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 AND ORDER

A robust discussion was had at the March 9, 2020 status conference about discovery issues that have arisen with cases that have been remanded or transferred from this MDL docket and can be expected to arise in the cases expected to be remanded or transferred soon. I use the term "discussion" rather than "argument" because no motions were pending when counsel rose to speak, though two oral motions were made during the course of their remarks. Counsel's excellent presentations helped me to a better understanding of the problems and what to do about them. Some history of the proceedings in this docket is needed before explaining.

The Judicial Panel on Multidistrict Litigation created this docket in October 2012. I appointed the Plaintiffs' Steering Committee and Executive Committee to speak and act for the plaintiffs and issued case management orders addressing several topics. The Steering Committee conducted an enormous amount of document-related discovery, including depositions of

Biomet's document custodians, in 2013. In 2014, the parties notified me of a tentative settlement, and I stayed proceedings as plaintiffs' co-lead counsel set about trying to satisfy the agreement's requirement of 90 percent participation. That required participation was achieved, and the Steering Committee members (most of whom had settled all of their cases) moved in April 2015 to be released from the Steering Committee. I released the Steering Committee members and invited new applications for appointment to a second Steering Committee.

Nobody applied for the job opening at first. We still had enough cases that I believed a steering committee was essential, so in May 2015 (15 months after entering the settlement stay) I appointed a ten-person Plaintiffs' Steering Committee – considerably smaller than is customary in mass tort MDLs, but 90 percent of the 2,000+ cases in the MDL docket had been settled (with more being filed since the settlement). Five of those individuals were appointed to the Executive Committee in June 2015.

Discovery resumed. I set a deadline of December 26, 2016, for common discovery from Biomet through Rule 30(b)(6) depositions. Generic expert discovery ensued. Both sides filed their *Daubert* motions by the December 2017 deadline, and I ruled on them. The December 21, 2015, scheduling order directed case-specific discovery to proceed in two groups, with seven more discovery groups activated on a rolling basis. Two groups of cases remain to be remanded or transferred[1] to other courts. In each case, the parties could serve

[1] I had entered an order allowing plaintiffs to file their complaints directly into the MDL docket without having to invoke the Panel's centralization authority. When a case had gotten all the

interrogatories, request some documents, and take depositions of specified witnesses. It was contemplated that more case-specific discovery might be needed after remand or transfer.

Biomet and both Steering Committees have done a wonderful job of working out discovery issues. I don't think I've been called upon to decide more than four discovery issues in this MDL. Still, apart from compromises discussed later in this opinion, the Federal Rules of Civil Procedure have governed the discovery process. Besides this MDL docket, there are a number of cases pending against Biomet in various state courts, presenting claims identical to the ones in this federal docket. Discovery in the state cases has been governed by the rules of procedure of the various states, some of which are more generous than the federal rules. Between the December 2016 discovery cutoff in the MDL docket and the different discovery standards between jurisdictions, plaintiffs in some of the state court cases have obtained a broader range of information than have the MDL plaintiffs. In the federal and state suits alike, courts have entered orders preventing plaintiffs' counsel from sharing discovery material with other plaintiffs' counsel.

benefit it could get from the MDL process and had to be sent to a different court for trial, two methods were used. For cases the Panel had centralized before me, I suggested that the Panel remand them; only the Panel, and not a transferee court, is empowered to send a case back to its pre-centralization district. On the other hand, the Panel had no hand in the cases directly filed in the Northern District of Indiana, so those cases are transferred under 28 U.S.C. § 1404(a).

THE PROBLEM

All of this has produced an exercise in compartmentalizing. One plaintiff's counsel might have the MDL discovery and the additional discovery that was acquired through state court litigation. That attorney has two different cases on liability, because she can't use the additional discovery in a federal trial (or in response to a summary judgment motion), and her expert can't use the additional discovery to support an opinion under the federal rules of evidence (or in response to a *Daubert* motion). Accordingly, she and others in her position have moved remand/transfer courts for additional discovery, largely consisting of what Biomet produced to state court plaintiffs but not to MDL plaintiffs. The MDL's discovery cut-off for common discovery blocks those efforts, and no federal court has granted the requests for additional discovery.

