-called 'discovery-rule.'") (citation omitted); *Payton v. Monsanto Co.*, 801 So.2d 829, 835 (Ala. 2001) ("The fact that a plaintiff discovers damage for the first time outside the limitations period does not save the plaintiff, because this Court has declined to apply a 'discovery rule.'").

- **California:** *Bekins v. AstraZeneca Pharm. LP*, 239 F. Supp. 3d 1220, 1224 (S.D. Cal. 2017) ("Typically, under California law, a claim accrues when the claim is complete with all of its elements, which ordinarily occurs on the date of the plaintiff's injury.") (internal quotation marks omitted); *Fox v. Ethicon Endo-Surgery, Inc.*, 35 Cal. 4th 797, 809 (2005) (explaining that, absent allegations sufficient to invoke the discovery rule, a products liability claim generally accrues with "the injury to the future plaintiff"); *Jaeger v. Howmedica Osteonics Corp.*, No. 15-CV-00164-HSG, 2016 WL 520985, at *10 (N.D. Cal. Feb. 10, 2016) (same).[8]

- **Idaho:** Idaho Code Ann. § 5-219(4) (damages action for personal injury is subject to two-year statute of limitations and "shall be deemed to have accrued as of the time of the occurrence, act or omission complained of"); *Theriault v. A.H. Robins Co., Inc.*, 698 P.2d 365, 370-71 (Idaho 1985) ("Theriault asks this Court to engraft a discovery exception to the statute of limitations contained in I.C. § 5-219(4) . . . . This we decline to do . . . . Since the 1971 amendment, in deference to the legislative policy expressed therein, this Court has consistently refused to create additional discovery exceptions.").

[7] The 22 Complaints in this category are: (1) Joseph Maize and Valeana Marshall, [D.E. 216] (Ala. law); (2) Janice Berg, [D.E. 150] (Cal. law); (3) Bill Bouman, [D.E. 581] (Cal. law); (4) Stephen Brightbill, [D.E. 240] (Cal. law); (5) Lydia Constantini, [D.E. 234] (Cal. law); (6) Kathleen Davis, [D.E. 266] (Cal. law); (7) Ellen and Richard Franklin, [D.E. 248] (Cal. law); (8) Sherri Lynn and Donnie Jobe, [D.E. 270] (Cal. law); (9) Rodney Little, [D.E. 261] (Cal. law); (10) Tanha Luvaas, [D.E. 577] (Cal. law); (11) Raymond and Ann Maples, [D.E. 274] (Cal. law); (12) Gloria and Kenneth Morgan, [D.E. 440] (Cal. law); (13) Deborah Schnick, [D.E. 194] (Cal. law); (14) Sheila Smith-Clark, [D.E. 277] (Cal. law); (15) Sherry Stoll and Carmen Roundtree, [D.E. 250] (Cal. law); (16) Kathryn Stranger-McGorrin and Brendan McGorrin, [D.E. 281] (Cal. law); (17) David and Earla Warner, [D.E. 251] (Cal. law); (18) Terry Botkin, [D.E. 260] (Idaho law); (19) Jacqueline Carrera, [D.E. 458] (Idaho law); (20) Kal Kinghorn and Diane Kinghorn, [D.E. 308] (Idaho law); (21) Constance McLaughlin, [D.E. 286] (Mich. law); and (22) James Stidham, [D.E. 1 in (No. 17-2527)] (Va. law).

[8] Although California recognizes a discovery rule, to invoke it, plaintiffs must "specifically plead facts to show (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence," *Fox*, 35 Cal. 4th at 808; *Bekins*, 239 F. Supp. 3d at 1225 (granting motion to dismiss complaint as untimely where the complaint "does not include any facts regarding the timing or manner of discovery . . . [,] does not allege [plaintiff] conducted any investigation into the cause of her injury, let alone a reasonably diligent investigation . . . [and] does not allege facts evincing her inability to have made earlier discovery even if she had conducted a reasonably diligent investigation"). Plaintiffs have failed to satisfy this burden either in the MACC or the Short Form Complaints. *See* Ex. B at B-006–094 (California Short Form Complaints).

