UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

In re BIOMET M2A MAGNUM HIP IMPLANT PRODUCTS LIABILITY LITIGATION	))))	**MDL No. 2391**

MEMORANDUM IN SUPPORT OF BIOMET DEFENDANTS' MOTION TO VACATE THE PANEL'S AUGUST 27, 2018 ORDER SUSPENDING TRANSFER OF ACTIONS TO MDL 2391

I. INTRODUCTION

Plaintiffs' actions in the wake of Judge Miller's decision to wind down MDL 2391 have regrettably forced Biomet to ask that the Panel vacate its August 27, 2018 Order suspending further transfer of tag-along actions to the MDL. Since Judge Miller began the process of remanding and transferring cases out of the MDL, Plaintiffs have served numerous sets of common-issue discovery requests in dozens of federal cases pending in district courts across the United States, in addition to state courts. These common-issue discovery requests violate Judge Miller's express determination that further common-issue discovery from Biomet not be allowed. As a result, the MDL is still needed to achieve the goals of efficiency, consistency, and fairness as charged by this Panel.[1] A single MDL judge—not numerous district court judges—should assess these common-issue discovery requests to ensure that the principles of efficiency, consistency, and fairness are being applied equitably across all cases.

Likewise, the MDL court is best suited to coordinate with state courts across the country to facilitate consistent and fair rulings on common-issue discovery questions, and the MDL court also can help facilitate resolution of additional cases through bellwether trials and coordinated

[1] To be clear, Defendants applaud Judge Miller's efforts to resolve the MDL and do not fault him for the unforeseeable actions taken by Plaintiffs' counsel throughout the country that led to this request.

settlement discussions. Accordingly, to realize the ongoing advantages of continued consolidation and centralization of cases in the MDL, Defendants Biomet Inc., Biomet U.S. Reconstruction, LLC, Biomet Manufacturing, LLC, and Biomet Orthopedics, LLC (collectively referred to as "Biomet") urge the Panel to vacate its August 27, 2018 Order suspending further transfer of tag-along actions to the MDL. Once the Order suspending further transfer of actions is lifted, Biomet will seek by separate motion retransfer to the MDL 104 cases[2] that were previously remanded or transferred by the MDL court, as well as transfer to the MDL for the first time 14 newly filed cases[3] pending in various federal courts.[4] Based on cases currently pending in the MDL and district courts, Biomet ultimately will seek a consolidated MDL of more than 160 cases.[5]

II. BACKGROUND

A. Formation of the MDL

On June 27, 2012, two Plaintiffs moved this Panel for centralized pre-trial proceedings of litigation involving Biomet's M2a Magnum hip implants. *See* Dkt. 1. On October 2, 2012, the Panel created an MDL in the Northern District of Indiana and assigned the Honorable Robert L. Miller, Jr. to oversee the MDL. *See* Dkt. 124. The Panel stated:

[2] These cases are pending in 46 federal district courts. *See* Ex. 1, List of Pending Remanded and Transferred Cases.

[3] These cases are pending in 12 federal district courts. *See* Ex. 2, List of Newly Filed Federal Cases.

[4] Once cases are recentralized in the MDL, Biomet intends to move the MDL court to (1) rule on pending and future discovery requests from Plaintiffs' counsel, (2) establish a case management plan to try bellwether cases, (3) issue a state court coordination order, and (4) assign a magistrate judge to initiate coordinated settlement discussions.

[5] When the Panel first created MDL 2391, eight cases from six different district courts were consolidated, and the Panel was aware of an addition 57 federal cases that were potentially related as tag-along actions. *See* Dkt. 124.

> [W]e find that these actions involve common questions of fact, and that centralization will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation. The actions share factual questions concerning design, manufacture, marketing and performance of Biomet's M2a Magnum system. Centralization will eliminate duplicative discovery, prevent inconsistent pretrial rulings on discovery and other issues, and conserve the resources of the parties, their counsel and the judiciary.

Id. at 2.

B. Proceedings in the MDL

During MDL proceedings before Judge Miller, Plaintiffs conducted broad and substantial discovery from Biomet, resulting in the following:

- Biomet collected more than 19.5 million documents (more than 6.3 terabytes of data) to identify potentially relevant documents and applied to this data set over 1,700 search terms developed in conjunction with Plaintiffs in the MDL. Ex. 3, Decl. of Erin Linder Hanig ("Hanig Decl."), ¶ 10.

- After deduplication and technology assisted review, Biomet produced 1.5 million documents (over 10 million pages) relating to M2a, including 81 different custodial files and shared data sources. *Id.* ¶ 11.

- Biomet's electronically stored information ("ESI") in that document production included 37 categories of metadata (whenever that data was available), including the name of the custodian, senders and recipients, email subject, data sent, filename, file path, folder name, document type, file extension, number of attachments, and Bates ranges. *Id.* ¶ 12.