But while no such request has been granted, Biomet has had to invest time and expense responding to and opposing those requests in the remand/transfer courts. For example, in *Hardison v. Biomet, Inc.*, No. 5:19-CV-00069 (M.D. Ga.), Biomet faced 47 post-remand requests for production of documents. Biomet strongly believes that it shouldn't be put to that additional effort and expense after remand/transfer because common discovery was fully handled in the MDL docket.

Biomet has carried its belief beyond its logical limits. I ruled common discovery complete in the M2a Magnum and M2a-38 hip implant system cases,

which comprised the lion's share of cases in the MDL and gave rise to the Panel's original centralization order. But cases involving other hip replacement models (Taper, ReCap, and metal on polythene) found their way into the MDL docket, as well, many through the court's order allowing direct filing with the transferee court rather than going through the Panel. I kept some of those cases in the docket with the understanding that discovery efforts would include them, but, perhaps because of the comparatively undersized steering committee, they simply gathered dust until I remanded or transferred them. Biomet is wrong to argue that common discovery is complete in the Taper cases, ReCap cases or the metal-on-polythene cases; common discovery never began.

THE PARTIES' REQUESTS

Returning to the M2a hip cases, Biomet wants to put an end to what it sees as the unfair burden of these post-deadline common discovery requests. To that end, Biomet effectively asks for a ten-day stay to allow it to file a motion or combination of motions designed to result in remanded/transferred cases being returned to the MDL docket, apparently in hopes that I will again tell everyone that common discovery is over and order the plaintiffs and their attorneys to cease and desist. Biomet made a similar request of the Panel last month, but the Panel denied Biomet's motion on procedural grounds.

The Plaintiffs' Steering Committee seeks to solve the post-remand/transfer discovery issues by asking me to order Biomet to turn over the additional

discovery to the Plaintiffs' Steering Committee, which can then send it to the attorneys for the cases that are in, or have passed though, this MDL docket.

WHO HAS THE ADDITIONAL DISCOVERY NOW

Biomet's approach seemingly would preserve a rigid distinction between parallel state and federal cases, with greater discovery available to (and possessed by) state court plaintiffs. Plaintiffs complaining of identical products would go into trial with disparate evidentiary arguments. And while no one cited any such people in the March 9 discussion, there might be federal plaintiffs who have never seen the additional state-court-generated materials.

But the line between the discovery-rich and the discovery-poor isn't so linear. Biomet has voluntarily provided some federal plaintiffs with the additional material it produced to state plaintiffs. Biomet tells me it has done so in the course of resolving discovery disputes; one plaintiff's attorney relates receiving the additional discovery as part of resolution of Biomet's request to take a post-remand case-specific deposition that should have been taken before remand.

Insofar as today's discovery topic is concerned, then, the plaintiffs' attorneys can be grouped into at least four categories:

1. Attorneys for state plaintiffs, who – to the extent they have been discussed in this docket – have the additional discovery and can use it.

2. Attorneys for federal plaintiffs and state plaintiffs who have received the additional discovery through their state court cases but can't use it in their federal cases.
3. Attorneys for federal plaintiffs and state plaintiffs who have received the additional discovery through their state court cases and also received it in one or more federal cases through a private agreement with Biomet.
4. Attorneys for federal plaintiffs but no state plaintiffs who haven't seen the additional discovery (unless they received it through a private agreement with Biomet).

Another method of dividing the cases becomes important only if Biomet doesn't receive the relief it plans to ask for next week: 45 of the pending federal cases are still in the MDL transferee court, with 80 or so pending in other federal courts following remand/transfer.