- **Michigan:** Mich. Comp. Laws Ann. § 600.5805(10) ("The period of limitations is 3 years after the time of the death or injury for all actions to recover damages for the death of a person, or for injury to a person or property."); *Trentadue v. Buckler Lawn Sprinkler,Co.,* 738 N.W.2d 664, 672 (Mich. 2007) ("[C]ourts may not employ an extrastatutory discovery rule to toll accrual"); *Tice v. Zimmer Holdings, Inc.*, No. 1:15-CV-134, 2015 WL 4392985, at *5 (W.D. Mich. July 15, 2015) ("*Trentadue* makes clear that the accrual date for Plaintiffs' claims is not tied to their knowledge of the harm . . . . [T]he claims accrued when the alleged defects in the Devices harmed Plaintiff. This must have occurred *before* Mr. Tice or his physicians determined that he needed corrective surgery, and may have occurred before he was even aware that the Devices were causing problems.").

- **Virginia:** Va. Code Ann. § 8.01-230 ("In every action for which a limitation period is prescribed, the right of action shall be deemed to accrue and the prescribed limitation period shall begin to run from the date the injury is sustained in the case of injury to the person or damage to property."); *Smith v. Danek Med., Inc*., 47 F. Supp. 2d 698, 701 (W.D. Va. 1998) ("Under Virginia law, the limitations period begins to run when the injury, no matter how slight, is sustained and regardless of whether more substantial injuries occur later. . . . Furthermore, Virginia does not follow a 'discovery rule' in applying the statute of limitations. . . . The statute of limitations begins to run at the date of injury even if no diagnosis was made or communicated to the plaintiff until later.") (citation omitted).

Under the laws of these states, Plaintiffs' claims accrued when they experienced an alleged injury. Each Plaintiff's revision surgery was a significant medical response to their already existing alleged injury as set forth in the MACC. By the time Plaintiffs underwent revision surgery, their alleged injury had necessarily already occurred because that injury is what gave rise to the revision surgery. These Plaintiffs' alleged injuries occurred, and the statute of limitations in these states began to run, no later than the date of each Plaintiffs' revision surgery. By the time Plaintiffs filed suit, however, the applicable statute of limitations had elapsed.

As a result, the claims of the Plaintiffs identified in Exhibit A under Alabama, California, Idaho, Michigan, and Virginia law are time-barred and should be dismissed.

B. Under the Law of Three Additional States, Plaintiffs' Claims Accrued at the Time of Plaintiffs' *Knowledge* of Their Injury, That Is, No Later Than the Date of the Revision Surgery.

Plaintiffs in eleven additional Complaints have brought untimely claims under the laws of Louisiana, New York and Tennessee. In these states, a Plaintiff's claim accrues, and thus the statute of limitations begins to run, from the date of Plaintiff's knowledge of an alleged injury.[9]

- **Louisiana:** *Asbestos v. Bordelon, Inc*., 726 So.2d 926, 974-75 (La. Ct. App. 1998) ("'Delictual actions are subject to a liberative prescription of one year. This prescription commences to run from the day injury or damage is sustained.' LSA–C.C. art. 3492. . . . Although prescription will not begin to run at the earliest indication that a plaintiff may have suffered some wrong; a plaintiff bears the responsibility to reasonably inquire into a possible injury he may have sustained. . . . Ultimately, when prescription begins to run depends on the reasonableness of a plaintiff's action or inaction. *Clearly, prescription begins to run when a plaintiff has actual knowledge of an injury*") (emphasis added).

- **New York:** *Gaillard v. Bayer Corp*., 986 F. Supp. 2d 241, 246 (E.D.N.Y. 2013) ("In other words, '[t]he three year limitations period runs from the date when plaintiff first noticed symptoms, rather than when a physician first diagnosed those symptoms.'" (quoting *Galetta v. Stryker Corp.*, 283 F. Supp. 2d 914, 917 (S.D.N.Y. 2003)).