- The collection and production of that ESI, approved by the MDL court in 2013, cost Biomet more than $1 million. *Id.* ¶ 13.

- Depositions were taken of 17 former or current employees of Biomet. *Id.* ¶ 14.

- The parties also conducted expert discovery on common issues related to M2a hip implants, including 6 depositions of expert witnesses for Biomet. *Id.* ¶ 15.

The MDL court did not conduct bellwether trials in any M2a case. The court originally scheduled bellwether cases by Order of December 10, 2013, *see* Ex. 4, Scheduling Order, at 1 (MDL Dkt. 1118) (setting a "timetable for progress of the case through five bellwether trials, if that many are needed"), but vacated that Order on February 3, 2014, in light of a proposed Master

Settlement Agreement. *See* Ex. 5, Order (MDL Dkt. 1317) ("In light of the parties' tender of the Settlement Agreement, … I VACATE the scheduling order entered on December 10, 2013 …."). Although that Settlement Agreement resolved most of the cases then pending, several hundred cases remained in the MDL. *See* Ex. 6, Fourth Suggestion of Remand and Explanation to Transferor Courts, at 2-3 (Sept. 18, 2019) (MDL Dkt. 3795).

On December 21, 2015, Judge Miller issued a scheduling order setting a December 26, 2016 deadline for the completion of all generic, non-expert discovery. *See* Ex. 7, Scheduling Order, at 6 (MDL Dkt. 3047). As Judge Miller recently reiterated, this "scheduling order contemplated that no further discovery from Biomet would be allowed," and "plaintiffs had a full opportunity to seek discovery from Biomet." *See, e.g.*, *In re Biomet Magnum Hip Implant Prods. Liab. Litig.*, No. 3:12-MD-2391, 2018 WL 7683307, at *3 (N.D. Ind. Sept. 6, 2018).

On August 24, 2018, the MDL Court issued an Order Vacating Direct Filing Provision and Requesting Cessation of Conditional Transfers. Ex. 8, Order Vacating Direct Filing Provision and Requesting Cessation of Conditional Transfers, at 1 (MDL Dkt. 3651). On August 27, 2018, the JPML entered the MDL court's Order and issued a Minute Order suspending further transfer of tag-along-actions to the MDL. Ex. 9, Order Vacating Direct Filing Provision and Requesting Cessation of Conditional Transfers (Dkt. 1211).

Soon after this Panel issued its Order suspending further transfer of cases to the MDL, Judge Miller began issuing (1) Suggestions of Remand to the Panel for the return of transferred cases to the transferor districts, *see, e.g.*, Ex. 6, MDL Dkt. 3795, and (2) Section 1404(a) transfers of direct-filed cases to "proper venues" as contemplated by the court's direct-filing order. *See, e.g.*, Ex. 10, Fourth Transfer Order and Explanation to Receiving Courts (Sept. 18, 2019) (MDL Dkt. 3796). Since this Panel entered its Minute Order Suspending Rule 7.1(a) on August 27, 2018,

Plaintiffs' attorneys have filed 101 new M2a cases (26 federal and 75 state cases, some of which have settled), and have served substantial discovery contrary to the language of Judge Miller's prior orders.

C. State Court Discovery

In addition to the extensive discovery that Biomet responded to in the MDL proceedings, Biomet also has responded to substantial additional discovery in non-MDL jurisdictions (normally from the same Plaintiffs' lawyers as those involved in the MDL[6]), including:

- Plaintiffs' attorneys conducted depositions of an *additional* 42 former or current Biomet employees, with at least five of them being deposed multiple times. Ex. 3, Hanig Decl., ¶ 23.

- The production of more than 590,000 *additional* documents (over 4 million additional pages) in a coordinated group of Florida cases. This production arose from adding more custodians and search terms in document collections and from productions in multi-party, state-court litigation in Florida concerning the same M2a hip implants. *Id.* ¶ 20. Biomet supplemented its production to MDL Plaintiffs with these new documents between April 2016 and July 2018. *Id.* ¶ 21.

- Discovery in Montana and Washington state courts, which alone resulted in the production of more than another 48,000 *additional* documents. *Id.* ¶ 22.

- Plaintiffs' attorneys also conducted *additional* depositions of multiple common-issue experts, including 3 MDL experts and additional experts on design and development, sale, regulatory, and other topics. *Id.* ¶ 24.

- A current production of *additional* common-issue documents from six document custodians is ongoing in Washington state court on the issue of the cessation of sales of the M2a-Magnum. *Id.* ¶ 25. This production alone is costing Biomet approximately an additional $65,000. *Id.*

[6] For instance, the following Plaintiffs' attorneys are a sampling of those who have appeared in the MDL but also have cases pending in state courts: Beasley, Allen, Crow, Methvin, Portis & Miles, P.C.; Jones Ward PLC; Maglio Christopher & Toale, PA; Saunders & Walker, PA; Searcy, Denney Scarola Barnhart & Shipley, PA; and Terrell Hogan & Yegelwel, P.A.