In hindsight, I might have prevented all of this by simply requiring that every remand or transfer be accompanied by a case management plan, agreed by the parties or devised by the transferee court, setting forth what discovery will be sought and what motions will be made after remand or transfer. I will enter such an order for Group 8B remands. But no such practice was adopted before, so we find ourselves in a nettlesome situation contemplated by neither rules of procedure nor traditional concepts of justice. Some federal plaintiffs who are denied access to, or use of, some discovery are asking transfer/remand courts

for discovery orders that were precluded by the strict terms of my orders, while Biomet is using that discovery material to buy its way out of discovery jams.

THE POST-REMAND/TRANSFER COMMON DISCOVERY REQUESTS

I begin with the post-remand/transfer conduct of the plaintiffs' counsel. As the judge who supervised discovery and declared common-issue discovery closed, I can't give my blessing to efforts to get discovery that should have been gotten while cases were in the MDL docket. I recognize that there is discovery out there that might well be relevant and helpful, and that others (in state court) will use it for their clients' benefit. I recognize, as well, that some counsel face a ticklish situation in which they can't use evidence procured for one client for the benefit of another client with an identical claim.

I also recognize that the Plaintiffs' Steering Committee tried to get that additional evidence last year. In March 2019, the Committee filed a paper entitled, "Plaintiffs' Executive Committee's Motion to Modify Future Remand/Transfer Orders." I found myself unclear on exactly what the Committee wanted me to do, so I asked the Committee to submit a proposed form of order. Instead, the Committee tried to explain more fully in a supplemental brief filed in May; Biomet was responding in opposition throughout the briefing process. With hindsight supplemented by Biomet's recent filings, it's apparent that the committee was looking for something like what they seek today. I denied the motion to the extent it sought action affecting

remanded/transferred cases and to the extent I understood it to address sharing of discovery materials among plaintiffs' counsel. I denied the request ("as I understand it") to make Biomet turn over anything it had turned over in other cases on the theory that I would be allowing other judges to determine the scope of discovery in the MDL docket I had been entrusted with.

More recent filings suggest that I might not have fully understood the scope of the problem that gave rise to the committee's motion. But in the end, the plaintiffs asked for the additional discovery from the state court cases, and I denied it.

Under the law of my circuit, an order cutting off discovery is considered the law of the case. See Winkler v. Eli Lilly & Co., 101 F.3d 1196, 1202 (7th Cir. 1996); accord, Kaiser v. Johnson & Johnson, 2017 U.S. Dist. LEXIS 187571 at *9 (N.D. Ind. 2017). I have found no circuit that views things differently, but didn't presume to tell the remand/transfer courts the law of their circuits. And Biomet tells me that so far, no district court has granted a plaintiff's post-remand/transfer request for the additional discovery produced in the state court cases.

And no law that I have found or been cited to would support the proposition that the order cutting off discovery was "a suggestion" rather than an order or the law of the case. Yet Navan Ward, Jr., co-lead counsel for the plaintiffs in this MDL, made that jaw-dropping statement to District Judge Tilman E. Self, III, of the Middle District of Georgia, during a March 6 telephonic

discovery conference in *Hardison v. Biomet, Inc., et al.*, No. 5:19-CV-00069 (M.D. Ga.):

> THE COURT: I thought Judge Miller's order said no further discovery would be handled or be taken under common issues.
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> MR. WARD: Well, Judge Miller's order of – we're calling it an order, but it was more so a suggestion to the local courts, which you would be, who is actually handling the case to make the final decision on those issues.
>
> But we don't even have to bring that issue up to you and we certainly could have.

[Doc. No. 3830-1 at 9]. As I said before, even understanding the supporting reasoning, I can't condone the post-remand/transfer common discovery requests filed by many plaintiffs in light of the discovery cut-off order. By the same logic, I can only condemn Mr. Ward's statement to Judge Self. I asked Mr. Ward at our status conference to explain the statement, and he wasn't able to do so.[2]

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[2] **THE COURT**: I think it's because Mr. Winter indicated you described a suggestion or order. I don't want to pick the word, at this point, but tell me how you came up with that.