- **Tennessee:** Tenn. Code Ann. § 28-3-104(b)(1) ("For the purpose of this section, in products liability cases, (1) The cause of action for injury to the person shall accrue on the date of the personal injury, not the date of the negligence or the sale of a product."); *Potts v. Celotex Corp*., 796 S.W.2d 678, 680-81 (Tenn. 1990) ("Under the 'discovery rule' applicable in tort actions, including but not restricted to products liability actions predicated on negligence, strict liability or misrepresentation, the cause of action accrues and the statute of limitations begins to run when the injury occurs or is discovered, or when in the exercise of reasonable care and diligence, it should have been discovered.").

As a result, under the laws in Louisiana, New York and Tennessee, Plaintiffs' claims accrued no later than the date of each Plaintiff's revision surgery. As explained above, the revision surgery is a medical response to the already-existing injury Plaintiffs assert in the MACC. Plaintiffs thus were aware of their alleged injuries, at the latest, when they underwent a

[9] These 11 Complaints are: (1) Claud and Sherry Aaron, [D.E. 456] (La. law); (2) KimberLee and Douglas Aitcheson, [D.E. 518] (N.Y. law); (3) Wilmer Colon, [D.E. 630] (N.Y. law); (4) Robert Cotten, [D.E. 233] (N.Y. law); (5) Colleen DeJohn, [D.E. 522] (N.Y. law); (6) Kathi and Pete Durdon, [D.E. 246] (N.Y. law); (7) Karen and Kam Leung, [D.E. 1 in No. 17-2508] (N.Y. law); (8) Sean McCormick, [D.E. 341] (N.Y. law); (9) Marc Palmquist, [D.E. 158] (N.Y. law); (10) Naomi Parrish, [D.E. 292] (N.Y. law); and (11) Chad Stafford, [D.E. 566] (Tenn. law).

significant surgery to address those injuries. Plaintiffs' claims under Louisiana, New York, or Tennessee law are thus time-barred on the face of the Complaints.

C. Under the Law of Twelve Additional States, Plaintiffs' Claims Accrued at the Time That Plaintiff Knew Or Should Have Known of the Cause of Their Injury, That Is, No Later Than the Date of the Revision Surgery.

Twenty-two other Complaints similarly have time-barred claims under the laws of twelve additional states—Alaska, Arizona, Arkansas, Indiana, Kentucky, Massachusetts, New Jersey, Ohio, Oregon, Pennsylvania, Utah and Wisconsin—in which Plaintiffs' claims accrued on the date the Plaintiff knew or should have known of the *factual* cause of his or her injury.[10]

- **Alaska:** *Sopko v. Dowell Schlumberger, Inc*., 21 P.3d 1265, 1271 (Alaska 2001) ("[U]nder the discovery rule an injured plaintiff has sufficient information to prompt an inquiry into his cause of action once the plaintiff learns that he has a 'medically documented . . . condition'") (holding that claim is untimely).

- **Arizona:** *Murrell v. Wyeth, Inc*., No. 13-cv-0290, 2013 WL 1882193, at *3 (D. Ariz. May 3, 2013) ("In the product liability context, [the discovery rule] means that the plaintiffs need to know that the product was in some way causally connected to their injuries. It is not enough that a person comprehend the 'what' of her injury; there must also be reason to connect the 'what' to a particular 'who' in such a way that a reasonable person would be on notice to investigate whether the injury might result from fault.") (citation, internal quotation marks and alteration omitted).

- **Arkansas:** *Martin v. Arthur*, 3 S.W.3d 684, 690 (Ark. 1999) ("We hold that in product liability cases, the statute of limitations . . . does not commence running until the plaintiff knew or, by the exercise of reasonable diligence, should have discovered the causal connection between the product and the injuries suffered."); *accord IC Corp. v. Hoover Treated Wood Prods., Inc*., 385 S.W.3d 880, 883 (Ark. Ct. App. 2011) ("A cause of action accrues when the plaintiff first becomes aware of his or her condition, including