D. Events Following Remands and Transfers from the MDL Court

Despite Judge Miller's conclusions that "**Discovery from Biomet and its personnel was extensive,**" that "**[t]he plaintiffs had a full opportunity to seek discovery from Biomet**," and that "**no further discovery from Biomet would be allowed**," *In re Biomet Magnum Hip Implant Prods. Liab. Litig.*, 2018 WL 7683307, at *3 (emphasis added), Biomet has been whipsawed by continuing common-issue discovery in remanded, transferred, and newly-filed federal cases, as well as state cases, initiated by the same lawyers who Judge Miller told were not entitled to more common-issue discovery.[7] And although Judge Miller properly refuses to grant Plaintiffs who remain in the MDL additional common-issue discovery or discovery that varies from what prior Plaintiffs already received through the MDL, certain Plaintiffs whose cases have been remanded continue to return to the well for more.

For instance, in March 2019, the Plaintiffs' Executive Committee (PEC) requested that Judge Miller order Biomet to produce for all Plaintiffs remaining in the MDL all documents that have been produced to non-MDL Plaintiffs. *See* Ex. 11, PEC's Motion to Modify Future Remand / Transfer Orders, at 5-6 (Mar. 19, 2019) (MDL Dkt. 3767-1). Judge Miller rejected this request on August 7, 2019. *See* Ex. 12, Opinion and Order, at 5 (denying PEC's motion) (MDL Dkt. 3786). Most recently, in *Williams v. Biomet, Inc.*, Judge Miller reiterated that the point of the MDL was to "'promote the just and efficient conduct of' the constituent cases" and that "non-case specific discovery . . . closed in December 2015," and he refused to order Biomet to serve individually-tailored discovery responses concerning common-issue documents to fit the unique

[7] For example, Beasley, Allen, Crow, Methvin, Portis & Miles, P.C.; Jones Ward PLC; Maglio Christopher & Toale, PA; Saunders & Walker, PA; and Searcy, Denney Scarola Barnhart & Shipley, PA have sought additional discovery outside of the MDL after they were denied additional discovery for their cases in the MDL.

preferences of a specific Plaintiff. *Williams v. Biomet, Inc.*, No. 3:18-cv-211, 2019 WL 6117594, at *3 (N.D. Ind. Nov. 15, 2019).

In spite of Judge Miller's clear and consistent statements that no further common-issue discovery be had, **since September 9, 2018, Biomet has been required to respond to discovery in remanded or transferred cases, where Plaintiffs seek common-issue discovery that Judge Miller rejected**. For example:

- Multiple additional common-issue depositions of current and former Biomet employees, including, but not limited to, depositions of company scientists, engineers, and other corporate representatives with knowledge about Biomet's quality assurance procedures. *See, e.g.*, Exs. 13-20, Common-Issue Deposition Notices. For instance, in *George v. Biomet, Inc.*, No. 2:18-cv-02394-APG-VCF (D. Nev.), Plaintiffs recently requested a 30(b)(6) deposition on common-issue topics such as "Biomet's policies and procedures governing adverse event report[ing]." Ex. 21, Plfs.' Notice of Oral and Videotaped Dep. Duces Tecum Pursuant to Fed. R. Civ. P. 30(b)(6), at 3. Additionally, in *Fitzsimmons v. Biomet Orthopedics, Inc.*, No. 2:19-cv-182 (M.D. Fla.), Plaintiff is seeking a Rule 30(b)(6) deposition regarding common-issue discovery involving Biomet Defendants' relationship with a former company spokesperson. Ex. 22, Notice of Videotaped 30(b)(6) Corp. Rep. Dep. Duces Tecum.

- ESI produced in any state court jurisdiction, but specifically in Montana and Washington state courts—requests that Judge Miller already rejected. For example, in *Bryngelson*, counsel, who is also a member of the MDL Plaintiff Steering Committee ("PSC"), requested "all documents and ESI produced to Plaintiffs in the Florida State Court Consolidated Biomet Hip Replacement Cases," "Montana State Court Biomet hip litigation," and "Washington State Court Biomet hip litigation." Ex. 23, *Bryngelson* Req., at 1-3. Similarly, in *Wilson*—which was remanded from the MDL—Plaintiff sought all documents and depositions "Defendants have . . . produced in any state court litigation regarding the BIOMET HIP SYSTEM during the relevant time period." Ex. 24, *Wilson* Req., at 1-2. In *Moore*, a case remanded from the MDL, co-lead PSC counsel in the MDL served discovery seeking "[a]ll common issue written discovery and common issue depositions provided and taken in jurisdictions in which Biomet M2a hip implant cases are pending other than in MDL 2391." Ex. 25, *Moore* Req., at 59. Similarly, the Plaintiff in *Marraffino* demanded "[a]ll documents and interrogatory responses and admissions produced in the MDL and state litigations concerning Biomet metal-on-metal devices," "[a]ll documents produced by Biomet and used by Plaintiff counsel in Florida state court litigation in punitive damage briefing," and "[a]ll documents produced by Biomet (not specific to any particular Plaintiff) and designated by Plaintiff counsel as trial exhibits in any proceeding including both Federal and State Court litigations." Ex. 26, *Marraffino* Req., at 1, 5, 8.

