

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION**

IN RE: BIOMET M2a MAGNUM HIP IMPLANT PRODUCT LIABILITY LITIGATION (MDL 2391)))))))	CAUSE NO: 3:12-MD-2391-RLM-CAN This Document Relates to All Cases
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**BIOMET DEFENDANTS’ PROPOSED SCHEDULING ORDER REGARDING
COMPLETION OF DISCOVERY AND STATEMENT IN SUPPORT**

Pursuant to the Court’s Memorandum of the September 3, 2015 status conference (Doc. No. 2971), the Biomet Defendants (hereinafter “Biomet”) submit their proposed scheduling order, attached as Exhibit A, and the following statement in support. In sum, Biomet contends that initiating more case-specific discovery and scheduling bellwether trials will be beneficial to the administration of this MDL. Therefore, Biomet requests that the Court adopt an amended version of its December 10, 2103 Scheduling Order as the discovery framework for this litigation.

I. Development of Discovery Scheduling in MDL 2391.

From the outset of this MDL, the Court has engaged both sides in the development of a practical and efficient discovery strategy, and that strategy has always contemplated the use of bellwether trials. During early 2013, PSC I and Biomet met and conferred on numerous occasions regarding the timing of discovery and selection of bellwethers.

After the September 23, 2013 status conference, the Court formally invited both sides to submit proposed scheduling orders “covering events to the point of trial readiness of the *first bellwether trial . . .*” (Doc. No. 918) (emphasis added). On October 25, 2013, PSC I submitted a proposed scheduling order (Doc. No. 935), and on November 1, 2013, Biomet responded with

its own proposal. (Doc. No. 951). Notably, both sides' proposals included case-specific discovery from a representative case pool and the selection of cases for bellwether trials from that pool.

After hearing comment at the November 18, 2013 status conference, the Court entered a Scheduling Order on December 10, 2013. (Doc. No. 1118). The Scheduling Order provided a timetable for the progress of the MDL through five bellwether trials, including a detailed plan for case-specific discovery on a limited number of cases to enable the selection of bellwether trials as well as a separate dispositive motion track to address statute of limitations cases. (Doc. No. 1118). Shortly thereafter, the Plaintiffs' Executive Committee and Biomet entered into the Master Settlement Agreement ("MSA") on January 31, 2014, and the Court vacated the discovery deadlines. (Doc. No. 1317).

II. The December 10, 2013 Scheduling Order's Bellwether Framework Still Applies.

The Court got it right with the December 10, 2013 Scheduling Order. Since 2013, the Court has made very clear that it intends to conduct bellwether trials before remanding member cases to their respective jurisdictions. (Doc. Nos. 918 and 1118). This strategy still holds water. Despite the large number of settlements pursuant to the MSA, the same global issues at play when the Court issued its December 10, 2013 Scheduling Order permeate the remaining cases.

Issues common to the remaining cases include: spoliation based on plaintiffs' failure to retain their explanted Biomet device(s), statute of limitations, state of the art, and learned intermediary defenses, and *Daubert* issues. Bellwether trials will continue to be valuable to effectively evaluate the strengths and weaknesses of these arguments.

For example, Biomet contends that the Instructions for Use ("IFU") issued with its M2a Magnum devices adequately describe the risks at issue in this litigation, including warnings

regarding elevated metal ions and the possibility of metal hypersensitivity reactions as early as 2005. If Biomet is successful on this defense in a bellwether trial, the outcome of that bellwether could precipitate the resolution of failure to warn claims in the remaining cases, especially given that every Biomet metal on metal device ever shipped contained an IFU in its packaging. *See In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, MDL No. 1358, 2007 WL 1791258, at *2-3 (S.D.N.Y. June 15, 2007) (“A bellwether trial also allows a court and jury to give the major arguments of both parties due consideration without facing the daunting prospect of resolving every issue in every action And every experienced litigator understands that there are often a handful of crucial issues on which the litigation primarily turns. A bellwether trial allows each party to present its best arguments on these issues for resolution by a trier of fact. Moreover, resolution of these issues often facilitates settlement of the remaining claims.”).

Similarly, “state of the art” is a common issue in the remaining cases. Plaintiffs claim that Biomet should have known of safety issues related to its metal on metal systems based on general concerns about metal on metal raised by the British Medicines and Healthcare Products Regulatory Agency (MHRA) in 2006. *See, e.g., Bell v. Biomet, Inc. et al.*, 3:14-cv-617 (Doc. No. 1 at ¶ 26). But, approximately 20% (48) of the remaining plaintiffs were implanted prior to 2006, and therefore, cases that fall into this bucket do not chronologically fit into plaintiffs’ defective design theory. Trying one of these cases as a bellwether will provide plaintiffs an opportunity to flesh out this claim in future cases. These are just two examples of global issues ripe for consideration using the bellwether process.