MR. WARD: Well, Your Honor, clearly, you know, what was done in the court, in the MDL court, goes with the remand courts, the voluminous amount of work that we did regarding the general experts, regarding both side's general experts, and regarding the discovery that had occurred up to the point of December of '15/'16 time frame.

And in your order, you had, I think, on Page 8, the (undiscernible) of remand -- and I'm assuming it's the same one for each one -- on Page 8, it is what you contemplated, that no further discovery would be allowed. And, of course, that's the Court's contemplation. And the issue that Ms. Fulmer brought up is the same issue that I have as far as cold-welding. The Court, assuming, didn't contemplate these extra issues that have come up.

Additionally, the Court also didn't have the ability, when discovery completed back in '15 and '16, 2015 and '16, the ability to see the 40 additional depositions that are directly related to each of these individual cases that have taken place in the other jurisdictions, as well, which are also things that have become very necessary for each and every one of the cases that have been remanded from this particular Court back to their local courts.

WHAT TO DO

Biomet asks me to order the Steering Committee to tell the attorneys representing the plaintiffs (some of whom serve on the Steering Committee) to stop making these post-remand/transfer requests for common discovery. I have

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> Again, in furtherance of, I guess, the phrase that Ms. Fulmer used as far as the haves and have nots, that is what has been created with regards to the necessity to be able to get that particular -- those particular discovery materials, because, again, you have experts, as well as lawyers who are a part of these other jurisdiction who have access to that information, and we are asking our experts to unknow things that they already know from other jurisdictions.
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> And, so, you know, you made a very poignant point in the fact that this is not an issue that has been brought up to the local courts. And to the extent that it has, it has overwhelmingly been ruled on that access should be granted to various different jurisdictions because we're dealing with the same issues.
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> And, so, Your Honor, as it relates to -- and, again, I know time is short. The drastic measure of sending cases back here not only is unprecedented, it's highly out of character with what this Court has done, which is a fantastic job of moving this case along and sending it back in its natural course. We are having to deal with a lot of issues that would be inevitable because, at some point in time, the discovery had to stop. At some point in time, you had to move it on and remand cases, but that should not, obviously, negatively affect any of the other cases, and that should also not be a reason for these cases to go back to the Court when you have courts like Judge Self and the court that **Harbison** is in who is ready and able to move forward with trial dates that are occurring, not to mention it being highly prejudicial to plaintiffs who have spent a tremendous amount of money in the natural course of litigation doing their case-specific experts, taking depositions of both our experts and their experts and having everything ready to go and a judge that is ready to hear these matters in trial.
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> And, so, the part of having an order that would allow or, either, suggest to the remanding courts that allowing discovery or accessing discovery for all the cases is certainly a very, very good way to avoid what defendants are asking this Court to do and to solve the problem that they have come to appreciate as an issue with moving forward, Your Honor.
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> **THE COURT**: Thank you, Mr. Ward.

[Doc. No. 3282, at 38-41].

authority over the Steering Committee, but I am unsure what authority the Steering Committee might have to compel other attorneys to behave in a desired way after a case's remand or transfer out of the MDL docket.

But Biomet's position troubles me even more. In its motion to the Panel and again at the March 9 status conference, Biomet complained of the time and expense of responding to the time-barred post-remand/transfer discovery requests. In its recent filing with this court, Biomet submitted discovery requests and responses from 32 remanded/transferred cases (one of which is a Taper case). Its objections are largely impenetrable boilerplate, such as this one found at page 6 of Tab 14 of Doc. No. 3824-14:

> Biomet expressly incorporates its Preliminary Statement and General Objections. Further, Biomet objects that the Request is overly broad, unduly burdensome, seeks information irrelevant to the claims and defenses asserted in this matter, and is not reasonably calculated to lead to the discovery of admissible evidence. Biomet also objects that Plaintiff's request is overly broad in its geographic and undefined temporal scope. Biomet further objects that the Interrogatory seeks information not reasonably accessible because of undue burden or cost, and the burden and expense of the Interrogatory outweighs its likely benefit in light of the factors set forth in Federal Rule of Civil Procedure 26(b). Responding to Plaintiff's Interrogatory would require an expensive and time-consuming search of multiple custodian files, which is disproportionate to the scope and needs of the case. Additionally, Biomet objects to the extent the Interrogatory seeks information already in Plaintiff's possession, custody, or control. Biomet further objects to the extent the Interrogatory is misleading, inaccurate, and assumes facts not in evidence and/or that Exhibit 3 is relevant or applicable to this Interrogatory in either substance or form. Biomet also objects that the Interrogatory seeks common issue discovery prohibited by the Transfer Order.

Much the same language is found in nearly every objection in nearly each of the cases included in Biomet's submission, leading me to think that these responses haven't been a big drain on Biomet's time and expenses in this

litigation. The brief filed by Maglio Christopher & Toale, P.A. and Nash and Franciskato Law Firm points out that plaintiffs have withdrawn many requests following meet-and-confer sessions, but if the discovery cut-off means that Biomet shouldn't have to respond to any requests for common discovery, the time and expense of responding to any at all is unduly burdensome.

This response also highlights the Catch-22 which counsel with plaintiffs in the state court and in the MDL face: "Biomet objects to the extent the Interrogatory seeks information already in Plaintiff's possession, custody, or control," even if the requester can only use it in the state court case.

Biomet also objects that it would be unduly and disproportionately expensive and burdensome to provide the MDL plaintiffs with the additional discovery. I struggle to understand this argument: Biomet already has produced the information to state court plaintiffs, and has also provided it to some number of the MDL plaintiffs. Among the documents submitted to the Panel in support of its February motion was an order of the St. Joseph County (Indiana) Circuit Court, which appears to have directed Biomet to produce to the Indiana state-court plaintiffs precisely the same additional discovery the MDL plaintiffs seek today. Providing the same information to the MDL plaintiffs would involve no new document searches, depositions, or information collection. Given modern data processes, I can't fathom why giving the same information to the Steering Committee would be unduly costly or time-consuming.

Biomet doesn't argue that anything other than the cutoff date makes this discovery improper. As explained already, the bulk of common MDL discovery of Biomet was completed four years ago. The world hasn't stopped spinning to allow case-specific discovery and suggestions of remand. As I understand it, much of the information the Committee seeks today relates to things that have happened since 2016. All of the cases still in the MDL docket, and most (if not all) of the cases remaining to be tried in the remand/transfer courts were filed after 2016. Biomet doesn't tell me that regardless of the cutoff date, no plaintiffs should have access to this information.

If the discovery cutoff is the cornerstone of Biomet's position, the cornerstone has proven easily relocated when doing so is in Biomet's interest. Biomet has provided one or more MDL plaintiffs – the record doesn't tell me how many – with the additional information as part, for example, of the resolution of a situation in which Biomet needed an adversary's agreement to conduct out-of-time depositions. There's nothing wrong with Biomet doing that; the court appreciates Biomet's willingness to work with two Steering Committees to resolve discovery disputes.

But Biomet's having done so creates a new category of plaintiffs with respect to this additional information: now, in addition to those who got the information through state court discovery, there are those to whom Biomet has chosen to give the information. With Biomet choosing which plaintiffs shall get

the information and which shall not, it is no longer my orders or the state court orders deciding who gets the information. Biomet is deciding.

It seems unsatisfactory to a sense of justice that a state court plaintiff and a federal court plaintiff, with the same lawyer, the same allegedly defective product and the same cause of action should head into trial with different bodies of evidence – but at least the differing state and federal discovery rules provide an explanation. It's even more unsatisfactory if the difference stems not from different standards, or from different interpretations from different judges, but rather from the defendant's choice that one plaintiff will get evidence that another won't. That isn't a principle of the MDL process – or, for that matter, of the American judiciary. But as long as Biomet is in a position to use the additional discovery as the coin of the meet-and-confer realm, that will be where the litigation stands.

