UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

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

MEMORANDUM CONCERNING PARTIES' DISCOVERY DISPUTES

The parties have presented two discovery matters that they haven't been able to resolve cooperatively. I write this memorandum with the assumption that the reader is familiar with the partial settlement reached earlier in this case, which produced a hiatus in the discovery process and a need to appoint a new plaintiffs' steering committee, which I'll call PSC2. Today's issues arise from the PSC2's efforts to pick up discovery from the hiatus.

I

The first disagreement relates to the PSC2's designation of records custodians for possible depositions. Before the partial settlement, the first plaintiffs' steering committee — PSC1 — conducted a record review that led it to request the files of 67 Biomet records custodians; Biomet produced those files. The list of 67 records custodians was itself a product of a meet-and-confer process; Biomet had wanted to produce the files of only 28 custodians. Once PSC2

got up and running, the renewal of discovery was a topic of discussion between the attorneys and me, with an eye toward entering a new case management order to move the remaining cases toward something approaching trial readiness. In a written submission, PSC2 told me the new scheduling order should (like the first) set a timeline for production of custodial files and prioritized depositions of Biomet witnesses, though PSC2 expected significantly fewer depositions would be taken than the first order contemplated. [Doc. No. 2961, at 7]. In court last September, the PSC2 told me it anticipated taking "fifteen or so" depositions. [Doc. No. 2950, at 31-32].

The attorneys discussed this issue again in court on December 7, as they explained the issues remaining to be resolved under the parties' proposed scheduling order. First, PSC2 said:

> And so, as we continue to move on in the proposed order, I want to be able to notate a couple of things on Paragraph 5, where it talks about the list of core depositions, custodians, the 67 custodian files that have been already produced by Biomet. Now, we wanted to clarify that. To the extent that, obviously, PSC 2 continues with their core discovery and either rely on old discovery or new discovery, to the extent that the new PSC finds or deems that there are additional witnesses outside of the 67 custodians that have already been produced, then we, certainly, want to have the opportunity to include those custodians in a listing of deponents that we feel are necessary to our case. The same is true for Paragraph 6, where, essentially, that is just a time frame for supplemental lists of custodial files which are over a time frame that, again, both of the parties agree with.

[Doc. No. 3025, at 10-11]. That apparently was the first Biomet had heard of PSC2's interpretation of those provisions, because Biomet responded,

> On the three other points, the one that came up about asking for more custodians, that had not come up, prior, in any prior discussions, Your Honor. On one level, it could make sense. But our only concern is that, if you're going to say, "I want 10 more custodians," just making up a number, that creates an obligation and a time line for us to go collect the information, retrieve it, make sure, you know, we do all the work that we need to do, pursuant to your orders, and then make it available. And given we're dealing with a reasonably tight discovery schedule here, if they're going to want more custodians, and we meet and confer on it, we just need to do it a lot sooner, rather than later, so that we can get everything done. But we recognize that that could be and it is a legitimate request, that we'll look at the 67. If we want more, we should -- the Plaintiffs have the right to ask for it.

Id. at 28-29.

Based on my understanding of those representations, as well as my understanding that both sides wanted to proceed in a way that would lead to orderly remand of the remaining cases to the transferor courts, I entered a new case management order on December 21, 2015. Paragraphs 5 and 6 are pertinent to the parties' current disagreement:

> 5. By January 30, 2016, the PSC shall provide an initial list of requested deponents from the 67 custodians that Biomet already produced, in order of priority. The PSC shall complete the depositions of the people on the initial list by September 26, 2016. To the extent Biomet may object to a particular custodian being deposed, the parties may file a joint memorandum, not to exceed 10 pages, of the disagreements that remain after meeting and conferring about the dispute. No formal motion will be required. I will hear argument when necessary.
>
> 6. By May 29, 2016, the PSC shall provide a supplemental list of requested deponents from the 67 custodians and others whose names arise in the first wave of custodian depositions, in order of priority. The PSC shall complete the depositions of the people on the supplemental list by December 26, 2016. To the extent Biomet may object to a particular custodian being deposed, the parties may file a joint memorandum, not to exceed 10 pages, of the disagreements that

> remain after meeting and conferring about the dispute. No formal motion will be required. I will hear argument when necessary.

[Doc. No. 3047, at 5-6].

On January 29, PSC2 sent Biomet an unprioritized list of 102 Biomet employees it might want to depose. Obviously, not all were from the earlier list of 67 custodians. Although the numbers shift as the discussion proceeds, my understanding is that those 102 names consisted of 39 custodians from among the 67 whose files had been produced to PSC1, and 63 other names that came from other sources.