- Common-issue discovery requests on broad topics seeking, among other things, year-by-year sales and gross revenue for M2a hip systems, "the cost of goods sold . . . , royalties paid, commissions paid and the net profit of those sales by year" for devices sold in Texas, the United States, and worldwide. Ex. 27, *Whitten* Interrog., at 1-4; Ex. 28, *Eanes* Interrog., at 1-4; Ex. 29, *Draude* Interrog., at 1-4 (propounded by MDL Plaintiff Counsel, Nash & Franciskato). Other requests seek the M2a-Magnum revision rate from 2005 to the present in the United States, United Kingdom, Australia, and Finland. Ex. 27, *Whiten* Interrog., at 5-8; Ex. 28, *Eanes* Interrog., at 5-8; Ex. 29, *Draude* Interrog., at 5-8. Plaintiff's counsel in *Meidenbauer* (also Nash & Franciskato) requested "[a]ll complaint files involving the M2a-ReCap hip replacement system"; "[a]ny and all promotional material or literature for the Biomet M2a ReCap"; documents "discussing the [alleged] off label use of the M2a ReCap"; "non-public, clinical studies regarding the M2a ReCap"; "the complete 510K file . . . submitted to the [FDA] for" various aspects of the Biomet M2a ReCap; engineering change notices, white papers, trend analysis, adverse event reports, and communications related to various aspects of the M2a ReCap. Ex. 30, *Meidenbauer* Req. for Produc., at 18, 23-35.

- Common-issue expert reports of Biomet experts from non-MDL jurisdictions. *See, e.g.*, Ex. 24, *Wilson* Req. for Produc., at 3 (a case remanded from the MDL).

- Listings of all jurisdictions in which a plaintiff has filed an action against Biomet related to M2a hip replacements. *See, e.g.*, *id.* at 1.

In other words, Plaintiffs' counsel, who were told by Judge Miller that the additional discovery was not appropriate, simply serve similar requests in multiple different courts (state and federal), find a single court who will permit the additional discovery, and then request in remanded and transferred federal court cases all discovery produced in any other action. For example, in *Hardison v. Biomet, Inc.*, No. 5:19-CV-00069 (M.D. Ga.), co-lead PSC counsel in the MDL sought documents and materials produced in matters pending in 16 state and two federal jurisdictions. Ex. 31, *Hardison* Req., at 1-2. Plaintiff also sought "the non-case specific deposition transcripts and all exhibits" taken in the same 18 jurisdictions. *Id.* This is discovery that the PSC was denied in the MDL.

Likewise, in at least eight federal cases,[8] **Plaintiffs have made Requests for Admissions and Interrogatories regarding whether a list of approximately 1,600 common-issue documents and any attachments thereto are business records subject to the business-record exception to hearsay**.[9] Plaintiffs did not serve these non-case specific requests for admissions or interrogatories during the MDL's discovery period, effectively preventing Judge Miller from ruling on them. Instead, they waited and served them in eight different jurisdictions likely to find which court will issue the most-favorable decision on these burdensome requests.

Biomet also is facing extensive common-issue discovery requests from Plaintiffs in state court proceedings across the country. *See, e.g.*, Exs. 39-52, State Court Common-Issue Discovery Requests. In one of these cases, counsel for multiple Plaintiffs—including counsel for Plaintiffs in (or formerly in) the MDL—recently ***admitted*** that their tactic across the country is to pursue duplicative, common-issue discovery across various jurisdictions. *See, e.g.*, Ex. 53, Dec. 3, 2019 Hr'g Tr. at 21:7-20 (arguing against Biomet's "position that they would like [plaintiff] not to do any further [common issue] discovery in this case"); 31:1-14 (arguing plaintiff should be allowed to re-propound discovery "even though the discovery is common issue – and currently it's pending in different jurisdictions").

In addition to the more than $1 million Biomet spent on discovery in the MDL, Ex. 3, Hanig Decl. ¶ 13, Biomet has spent at least another $1 million responding to federal and state discovery outside of the MDL. *Id.* ¶ 17. In total, Biomet has spent more than $2 million

[8] (1) *Tullos v. Biomet, Inc.*, No. 4:18-cv-926-DPM (E.D. Ark.); (2) *Sanden v. Biomet, Inc.*, No. 4:19-cv-162-DPM (E.D. Ark.); (3) *Honeycutt v. Cuckler*, 4:19-cv-216-DPM (E.D. Ark.); (4) *Burnett v. Cuckler*, No. 1:19-cv-00094-SPB (W.D. Pa.); (5) *Draude v. Cuckler*, No. 3:19-CV-0946-M (N.D. Tex.); (6) *Eanes v. Cuckler*, No. 3:19-CV-0945-K (N.D. Tex.); (7) *Whitten v. Biomet*, No. 3:19-CV-0944-M (N.D. Tex.); and (8) *Meidenbauer v. Biomet, Inc.*, No. 2:19-cv-1417 (E.D. Wis.).