That situation is unacceptable.

The Steering Committee's proposal provides the only available avenue of relief. As long as cases remain in this docket, I have authority as an MDL judge to order Biomet to produce to the Steering Committee the extra generic discovery it already has provided to state court plaintiffs. The Steering Committee, in turn, remains linked to counsel in the remanded/transferred cases, and is free to provide that information to those counsel. This remedy should sharply reduce both the perceived need of plaintiff's counsel to seek additional generic discovery after remand or transfer, and Biomet's burden of responding to such requests.

This remedy is imperfect. It provides no benefit to the plaintiffs who settled cases when they were discovery-poor. But nearly 2,000 plaintiffs settled in 2014 and 2015 without this information, as well. The litigation process only allows one to reach back a limited period in time.

DISCOVERY GROUP 8A CASES

Remand and transfer of the cases in Group 8A have been delayed while the recent issues are addressed. Plaintiffs in those cases shouldn't have to wait, as the record stands today, for the opportunity to get trial dates in the courts to which the cases will be sent. There might be as many as three reasons to delay remand or transfer of the Group 8A cases:

1. To let the plaintiffs be beneficiaries of the order that Biomet produce the additional discovery from the state court cases. But the order contemplates that the Steering Committee will share the additional discovery with the plaintiffs in the remanded and transferred cases.
2. To await Biomet's motion concerning the return of the remanded (and perhaps the transferred) cases to the MDL docket. But if Groups 6 and 7 can be returned to the MDL docket, Group 8A would be retrieved as well, so there will be no prejudice to Biomet.
3. To allow for development of the post-remand/transfer case management orders that will be required in Group 8B cases. But

Biomet's production of the additional discovery materials to the Steering Committee should make things run more smoothly after remand or transfer, leaving too little case management gain to outweigh further delay.

I decline to stay the remand of the Discovery Group 8A cases for any longer.

THE ORDER

For all of these reasons, I am ordering the following:

1. Biomet shall produce to the Plaintiffs' Steering Committee the common issue written discovery and common issue depositions provided and taken in state-court Biomet M2a hip implant cases and produced to the state-court plaintiffs before the date of this order.
2. Biomet's oral motion for a short stay of remand is DENIED.
3. Cases in Discovery Group 8A shall be the subject of a suggestion of remand and transfer order issued separately but contemporaneously with this order.
4. Cases in Discovery Group 8B will not be the subject of a suggestion of remand or transfer order until a case management plan is devised to accompany the case.

a. Because the extent of case-specific discovery was limited while the cases were in the MDL docket, counsel and I have worked on the assumption that more case-specific discovery might be needed when a case is remanded or transferred for trial; if such discovery is anticipated, it should be included the post-remand/transfer plan.

b. If further non-case-specific discovery is anticipated, it should be included the post-remand/transfer plan.

c. I have declined to rule on motions for which state law provides the rule of decision; if such a motion is anticipated, it should be included the post-remand/transfer plan.

d. Should the parties be unable to agree on a post-remand/transfer plan, they should file a statement to that effect with this court. If the parties disagree as to case-specific discovery or state law-specific motions, they should identify the desired discovery or motion, with each side's reasons for or against. If the parties disagree as to further non-case-specific discovery, the parties shall identify, without the traditional "reserving-all-rights" bafflegab, what is sought and why, and why each request is opposed.

e. I will rule as needed on case-specific or non-case specific discovery issues, or disputes about what non-trial motions may be pursued, noting the points on which the parties might disagree. The order will include an explanation that by making these requests and objections, the parties implicitly represent that there will be no further requests or objections. I hope to achieve the clearest positive explanation for the benefit of the receiving courts of what I have ruled on and why I have ruled as I have, and what the receiving court should anticipate.

SO ORDERED this 12th day of March, 2020

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