

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

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

OPINION AND ORDER

The Plaintiffs’ Executive Committee has filed a motion modestly entitled, “Motion to Modify Future Remand/transfer Orders”, but the motion actually seeks much more than that. After a long – too long – consideration, I have concluded that I can't grant the motion.

Discovery with respect to Biomet was closed in this MDL docket in 2016. The Plaintiffs’ Executive Committee's motion is based on the assumption that since then, Biomet has produced information to plaintiffs proceeding in state courts, and hasn’t produced that information to the MDL Plaintiffs’ Executive Committee. One of Biomet's attorneys filed an affidavit with Biomet's supplemental opposition in which she reports that the MDL plaintiffs already have received the “vast majority” of the documents that have been produced in non-MDL cases. The problem might not be as great as the plaintiffs fear, but the issue remains as long as there are documents that some plaintiffs have and others don't.

The Plaintiffs' Executive Committee's motion asks the court to define, or at least to clarify, Biomet's duty to supplement discovery, or alternatively to allow plaintiffs to engage in case-specific discovery, and to address the admissibility of discovery Biomet has produced in various non-MDL court's. I don't believe that I have the authority to do any of the things the Executive Committee asks.

First, admissibility of evidence is generally a matter for transferor courts, and the Plaintiffs' Executive Committee hasn't indicated why a docket-wide ruling in the transferee court is appropriate.

The supplementation issue would require me to order specific document production in cases no longer before me. Collecting the numbers would simply delay this ruling even longer, but I have sent more than 200 cases back to transferor courts (through the JPML) or to the courts in which the cases would have been filed but for direct filing into this MDL. I am no longer the judge to whom those cases are assigned, and have no standing to make orders in those cases. The Plaintiffs Executive Committee has cited no law to support the proposition that a transferee court has continuing jurisdiction over remanded or transferred cases.

There are still cases in the MDL in which I would have authority to enter orders or to amend the documents that accompany cases on remand or transfer. But what the plaintiffs ask would be inconsistent with my responsibility as a transferee judge. As I understand the plaintiff's request, which already has been

clarified once at my request, the plaintiffs want me to order Biomet to produce for all plaintiffs remaining in the MDL all documents that have been produced to non-MDL plaintiffs in M2a implant cases. Management of discovery is a core obligation of any MDL transferee judge. The requested order would constitute an abdication of my duty to manage discovery: in effect, I would incorporate by reference all discovery orders entered by all judges in the non-MDL cases. To do so in a one-off civil case likely would be an abuse of discretion; to do so in a multi-case MDL docket would be far worse.

I confess confusion, even after the plaintiffs tried to clarify the order they seek, about whether the plaintiffs want any further order about the sharing of discovery from one case, whether in or outside this MDL, with others. In their original submission, the Plaintiffs' Executive Committee pointed to cases that seem to encourage the sharing of products of discovery among individual plaintiff's lawyers. Its supplemental brief doesn't seem to contemplate such an order. In case the Plaintiffs' Executive Committee envisions an order directing plaintiffs' attorneys in other cases to share their discovery with the plaintiff's lawyers in this MDL, I don't have the authority to disregard protective orders other courts have entered.

Yesterday, the Plaintiffs' Executive Committee supplemented its papers with a citation to an opinion I wrote nearly thirty years ago, Wauchop v. Domino's Pizza, Inc., 138 F.R.D. 539 (N.D. Ind. 1991). It's good to know the case has stood

the test of time, but Wauchop approached the discovery-sharing issue from the opposite direction. Wauchop addressed a motion by the defendant for a protective order that would prevent the Wauchops' attorneys from sharing the discovery they received in the Wauchops' case with attorneys representing plaintiffs in other personal injury cases based on Domino's' 30-minute guarantee. I denied the motion for a protective order, leaving the Wauchops' attorneys free to share what Domino's produced in discovery.

The Plaintiffs' Executive Committee doesn't want freedom to share the information they got from Biomet with other plaintiffs. They want any discovery that any other plaintiff got from Biomet. Wauchop provides no authority for that request.

Lastly, the Plaintiffs' Executive Committee asks that I define Biomet's duty to supplement the disclosures in the Defendant's Fact Sheets pursuant to Fed. R. Civ. P. 26(e). The Defendant's Fact Sheets, like the Plaintiffs' Fact Sheets, are a substitute of discovery; the February 15, 2013 case management order that created the duties to complete and serve plaintiff's and defendant's fact sheets placed that obligation under "VII. Discovery". Biomet has the same duty to supplement its fact sheets as it has with respect to disclosures, interrogatories, and production requests under Fed. R. Civ. P. 26(e).

This motion has lain too long awaiting ruling, and I apologize to all for that. I wrestled with this motion more than most. It does no credit to the MDL process

for a plaintiff to face trial with less information than she would have had had her case not been swept into an MDL docket. It appears that might be happening here. But despite my desire to avoid that result, I couldn't find a way to do that consistent with the MDL process and the jurisdiction of a single federal court. Accordingly, with more misgivings than usual, I deny the "Plaintiffs Executive Committee's motion to modify future remand/transfer orders [Doc. No. 3767].

SO ORDERED.

ENTERED: August 7, 2019

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