III. Case-specific Discovery is Necessary to Effectuate a Successful Bellwether Plan.

Biomet proposes that the PSC and Biomet each choose twenty-five cases for limited case-specific discovery, and then the Court shall select appropriate cases for bellwether trials

from this pool of fifty cases. *See* Biomet's Proposed Scheduling Order, attached as Exhibit A.

Biomet also proposes that the Court shift from a statute of limitations dispositive motion track to a spoliation track. *See id.* According to verified Plaintiff Fact Sheet representations, in approximately one hundred of the remaining cases¹, plaintiffs' explanted device is unavailable for analysis, and in 50 of the cases, the revisions occurred after the Court's initial preservation order was issued in October 2012. In many states, the unavailability of the explanted device may preclude manufacturing and design defect claims. *See e.g., Macaluso v. Herman Miller, Inc.*, U.S. Dist. LEXIS 3717 (S.D.N.Y. Mar 9, 2005) (granting summary judgment when device not available for examination). In some states, failure to show sufficient diligence in preserving the product at issue may result in dismissal. *See, e.g., Flury v. Daimler Chrysler Corp.*, 427 F.3d 939, 947 (11th Cir. 2005) (granting summary judgment for defendant on manufacturing defect claim where "[p]laintiff's spoliation of critical evidence in this case deprived the opposing party of an opportunity to put on a complete defense."). *See also* Defendants' November 9, 2012 Pre-Conference Submission, 3-4. Establishing case-specific discovery and dispositive motions for a representative number of these spoliation cases, which constitute almost half the pending cases, will inform plaintiffs with similar factual scenarios of their likelihood of proceeding on the merits of their claims.

In contrast to the significant number of current cases subject to spoliation motions, Biomet currently believes there are approximately twenty pending cases which are subject to statute of limitations summary judgment motions and two of these cases involve pro se litigants. Because statute of limitations analysis now impacts less than ten percent of the current MDL docket, Biomet does not believe a separate statute of limitations bellwether track is warranted.

¹ Plaintiff Fact Sheets are not yet due in twenty-one cases and in another four cases, information on the location of the explanted device has not yet been provided. Depending on what is learned regarding the explants for these twenty-five cases, at least half the pending cases may be subject to spoliation motions.

To the extent the Court wants to have a statute of limitations bellwether track, however, Biomet will promptly provide the list of cases it believes are time-barred to PSC II so the parties can each pick a representative number of cases.

IV. Shorter Bellwether Deadlines Make Sense Given the Discovery Completed to Date.

While Biomet requests that the Court use its December 10, 2013 Scheduling Order as a template going forward, several deadlines may be shortened or eliminated altogether because of discovery already completed in this litigation. Biomet has collected documents from sixty-seven employee custodians and produced more than 1,500,000 documents (9,298,852 pages) along with 12 corresponding privilege logs. Similarly, individual plaintiffs' counsel and Biomet have collected and exchanged relevant medical records for the majority of remaining plaintiffs, and PSC I conducted 30(b)(6) depositions of eight Biomet corporate witnesses. For this reason, certain deadlines included in the December 10, 2013 Scheduling Order, such as certifying the production of custodian files and the provision of privilege logs, are no longer applicable, and Biomet has not included those dates in its proposed scheduling order. *See* Biomet's Proposed Scheduling Order, attached as Exhibit A.

Likewise, Biomet proposes that the Court shorten the deadlines for the bellwether track cases by sixty to ninety days from the original Scheduling Order to account for the significant discovery completed to date. *See id.* This proposed schedule facilitates prompt resolution of common dispositive issues and establishes a bellwether procedure that will move the overall litigation toward resolution.

For these reasons, Biomet respectfully requests that the Court adopt its proposed scheduling order, attached to this statement as Exhibit A.

Dated: September 17, 2015

/s/ Erin Linder Hanig

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CERTIFICATE OF SERVICE

I certify that on September 17, 2015, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which provided electronic service upon all counsel of record.

/s/ Erin Linder Hanig

Erin Linder Hanig (29113-71)

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BIOMET DEFENDANTS’ PROPOSED SCHEDULING ORDER

1. For all cases filed in this MDL before December 31, 2014 the PSC and Biomet each will choose 25 cases for case-specific discovery. The PSC and Biomet will each identify their chosen cases by [30 days from date of Order]. Case-specific discovery for each of the 50 cases will be completed by [240 days from date of Order]. From this pool of cases, the Court will select cases for bellwether trials.

a. Case-specific fact discovery shall be governed by the Federal Rules of Civil Procedure, the local rules of this Court, and any applicable past or future orders entered in 3:12-MD-2391. Case-specific fact discovery shall be limited to depositions of (a) the plaintiffs, (b) the implanting surgeon, (c) the revising surgeon, (d) the Biomet representative who sold the product, (e) a separate Biomet representative (if any) who was present in the operating room during the implant surgery, and (f) two additional fact witness per side (if any).

b. If the plaintiff should dismiss any case selected for case-specific discovery, Biomet will select a replacement. If any case selected for case-specific discovery is dismissed as a result of a settlement, the PSC will select a replacement.