PSC2 didn't comply with ¶ 5 of the December case management order. It sent Biomet a list of unprioritized names of people PSC2 might want to depose. Roughly forty percent of the original 102 names were not among the 67 pre-hiatus names. Paragraph 5 of the case management order contemplated a subset of the 67 pre-hiatus custodians, in order of priority, whose depositions PSC2 wanted to take. PSC2 didn't produce that list by January 30. PSC2's list of 102 possible deponents was alphabetical, without identifying custodians whose depositions were to be taken or specifying the order of priority, and so didn't comply with the case management order. Nearly two months of discovery have been lost as a result.

PSC2 still can comply with ¶ 6 of the case management order. By May 29, it can present a list of proposed deponents in order of priority. The December case management order didn't limit that anticipated list to the 15 depositions PSC2

estimated before the order was entered, but it gives Biomet the right to object to specific additional depositions. If Biomet files such objections to persons on the list to be filed by May 29, I will take into account both that additional depositions were contemplated and that the noncompliance with ¶ 5 eliminated about eight weeks of discovery time contemplated by the December case management order.

II

The second dispute is less straightforward. In March 2013, Biomet served responses to PSC1's interrogatories and document requests. PSC2 wants Biomet either to supplement each of its responses or to supplement or respond to specified interrogatories and requests. Biomet responds that requiring it to do so would be disproportionate under Federal Rules of Civil Procedure 1, 33, and 34, as amended on December 1, 2015, and that PSC2's demands are inconsistent with my earlier discovery orders.

A party has an obligation to supplement its written discovery responses, but that obligation isn't triggered by an adversary's demand:

> **(e) Supplementing Disclosures and Responses**
>
> **(1) In general.** A party who has . . . responded to an interrogatory [or[request for production . . . must supplement or correct its disclosure or response:
>
> **(A)** in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or
>
> **(B)** as ordered by the court.

FED. R. CIV. P. 26(e). PSC2 has provided me with no reason to order Biomet to supplement all of its previous responses to interrogatories and production requests. As already noted, that might not be what PSC2 wants now, anyway.

A

Apart from supplementation, there appear to be two types of Biomet responses to which PSC2 directs my attention. In response to many of the interrogatories and requests for production, Biomet objected, but said it would produce the documents or information. At the hearing, Biomet told me it has completed those responses by placing the information into the digital document repository to which both sides have access. PSC2 tells me it can't tell which of the documents in that repository correspond to a particular request or interrogatory.

Neither side told me what sort of notification Biomet gives when it electronically places an item into the digital repository, but I assume Biomet reports what it's adding to the collection and why. I also assume PSC1 has done its best to deliver its records to PSC2, but I also realize that PSC1 spent most of its final year of existence focused on settlement issues, so it makes sense that PSC2 would be unable to associate an interrogatory or a document request to a particular document in the digital repository.

Because it seems reasonable to think the notifications are accessible by Biomet at a modest expense, I direct Biomet to provide PSC2 with information correlating electronic documents in the digital repository with interrogatories and

document requests that Biomet promised to comply with. That information should facilitate the continuing discovery process.

B

Finally, as to some interrogatories and document requests, Biomet responded with boilerplate objections. For example, document request 86 sought, "All DOCUMENTS that RELATE to or reflect the market share percentage of the various BIOMET HIP SYSTEM, including but not limited to all DOCUMENTS reflecting any analyses of market acceptance of the original, successor and derivative BIOMET HIP SYSTEM." Biomet responded, "Defendants object to this Request because it is overly broad, unduly burdensome, impermissibly vague, and not limited to a relevant time period. Defendants further object to this request as not reasonably calculated to lead to the discovery of admissible evidence." Biomet now adds that the cost of production would be disproportionate. In its current submission, PSC2 narrowed the request to the years 1998 to present and only documents in Biomet's possession.

I don't have enough information to help the parties handle disputes over this sort of request and response. The original objections offer plenty of grounds but no explanations; I don't know why Biomet thinks the request is overly broad or unduly burdensome. Nor have I any idea what response there might be to the objections; I don't know why PSC2 thinks that even a modified 18-year time frame isn't overly broad.

It's not clear to me whether Biomet contends that responding to this set of requests and interrogatories (those to which its objections weren't accompanied by a promise to respond anyway) places a disproportionate burden on Biomet. If so, the burden on Biomet would have to be very substantial since this discovery now covers nearly 300 cases, and Biomet hasn't told me just what the burden would be. On the other hand, I have no idea what to place on the other side of the scale; the relevancy of market share or market acceptance isn't intuitive. It might well be relevant, but I can't easily put my finger on the issue to which market share relates.

As to this set of interrogatories and requests for production, then, I can't resolve the disputes on this record. A conference with the attorneys, at which the relevancy and objectionability of each interrogatory and document request can be identified and discussed, will be the most efficient and expeditious manner of resolving the issues. Unless a necessary person can't be present, I will convert the April 14 contingent telephone hearing to a daylong conference to address each of the disputed interrogatories and requests for production. I urge the parties to conduct another meet-and-confer before that conference; any agreements will shorten what otherwise promises to be a very long day.

ENTERED: March 28, 2016

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