[9] *See* Ex. 32, *Tullos*, *Sanden*, and *Honeycutt* Req., at 1; Ex. 33, *Burnett* Req., at 1; Ex. 34, *Draude* Req., at 1; Ex. 35, *Eanes* Req., at 1; Ex. 36, *Whitten* Req., at 1; Ex. 37, *Sones* Req., at 1; Ex. 38, *Meidenbauer*, Req., at 1.

responding to discovery requests in M2a cases. *Id.* ¶ 18. Since the MDL started remanding and transferring cases out of the MDL, discovery costs have increased substantially. *Id.* ¶ 19.

Finally, Plaintiffs' own handling of the continuing litigation demonstrates the ongoing need for coordination and consolidation. Plaintiffs themselves have moved to consolidate remanded cases in various district courts where there are multiple cases pending. *See, e.g.*, Exs. 54-57, Plaintiffs' Motions for Consolidation. Biomet submits a bellwether process should be conducted in the MDL, and not piecemeal throughout the country at the Plaintiffs' choice.

III. LEGAL STANDARD

A. Intent and Purpose of 28 U.S.C. § 1407

In adopting 28 U.S.C. § 1407, Congress provided for the efficient and consistent administration of mass torts in federal court while maintaining the balance and fairness of individual case litigation. The purpose of section 1407 is "to eliminate the potential for conflicting contemporaneous pretrial rulings by coordinate district and appellate courts in multidistrict related civil actions," *In re Plumbing Fixture Cases*, 298 F. Supp. 484, 490-92 (J.P.M.L. 1968), and to ensure the just and efficient management of consolidated pretrial proceedings by eliminating duplicative discovery and conserving the resources of the parties, their counsel, and the judiciary. *See U.S. ex rel. Pogue v. Diabetes Treatment Centers of America, Inc.*, 238 F. Supp. 2d 270, 273 (D.D.C. 2002).

The MDL process is also an aid to the group settlement of mass torts, a process that also saves the courts and the parties time and money. As noted by the Bloch Judicial Institute, "[m]ost cases transferred pursuant to 28 U.S.C. § 1407 are . . . resolved in the transferee court so that there is no need for large numbers of cases to be transferred back at the completing of the MDL proceedings." Bloch Judicial Institute, Duke Law School, Guidelines and Best Practices for Large

and Mass-Tort MDLs, at 93 (2d ed. 2018); *see also* Manual for Complex Litigation § 20.132, at 223 (4th ed. 2004) ("Few cases are remanded for trial; most multidistrict litigation is settled in the transferee court."). When cases are dealt with in MDL proceedings, efficiency is achieved "because district courts around the country are spared extensive work on cases in which they have little or no background." Bloch Judicial Institute, Duke Law School, Guidelines and Best Practices for Large and Mass-Tort MDLs, at 93 (2d ed. 2018).

B. JPML's Authority Under Section 1407

Section 1407 grants this Panel substantial power and broad discretion to pursue these statutory goals. "When civil actions involving one or more common questions of fact are pending in different districts," the Panel is authorized to transfer such actions "to any district for coordinated or consolidated pretrial proceedings" upon determination "that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions." 28 U.S.C. § 1407(a). As courts have noted, the term "pretrial" includes "all judicial proceedings before trial." *U.S. ex rel. Hockett v. Columbia/HCA Healthcare Corp.*, 498 F. Supp. 2d 25, 37 (D.D.C. 2007). "This means that pretrial proceedings do not conclude until a final pretrial order is entered, and that all prior proceedings—including rulings on motions for summary judgment—are pretrial proceedings that may properly remain before the transferee court." *Id.*

Transfer may be initiated by the Panel on its own initiative or by motion filed with the Panel by a party in any action in which transfer for coordinated or consolidated pretrial proceedings under § 1407 may be appropriate. 28 U.S.C. § 1407(c). Where "significant benefits are to be gained by coordinated and consolidate[d] proceedings," the Panel should order transfer. *In re New York City Municipal Securities Litig.*, 439 F. Supp. 267, 270 (J.P.M.L. 1977).