[10] The twenty-two Complaints that fall within this category are: (1) Troy Hart, [D.E. 149] (Alaska law); (2) Eleanor Cannan, [D.E. 265] (Ariz. law); (3) Rebecca and Gregory Reihman, [D.E. 433] (Ariz. law); (4) Larry and Tuyete Sellmeyer, [D.E. 1 in No. 17-2514] (Ariz. law); (5) Armando Norzagaray, [D.E. 576] (Ariz. law); (6) Janice Walker, [D.E. 349] (Ark. law); (7) Patrick and Darlene Kelly, [D.E. 272] (Ind. law); (8) Philip and Ruby Marcum, [D.E. 1 in No. 17-2525] (Ind. law); (9) Sara Crews, [D.E. 147] (Ky. law); (10) John Cappello, [D.E. 284] (Mass. law); (11) Thomas Hopkins, [D.E. 152] (Mass. law); (12) Connie and James Marotta, [D.E. 156] (Mass. law); (13) Roy Sturm, Jr., [D.E. 278] (N.J. law); (14) Wendy Lowe, [D.E. 273] (Ohio law); (15) Robert Thompson, [D.E. 580] (Ohio law); (16) David and Catherine/Paula Dunsmore, [D.E. 276] (Or. law); (17) Karen Houmes, [D.E. 153] (Pa. law); (18) Jeffrey and Mary Ann Dennis, [D.E. 247] (Pa. law); (19) Duane Britt, [D.E. 444] (Utah law); (20) David James, [D.E. 262] (Utah law); (21) Lori Mergener. [D.E. 283] (Wis. law); (22) Kristi Tursky, [D.E. 238] (Wis. law).

both the fact of the injury and the probable causal connection between the injury and the product's use, or when the plaintiff by the exercise of reasonable diligence, should have discovered the causal connection between the product and the injuries suffered.").

- **Indiana:** *DuRocher v. Riddell, Inc.*, 97 F. Supp. 3d 1006, 1029 (S.D. Ind. 2015) ("'[T]he Indiana statute of limitations begins to run from the date that the plaintiff *knew or should have discovered* (1) that the plaintiff suffered an injury or impingement, and (2) that the injury or impingement was caused by the product or act of another.' . . . The causation prong of Indiana's discovery rule is defined as: 'a person knows or should have discovered the cause of his injury when he has or should have discovered some evidence that there was a reasonable possibility that his injury was caused by the act or product of another,' which requires 'more than a mere suspicion.'").

- **Kentucky:** *Bosch v. Bayer Healthcare Pharm., Inc*., 13 F. Supp. 3d 730, 737 (W.D. Ky. 2014) ("The limitations period begins running on the date the injury is inflicted even where the injury is slight initially and its full extent is not known until years later. The discovery rule 'is available only in cases where the fact of injury or offending instrumentality is not immediately evident or discoverable with the exercise of reasonable diligence.'") (quoting *Fluke Corp. v. LeMaster*, 306 S.W.3d 55, 60 (Ky. 2010)) (citation omitted); *id*. (claims were untimely under Kentucky's one-year statute of limitations where suit was filed "almost two years after [plaintiff] had her [allegedly defective medical device] removed").

- **Massachusetts:** *Lareau v. Page*, 840 F. Supp. 920, 925 (D. Mass. 1993) ("Under the discovery rule, the plaintiff's cause of action does not accrue until she knows or reasonably should have known that she was injured at the defendant's hands. The plaintiff need not have knowledge of the 'full extent' of her injury for the statute to commence to run. Moreover, once she has notice of the 'likely cause' of her injury, under Massachusetts law . . . 'the potential litigant has the duty to discover from the legal, scientific and medical communities whether the theory of causation is supportable and whether it supports a legal claim.'"), *aff'd*, 39 F.3d 384 (1st Cir. 1994) (citations omitted).

- **New Jersey:** *Yarchak v. Trek Bicycle Corp*., 208 F. Supp. 2d 470, 486 (D.N.J. 2002) ("[B]efore a cause of action will be deemed to have accrued, a prospective litigant must be shown to have had an informed suspicion—based on 'some reasonable medical support'—that a particular product or toxin may have either caused or contributed to the injuries which are the subject of his suit").