2. The Court will resolve spoliation issues in ten representative cases under the following schedule:

a. The PSC and Biomet will each choose five cases to serve as representative cases. Those cases must be selected from cases filed in this MDL docket as of June 30, 2015 and cannot be a case chosen for case specific discovery pursuant to paragraph 1 of this Order. The PSC and Biomet will identify their chosen representative cases by [45 days from date of Order].

3. If the plaintiff should dismiss any representative spoliation case, Biomet will select a replacement. If any representative spoliation case is dismissed as a result of a settlement, the PSC will select a replacement.

a. Core discovery for each of the ten representative spoliation cases shall be completed by [150 days from date of Order]. Discovery shall be governed by the Federal Rules of Civil Procedure, the local rules of this Court, and any applicable past or future orders entered

in 3:12-MD-2391. Discovery shall be limited to the following:

- i. Biomet may depose the plaintiff or plaintiffs.
- ii. Plaintiff and Biomet each may depose one person who handled the device at issue in the case after it was explanted.
- iii. Biomet may propound interrogatories corresponding to questions 4, 5, and 54 of its originally proposed Plaintiff Fact Sheet (this order doesn't preclude objections by the plaintiff or plaintiffs).¹
- iv. If a particular plaintiff has provided information and releases that would allow Biomet to acquire the documents from the plaintiff's health care providers, Biomet may propound document requests corresponding to requests 1 and 2 of its originally proposed Plaintiff Fact Sheet (this order does not preclude objections by the plaintiff or plaintiffs).²

4. The plaintiffs in the ten representative spoliation cases may seek leave of Court to conduct other particular case-specific discovery.

a. Biomet shall serve its summary judgment motions in the ten representative cases by [180 days from date of Order]. The Court will strike any motions that seek judgment on any ground other than spoliation. The plaintiffs shall serve their responses on Biomet by [201 days from date of Order]. Biomet shall file the motions, responses, and its replies with the court by [208 days from date of Order].

¹ 4. When did you first contemplate obtaining an attorney regarding any of the injuries alleged in your Complaint?

² 5. When did you first contact an attorney regarding any of the injuries alleged in your Complaint? (This question asks for the first contact with any attorney, including but not limited to your present attorney).

54. Since you received your M2a device, have you had any social media accounts, including but not limited to Facebook, Twitter, MySpace, and LinkedIn.

Yes No

If Yes, please provide the following information:

Social Media Website	User Name(s)	Associated E-mail Address(es)	Approximate Date Account was Created

REQUEST NO. 1: All medical records from any physician, hospital or health care provider who has treated you for any injury, illness and/or disease identified in response to the Plaintiff Fact Sheet.

REQUEST NO. 2: All radiographs (x-rays, ultrasounds, MRIs, CT scans) that relate to the condition and injuries alleged in your complaint or that show any portion of your hip and/or depict the M2a Device.

5. By [180 days from date of Order], the PSC and Biomet shall exchange their selections for the case-specific discovery pool for bellwether trials. The parties shall meet and confer on the selection of ten cases for bellwether trials and inform the Court of their agreed selections and any proposed additional selections (with reasons for the proposed selections) by [187 days from date of Order]. The Court will select five bellwether cases and the order of trials by [194 days from date of Order]. Cases in the representative case pool may be dismissed by the plaintiff only with prejudice. In the event of dismissal or settlement of a case in the representative case pool, the PSC and Biomet each shall submit one candidate to replace it; the Court will choose one of those candidates to schedule for a bellwether trial. The Court prefers not to have either side with full control over the selection of a case for bellwether trial purposes.

6. The PSC shall submit its bellwether case-specific expert reports, with deposition dates for all such experts, by [210 days from date of Order]. Biomet shall submit its bellwether case-specific expert reports, with deposition dates for all such experts, by [240 days from date of Order]. All bellwether expert discovery will be completed by [300 days from date of Order].

7. All summary judgment motions or motions directed at admissibility under Federal Rule of Evidence 702 shall be filed by [314 days from date of Order]. Response briefs shall be filed by [360 days from date of Order], and reply briefs shall be filed by [375 days from date of Order]. The Court will schedule a hearing on any such motions as soon thereafter as reasonable.

8. Any motions in limine in the cases selected for bellwether trials shall be filed by [390 days from date of Order]. Neither side shall file more than one motion per case, though the motions can contain multiple requests for rulings. Response briefs shall be filed by [410 days from date of Order], and reply briefs shall be filed by [417 days from date of Order]. The Court will schedule a hearing on any such motions as soon thereafter as is reasonable, taking into account the order in which the cases are set for trial.

9. The Court will schedule the bellwether trials [beginning 480 days from date of Order]. The scheduling of trials will be done consistent with *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998).

SO ORDERED

Dated:

Judge, United State District Court