The statutory authority to remand a case back to a transferor court lies with the Panel, not the MDL court. *In re Roberts*, 178 F.3d 181, 184 (3d Cir. 1999); *In re Bridgestone/Firestone, Inc.*, 128 F. Supp. 2d 1196, 1197 (S.D. Ind. 2001) ("The power to remand a case to the transferor court lies solely with the Panel."). Whether remand is appropriate depends on "whether the case will benefit from further coordinated proceedings as part of the MDL." *In re Bridgestone/Firestone, Inc.*, 128 F. Supp. 2d at 1197. Where continued consolidation will eliminate duplicative discovery, prevent inconsistent pretrial rulings, and conserve the resources of the parties, their counsel, and the judiciary, remand is inappropriate. *Diaz v. Ameriquest Mortgage Co.*, No. 09-C-1151, 2014 WL 26265, at *1 (N.D. Ill. Jan. 2, 2014) (citing *In re Heritage Bonds Litig.*, 217 F. Supp. 2d 1369, 1370 (J.P.M.L. 2002); *In re FedEx Ground Package System, Inc. Employment Practices Litig.*, No. 3:05-MD-527, 2010 WL 3239330, at * 2 (N.D. Ind. Aug. 12, 2010); *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 668 (S.D. Tex. June 30, 2005)).

Inherent in the Panel's authority to transfer and remand cases is the authority to (1) reopen an MDL, *see Tennessee Med. Assoc. v. United Health Grp. Inc.*, No. 02-22486-CIV, 2014 WL 12837582, at *6 (S.D. Fla. Jan. 16, 2014) (suggesting that defendants could have filed a motion to "reopen the MDL"), (2) issue and revoke orders suspending transfer of new cases to an MDL, *see In re Zimmer NexGen Knee Implant Prods. Liab. Litig.*, MDL No. 2272, Minute Order Revoking Order (J.P.M.L. Nov. 5, 2018) (Dkt. 2417) ("The MINUTE ORDER SUSPENDING RULE 7.1(a), issued on 09/20/2018, is REVOKED."), and (3) issue new transfer orders to send previously remanded cases back to an MDL. *See In re Vioxx Prods. Liab. Litig.*, 2017 WL 2719993, at *4 (E.D. La. June 23, 2017) ("'further proceedings in the transferee court with respect to a remanded case are not authorized *absent a new transfer* order from the Panel'" (emphasis added)) (quoting Manual for Complex Litigation § 20.133, at 226 (4th ed. 2004)); Manual for Complex Litigation

§ 20.133, at 226 n. 677 (4th ed. 2004) ("[T]he Panel has by a new order again transferred a remanded case to the transferee district or transferred it to a new district as part of another multidistrict proceeding."). The Panel should take these measures anytime the Panel believes a case will benefit from further coordinated and consolidated proceedings as part of an MDL. *See In re New York City Municipal Securities Litig.*, 439 F. Supp. 267, 270 (J.P.M.L. 1977).

IV. ARGUMENT

Biomet urges the Panel to revoke its August 27, 2018 Minute Order Suspending Rule 7.1(a) (Dkt. 1212) so that new and previously remanded and transferred federal M2a cases can be transferred to the existing MDL. Such action by the Panel would help fulfill the goals of section 1407 in a number of ways.

A. Common Issue Discovery in Federal Courts and State Court Coordination

Judge Miller unambiguously concluded that all necessary common-issue discovery has been completed. *In re Biomet Magnum Hip Implant Prods. Liab. Litig.*, 2018 WL 7683307, at *3 ("[N]o further discovery from Biomet would be allowed."). Defying this conclusion, however, multiple Plaintiffs' attorneys who participated in the MDL proceedings continue to seek additional common-issue discovery in their remanded, transferred, or newly filed federal cases, as well as in their state court cases. Moreover, these Plaintiffs' attorneys often serve these common-issue discovery requests in multiple jurisdictions at once, plainly forum shopping and hoping to find some jurisdiction that will permit the burdensome and, Biomet submits, harassing discovery. If successful, Plaintiffs then use these orders to secure the same discovery in other jurisdictions across the country. These belated common-issue discovery efforts include duplicative attempts to obtain:

- Multiple additional common-issue depositions of Biomet corporate witnesses, including company scientists, designers, and engineers, and those with knowledge of spokespersons, the relationship between corporate entities, and quality assurance. *See, e.g.*, Exs. 13-22, 58-61, Common Issue Deposition Notices.

- Multiple additional Requests for Production of common-issue discovery, including, but not limited to, requests for financial information, communications with non-case-specific surgeons, and additional FDA-related documentation by the same lawyers Judge Miller already told they could not obtain the additional information.[10]

- Multiple additional sets of Interrogatories and Requests for Admissions related to common-issue discovery, including, but not limited to, requests regarding whether numerous (approximately 1,600) documents are business records or otherwise subject to hearsay objections.[11] *See* Ex. 32, *Tullos*, *Sanden*, *Honeycutt* Req., at 1; Ex. 33, *Burnett* Req., at 1; Ex. 34, *Draude* Req., at 1; Ex. 35, *Eanes* Req., at 1; Ex. 36, *Whitten* Req., at 1; Ex. 37, *Sones* Req., at 1; Ex. 38, *Meidenbauer* Req., at 1.