- **Ohio:** Ohio Rev. Code Ann. § 2305.10(B)(1) ("[A] cause of action for bodily injury . . . caused by exposure to . . . ethical medical devices accrues upon the date on which the plaintiff is informed by competent medical authority that the plaintiff has an injury that is related to the exposure, or upon the date on which by the exercise of reasonable diligence

the plaintiff should have known that the plaintiff has an injury that is related to the exposure, whichever date occurs first."); *Musgrave v. Breg, Inc*., No. 2:09-cv-01029, 2011 WL 5299489, at *3 (S.D. Ohio Nov. 4, 2011) ("[A] plaintiff's cause of action is only deemed to have accrued as of the date of reasonable discovery of the alleged linkage between the injury and the medical device at issue").

- **Oregon:** Or. Rev. Stat. Ann. § 30.905(1) ("[A] product liability civil action for personal injury or property damage must be commenced not later than two years after the plaintiff discovers, or reasonably should have discovered, the personal injury or property damage and the causal relationship between the injury or damage and the product, or the causal relationship between the injury or damage and the conduct of the defendant.").

- **Pennsylvania:** *Danysh v. Eli Lilly & C*o., No. 1:10-cv-2116, 2011 WL 4344601, at *7 (M.D. Pa. July 13, 2011) (The statute "begins to run once the plaintiff is on 'inquiry notice' – that is, actual or constructive knowledge of at least some form of significant harm and of a factual cause linked to another's conduct, without the necessity of notice of the full extent of the injury, the fact of actual negligence, or precise cause.") *aff'd*, 461 F. App'x 75 (3d Cir. Jan 31, 2012).

- **Utah:** UTAH CODE ANN. § 78B-6-706 (The statute runs from the date the party claiming injury "discovered, or in the exercise of due diligence should have discovered, both the harm and its cause."); *Adams v. Am. Med. Sys., Inc*., 705 F. App'x 744, 745, 747 (10th Cir. 2017) (granting motion to dismiss) ("Adams contends that the statute of limitations did not begin to run until she knew, or in the exercise of due diligence should have known, that her harm was caused by a defect in the product, the mesh sling. But Adams does not cite, and we could not find, any Utah Supreme Court decision that that § 78B-6-706's two-year limitations period does not run until the plaintiff knows, or should have known, that her harm is caused, not just by the product, but a defect in that product.").

- **Wisconsin:** *S.J.D. v. Mentor Corp*., 463 N.W.2d 873, 875 (Wis. Ct. App. 1990) ("[A] cause of action cannot be said to accrue until the claimant discovers both the nature of his or her injury and its cause—or at least a relationship between the event and the injury.").

Under the laws of these states, the claims of the Plaintiffs in Exhibit A again accrued no later than the date of each Plaintiff's revision surgery. As alleged in the MACC, revision surgery specifically addresses the BHR, removing the device and converting it to a total hip replacement. *See* MACC ¶ 16 (describing revision surgery occasioned by a "failed BHR"). Plaintiffs allege that they underwent significant medical intervention specifically targeted to the BHR device that they further allege caused their injuries. As a result, on the date of the revision surgery at the

latest, Plaintiffs knew or should have known of their alleged injuries and their alleged cause, which triggered the start of the statute of limitations period. Plaintiffs' claims under these state laws are time-barred on the face of the Complaints and should be dismissed.[11]

* * *

The claims of the Plaintiffs who filed the Complaints identified in Exhibit A should be dismissed because those Plaintiffs filed suit outside the applicable statute of limitations period based upon an analysis of the MACC and their individual Short Form Complaints. Under the law applicable to Plaintiffs, their claims accrued no later than the date of their revision surgeries set forth in their Short Form Complaints. Plaintiffs filed suit, however, outside of the statute of limitations period set by the state law that authorizes their claims. Accordingly, the claims of the Plaintiffs identified in Exhibit A should be dismissed under Rule 12. *See Douglas*, 632 F. Supp. 2d at 491 (dismissing claims that were untimely based upon the face of the Complaint).

