

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN RE: BIOMET M2a MAGNUM HIP)
IMPLANT PRODUCTS LIABILITY) CAUSE NO. 3:12-MD-2391 RLM
LITIGATION (MDL 2391))
)
)
)
_____)
This Document Relates to All Cases)
_____)

ORDER

A telephonic hearing was held at the request of counsel on February 16, 2016. Navan Ward represented the plaintiffs, and John LaDue and John Winter represented Biomet. The parties asked me to consider two issues, one a procedural question and one a legal question. Both issues relate to the cases listed on Exhibit A or Exhibit B of the December 21, 2015 Scheduling Order. Exhibit A lists cases Biomet believes involve statute of limitations issues, and Exhibit B lists cases in which Biomet anticipates raising a spoliation defense.

The first issue concerns the scope of questioning allowed at the depositions of the plaintiffs listed on either exhibit. Biomet would like to conduct a single, full deposition of these plaintiffs, including questioning on all discoverable topics. PSC-II takes no position on this issue, but notes that counsel for some plaintiffs would prefer that questioning at the initial depositions be limited to statute of limitations or spoliation issues; a second deposition occurring later would fill in the rest of the case-specific discovery.

Following discussion, I concluded that the idea behind the MDL process is to reduce expense and inconvenience to the parties, and bifurcating the depositions of these plaintiffs would be inconsistent with that goal. Economy is best served by allowing Biomet to conduct a single deposition of each plaintiff, with whatever is discoverable being available for questioning during that deposition. That's the way I've approached depositions of Biomet's witnesses, and we will do the same for plaintiffs' witnesses. I recognize that we have sixty-eight plaintiffs listed on the two exhibits, and it may be that there are cases in which there's a reason why a plaintiff wouldn't be able to sit for a full deposition without additional time or information. I'll entertain motions by counsel of record explaining why it would be unfair, unjust, or inconvenient for a plaintiff to give a full deposition at this point in a particular case. The presumption will be that unless I rule to the contrary in a given case, there will be a single deposition of each Exhibit A and Exhibit B plaintiff, not to be bifurcated between statute of limitations or spoliation issues on the one hand and the rest of the case on the other. Individual counsel of record can request adjournment of the deposition or some other arrangement in light of the unique circumstances of a particular plaintiff.

The second issue relates to who is or isn't properly included among the spoliation cases listed on Exhibit B. PSC-II believes some of the plaintiffs included on Exhibit B shouldn't be, and that the Exhibit B group should be limited to people who were parties at the time I issued the orders obligating plaintiffs to preserve their explants. Biomet would like to leave on the list people who may not

have been parties or even represented by attorneys at the time of the court's orders, arguing that anyone who reasonably anticipates litigation has an obligation to preserve evidence.

In essence, the parties ask me to decide who my prior orders apply to, and I don't think I can answer that legal question without the backdrop of the individual cases. The scheduling orders established a framework through which we could get that backdrop, and the parties could then argue the law with the factual backdrop in mind through motions for summary judgment. Biomet might be mistaken, and the spoliation question might turn on state law for plaintiffs who had revision surgeries before becoming parties. If that's the case, I don't anticipate resolving state law spoliation issues. But to the extent I can resolve federal spoliation issues, I will do so on summary judgment. Accordingly, I'm going to defer ruling on PSC-II's request to take any plaintiffs off the Exhibit B list until the summary judgment briefing, when I'll have the necessary factual background to decide whether the preservation orders apply to particular plaintiffs.

SO ORDERED.

ENTERED: February 17, 2016

_____/s/ Robert L. Miller, Jr._____
Judge
United States District Court