Judge Miller in the MDL should be permitted by this Panel to quell these duplicative and inefficient discovery requests by Plaintiffs' attorneys. *See In re Biomet M2a Magnum Hip Implant*

[10] For example, in *Rossi v. Biomet, Inc.*, No. 17-2-30517-1 SEA (Wash. Super. Ct.), Biomet essentially was required to identify the bates number for every document it could possibly use at trial or waive its right to use such documents. Among many other common issue discovery requests, Biomet was ordered to respond to requests for "all documents referencing any warnings or instructions that were considered or prepared for the Magnum"; "corporate records (including amendments) between 2008 and 2018, including but not limited to the Articles of Incorporation, By-Laws, Shareholder Agreements, and Buy-Sell Agreements"; "dates, physicians and hospitals for each [M2a-Magnum] implant" in "the State of Washington"; "dates, physicians and hospitals" for each M2a-Magnum "sold in the State of Washington"; "all known communications between a Defendant and" any physician that implanted a M2a-Magnum device in the State of Washington; and interrogatories seeking information related to "information from Finland, the Netherlands, Australia and the United Kingdom" involving M2a-Magnum devices. Ex. 39, *Millard* Req. In *Reed v. Biomet, Inc.*, No. CGC-18-565909 (Cal. Super. Ct.), Plaintiffs sought "each image of a pseudotumor, tissue necrosis, bone loss, metallosis, Adverse Reaction to Metal Debris [], or Aseptic Lymphocyte-Dominated Vasculitis-Associated Lesion [] occurring in a patient with a Biomet M2a-38 hip replacement" and "any video taken of a Biomet M2a-38 revision surgery and any correspondence, records, or notes accompanying or stored with the image." Ex. 42, *Reed* Req., at 1-3. The request is not Plaintiff-specific, and literally requests every responsive image in Biomet's control. Similarly, in *Yelvington v. Biomet, Inc.*, No. 2018-CA-002056 (Fla. Cir. Ct.), Plaintiff's counsel involved in the MDL requested for each M2a-Magnum device sold in Florida, the United States, Sweden, the European Union, and worldwide, "the gross revenue of those sales by year, the cost of goods sold [], royalties paid, commissions paid, and the net profit of those sales by year," in addition to "how each of these calculations were made"; "the revision rate for the M2a-Magnum Hip replacement System" in the United States, Sweden, the European Union, United Kingdom, Australia, and Finland, and "how such numbers were calculated"; "[a]ll complaints involving the M2a-38 and M2a Magnum hip replacement system, filed within the European Union"; and "[a]ll documents constituting Biomet's complaint reporting policy and procedures within the European Union." Ex. 41, *Yelvington* Interrog., at 4-14; *see also* Ex. 27, *Whitten* Reqs. for Produc., at 1-8; Ex. 28, *Eanes* Reqs. for Produc., at 1-8; Ex. 29, *Draude* Reqs. for Produc., at 1-8 (each containing requests nearly identical to *Yelvington*). Such examples are far from outliers, and Biomet has a multitude of similar requests it could cite.

Prods. Liab. Litig., 896 F. Supp. 2d 1339, 1340 (J.P.M.L. 2012) (agreeing that centralization of M2a cases will help "eliminate duplicative discovery, prevent inconsistent pretrial rulings on discovery and other issues, and conserve the resources of the parties, their counsel and the judiciary"). These abuses undercut the efficiencies of the MDL, and cost Biomet and the judiciary extensive time, money, and resources, and do not appear to be ending. Biomet believes that Judge Miller correctly concluded that all necessary common-issue discovery is complete. Additional common-issue discovery at this point—nearly eight years after the creation of the MDL—is needless and appears intended to harass Biomet. The MDL court, with the offending attorneys before it, would be able to enforce the existing orders and discourage duplicative and inefficient discovery practices.

The MDL court is also in the best position to coordinate with state courts and keep them informed of the status of discovery to reduce the likelihood of inefficient, inconsistent, and unfair rulings that undermine the judicial process and otherwise waste the resources of the parties and the judiciary. *See* Fed. Judicial Ctr., Manual for Complex Litigation (Fourth), 230-32 (2004) (noting benefits of coordination by MDL court with state courts to promote the goals of efficient, fair, and consistent administration of related cases); J.P.M.L & Fed. Judicial Ctr., Ten Steps to Better Case Management: *A Guide for Multidistrict Litigation Transferee Judges*, 6 (2d Ed., 2014) ("Coordination with state judges can be very important").

But even assuming, contrary to Judge Miller's ruling, that more common-issue discovery is appropriate, any such discovery should take place under the control of an MDL judge who can prevent repetition and achieve the consistency and efficiency that this Panel intended in its original Transfer Order. Moreover, although state court discovery is not within the MDL judge's formal jurisdiction, experience has shown that state court judges also support efficient and non-repetitive

discovery, and an MDL judge can accomplish a good deal with a discovery coordination order. *See* Fed. Judicial Ctr., Manual for Complex Litigation (Fourth), 236-38 (2004). For this reason, Biomet intends to move the MDL court to issue a state court coordination order in the near future.