D. The Breach of Express Warranty Claims In All But 7 of the 55 Complaints at Issue Should Be Dismissed as Untimely.

The dismissal of the claims of the Plaintiffs identified in Exhibit A is subject to one qualification. The laws of Alabama, New York, Pennsylvania, and Tennessee arguably apply a four-year statute of limitations to breach of express warranty claims in products liability actions.[12] As a result, S&N does not now contend that the breach of express warranty claims of

[11] Plaintiffs cannot avoid this result by arguing that the statute of limitations should be tolled under the doctrine of fraudulent concealment. *See* MACC ¶¶ 265-71. This Court has considered and rejected this claim of fraudulent concealment in its March 26, 2018 Memorandum [D.E. 608]. The Court first recited Plaintiffs' argument that (1) "Smith & Nephew did not have legal protection under the FDA's premarket approval because of their alleged violations of the conditions of that approval," and (2) "because Smith & Nephew did not inform the medical community or patients about its lost legal protection it committed fraud." *Id.* at 5 n.5. The Court then rejected that argument, holding that "[o]nly the FDA has the authority to withdraw approval from a device, and it did not do so here." *Id.*

[12] *See* Ala. Stat. § 7-2-725; *Simmons v. Am. Mut. Liab. Ins. Co*., 433 F. Supp. 747, 749 (S.D. Ala. 1976); *Calabria v. St. Regis Corp*., 124 A.D.2d 514, 516 (N.Y. App. Div. 1986), *aff'd*, 560 F.2d 1022 (5th Cir. 1977); 13 Pa. Cons. Stat. Ann. § 2725(1); 42 Pa. Cons. Stat. Ann. § 5525(2); *Floyd v. Brown & Williamson Tobacco Corp*., 159 F. Supp.

the Plaintiffs who filed the seven Complaints listed below are time-barred on the face of the Complaints because Plaintiffs' revision surgeries were within four years from the date of lawsuit filing.[13] S&N reserves the right to move to dismiss the Plaintiffs' breach of express warranty claims on statute of limitations grounds at a later date. The breach of express warranty claims for Plaintiffs identified in the other 48 Complaints subject to this Motion, however, should be dismissed as untimely.

CONCLUSION

For the reasons set forth above, the claims of the Plaintiffs identified in Exhibit A should be dismissed as time-barred.

REQUEST FOR HEARING

S&N hereby requests a hearing on this motion pursuant to Local Rule 105(6).

2d 823, 831 (E.D. Pa. 2001); Tenn. Code Ann. § 47-2-725(1); *Zager v. Medtronic, Inc.*, No. 3:08-cv-44, 2008 WL 11342536, at *2 (E.D. Tenn. May 14, 2008).

[13] The seven Complaints for which S&N is not seeking dismissal of the breach of express warranty claims are: (1) Joseph Maize and Valeana Marshall, [D.E. 216] (Ala. law); (2) Wilmer Colon, [D.E.630] (N.Y. law); (3) Robert Cotten, [D.E. 233] (N.Y. law); (4) Colleen DeJohn, [D.E. 522] (N.Y. law); (5) Karen and Kam Leung, [D.E. 1 in No. 17-2508] (N.Y. law); (6) Naomi Parrish, [D.E. 292] (N.Y. law); (7) Karen Houmes, [D.E. 153] (Pa. law). Six other Complaints allege that Plaintiffs' claims are governed by one of these state laws, but, as set forth in Exhibit C, their breach of express warranty claims are nonetheless time-barred even under the longer four-year statute of limitations: (1) KimberLee and Douglas Aitcheson, [D.E. 518] (N.Y. law); (2) Kathi and Pete Durdon, [D.E. 246] (N.Y. law); (3) Sean McCormick, [D.E. 341] (N.Y. law); (4) Marc Palmquist, [D.E. 158] (N.Y. law); (5) Chad Stafford, [D.E. 566] (Tenn. law); (6) Jeffrey and Mary Ann Dennis, [D.E. 247] (Pa. law).

Dated: June 20, 2018

Respectfully Submitted,

/s/ Terri S. Reiskin

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CERTIFICATE OF SERVICE

I, Sara J. Gourley, hereby certify that on this 20th day of June, 2018, I electronically filed the foregoing with the Court using the CM/ECF system, and thereby delivered the foregoing by electronic means to all counsel of record.

/s/ Sara J. Gourley
Counsel for Defendant Smith & Nephew, Inc.