

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  
LITIGATION (MDL 2391) )  
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This Document Relates to All Cases )  
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ORDER RE: PROCEDURE GOVERNING DISCOVERY  
FOR *IN EXTREMIS* PLAINTIFFS

The following procedure will be followed with respect to case-specific discovery for agreed *in extremis* cases.

1. ***In Extremis case.*** Case-specific discovery for *in extremis* cases will have priority and may commence on or after February 29, 2016.

2. ***In Extremis.*** A plaintiff will be considered "*in extremis*" when plaintiff is expected to reach, within the next twelve months, a state or condition of difficulty in testifying competently in a deposition or being no longer capable of testifying competently in a deposition and is unlikely to recover sufficiently to provide competent testimony at a later date.

3. ***Notice.*** Counsel shall give notice to Biomet and the PSC as soon as possible upon learning of a plaintiff's *in extremis* condition. The notice must be made in writing as to the nature of the person's *in extremis* condition and person's competency to testify. The notice shall be accompanied by a letter from the treating physician briefly describing the plaintiff's condition. The notice also shall

contain a suggested date, time, and location for the person's *in extremis* deposition.

4. Within five calendar days of receiving such notice, Biomet shall inform noticing counsel and the PSC as to whether or not there is agreement on the need to take the deposition. If there is no agreement, counsel shall jointly contact this court to bring the dispute to the attention of this court as soon as reasonably possible.

5. Upon receiving notice of a plaintiff's *in extremis* condition and competency to testify, and once agreement is reached that a deposition will be taken, the parties shall meet and confer in good faith to confirm the date, time, and location of the deposition. Counsel who elects to take the deposition shall be responsible for securing and providing a court reporter and, if desired, a videographer for the deposition.

6. ***In Extremis Protocol.*** For all *in extremis* plaintiffs, Biomet shall first be entitled to a discovery deposition not to exceed seven hours, followed by a preservation deposition not to exceed seven hours. The depositions will be scheduled on sequential days, to the extent feasible. Nothing in this order prevents the parties from seeking a second preservation deposition should previously undisclosed, relevant evidence be identified at the discovery deposition to allow the Parties to obtain such evidence prior to the preservation deposition.

7. If possible, the deposition will be conducted in a manner to replicate, to the extent feasible, the presentation of evidence at trial. Unless physically

unable, the deponent shall be seated a table except when reviewing or presenting demonstrative materials for which a change in position is needed.

8. ***In Extremis Records.*** Within ten calendar days of providing the notice, plaintiff's counsel shall provide to Biomet any and all medical and pharmacy records in their possession, as well as current signed medical authorizations, to the extent that those documents and records have not previously been produced in this litigation. In those cases in which medical records and documents have been produced, plaintiff's counsel shall provide any new medical or pharmacy records in his or her possession.

9. ***In Extremis Implant and Revision Surgeons.*** Within 30 days of an *in extremis* plaintiff's deposition, plaintiff will provide two dates for depositions of the surgeons, with such dates not more than 90 days after the *in extremis* plaintiff's deposition. Biomet will notify plaintiffs within five business days which date has been selected and that date will be a final date, unless a surgeon's schedule requires a change.

10. ***In Extremis Fact Discovery.*** For all *in extremis* cases in MDL No. 2391 as of the date of this Order, all other depositions and fact discovery must be completed by September 26, 2016.

11. ***Cooperation to Obtain Records.*** Should Biomet encounter difficulty in timely securing medical and pharmacy records before a plaintiff's deposition, plaintiff's counsel will, upon request, provide reasonable assistance to defendants' counsel in securing such records.

12. This order is not intended to create additional obligations on the part of any counsel to these proceedings beyond those imposed by the ethical and professional obligations assumed by all counsel anytime they agree to participate in a litigation to monitor the health and well-being of the plaintiffs or witnesses in these proceedings. Nor is this order intended to create any obligation linked to constructive notice, but is triggered only when actual notice occurs.

SO ORDERED.

ENTERED: February 29, 2016

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