As this proliferation of disputes related to common-issue discovery illustrates, the MDL court can add substantial value to this complex litigation by ensuring that the principles of efficiency, consistency, and fairness are being equitably applied to rulings common to all cases.

B. Bellwether Trials and Coordinated Settlement Discussions

As noted above, the MDL court originally contemplated bellwether trials to assist the parties in determining the values of the cases and thus to aid settlement. Ex. 4, Scheduling Order, at 1 (Dkt. 1118). But the court abandoned that plan, because "in light of the Master Settlement Agreement, bellwether trials were not needed to help understand the value of the claims." *See* Ex. 6, Fourth Suggestion of Remand and Explanation to Transferor Courts, at 9 (Sept. 18, 2019) (Dkt. 3795).

Although the Master Settlement negotiated by Plaintiffs' counsel should indeed have educated all parties concerning the reasonable value of the M2a cases, there remain a substantial number of disagreements between Plaintiffs' counsel and Biomet regarding Plaintiffs' likely success in litigation and the likely amount of any damage award. Bellwether trials would cure Plaintiffs' misimpressions on this score—or, if the mistake is on the part of Biomet, such trials would correct Biomet's view. Such trials also would thwart the attempts of Plaintiffs' attorneys to promote simultaneous multi-plaintiff trials, a practice that not only unfairly prejudices Biomet, but potentially warps and disguises the true case values needed for broader settlement negotiations. The benefits of individual bellwether trials in front of a judge who is well-acquainted with the M2a

product and the history of this litigation provides a strong reason for continued and renewed MDL proceedings.

Throughout the bellwether process, the parties also could engage in renewed and better-informed coordinated settlement discussions in the MDL. *See* Complex Manual for Litigation § 20.132, at 223 (4th ed. 2004) ("As a transferee judge, it is advisable to make the most of this opportunity and facilitate the settlement of the federal and any related state cases."). Coordinated settlement discussions would promote efficiencies and eliminate the need for numerous mediations across multiple jurisdictions. Continued consolidation of cases in the MDL court would thus help promote the goal of efficiency. *See In re Bridgestone/Firestone, Inc.*, 128 F. Supp. 2d at 1197 (noting that continued consolidation is appropriate where "the case will benefit from further coordinated proceedings as part of the MDL").

C. Sharing of Existing Discovery and Plaintiffs' Express Interest in Continued Consolidation

Plaintiffs' attorneys in state and in remanded, transferred, and newly filed federal cases—including many Plaintiffs' attorneys who previously represented MDL Plaintiffs—frequently seek provisions in case management and protective orders to permit the sharing of existing discovery with other counsel. *See, e.g.*, Ex. 62, Stipulated Global Protective Order. A reinvigorated MDL could address the issue of Plaintiffs sharing MDL discovery in a coordinated manner while maintaining a consistent and enforceable means for Biomet to prevent unnecessary distribution and to protect its confidential information. Continued coordination of cases in the MDL would allow for the formulation of a fair and consistent procedure for the sharing of existing discovery—something that is impossible under the current framework of disjointed and uncoordinated courts in multiple jurisdictions.

Finally, many Plaintiffs also have expressed continued interest in consolidation. Indeed, Plaintiffs have moved to consolidate remanded and transferred cases all across the country. *See, e.g.*, Exs. 54-57, Plaintiff Motions for Consolidation. All parties, therefore, stand to benefit from continued, centralized consolidation of cases in the MDL.

V. CONCLUSION

The MDL this Panel created had a significant measure of success, but further assistance from the MDL is necessary. Bellwether trials will provide the parties with additional information that will help resolve the remaining cases. And the MDL is still needed to assess Plaintiffs' new and renewed common-issue discovery requests to ensure that the principles of efficiency, consistency, and fairness are being applied. Likewise, the MDL court is in the best position to inform and coordinate with state court jurisdictions across the country to promote and facilitate efficient, consistent, and fair rulings on common-issue discovery and other pre-trial matters. Moreover, new M2a cases continue to be filed, and it is possible that Plaintiffs' attorneys may have held back some of these newly filed cases to avoid the MDL and its settlement process.

A recentralized and reinvigorated M2a MDL would assist in settlement of cases and would greatly assist in the twin goals of efficient and consistent administration of these cases. Recentralization will eliminate duplicative discovery, prevent inconsistent pretrial rulings, and conserve the resources of the parties, their counsel, and the judiciary. Biomet therefore urges the Panel to vacate its Order suspending further transfer of tag-along actions to the MDL, so that Biomet may seek to transfer previously remanded and transferred cases back to the MDL along with newly filed cases pending in federal court.

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Respectfully submitted

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