

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))

ORDER

Biomet filed an amended motion for protective order seeking to impose multiple conditions on its compliance with the court's March 12 order requiring it to produce common issue depositions and written discovery relating to the M2a hip implant that were produced in related state court proceedings prior to March 12, 2020.¹ The Plaintiffs' Steering Committee objects, seeks immediate access to those documents, and asks me to issue a "global" protective order and discovery

¹ Biomet wants to amend the March 12 order to include the following restrictions:

(1) production will be limited to discovery produced by Biomet, Inc., Biomet Orthopedics, LLC, Biomet US Reconstruction LLC and Biomet Manufacturing, LLC;

(2) the discovery produced will be subject to the Stipulated Protective Order of Confidentiality entered on February 15, 2013 [Doc. No. 242], and plaintiffs may not obtain M2a discovery from anyone other than the Plaintiffs' Steering Committee and/or share it with other counsel;

(3) confidentiality and privilege challenges must be made on a document-by-document bases and will be governed by controlling law in the Northern District of Indiana and/or the February 15, 2013 Stipulated Protective Order of Confidentiality, and blanket challenges are prohibited in this court and in the transferor or receiving courts;

(4) documents that were subject to a privilege challenge in a Montana state-court case will not be produced until Biomet has "exhausted its legal options, including the right to appeal to this Court"; and

(5) plaintiffs must accept written discovery and depositions in their current forms and can't challenge or pursue Biomet's responses further.

Biomet also asks me to reaffirm that common issue discovery is complete once the state-court documents are produced, restrict discovery in the remanded and transferred Recap and Tapor cases to case-specific fact discovery and device-specific expert discovery, and issue another state court coordination letter.

efficiency agreement that would expand the scope of the March 12 order well beyond its limits and permit unrestricted access, use, and sharing by the plaintiffs of any and all discovery materials they have received with other “collateral litigants”. The law firms of Maglio Christopher & Toale and Nash & Franciskato (collectively referred to as “MCTNF”) filed a separate response on behalf of their clients advising that MCTNF and Biomet had entered into a stipulated Protective Order and Discovery Efficiency Agreement in July 2019 that authorized sharing of discovery in MCTNF cases and contending that the relief Biomet now seeks would “undermine the mutually negotiated rights and responsibilities under that Agreement and materially prejudice MCTNF plaintiffs who otherwise rely on this Agreement for access to and utilization of discovery.” For the following reasons, the court denies Biomet’s amended motion for protective order [Doc. No. 3846].

Common issue discovery in this MDL began in 2013 and concluded in August 2018, with the completion of expert depositions. Of the 2891 cases that were filed, only 40 remain – all of which await remand or transfer or are engaged in settlement negotiations. The parties were provided with multiple opportunities throughout the course of these proceedings to bring any issue regarding discovery to the court’s attention, and, with few exceptions, declined to do so or waited until after common issue discovery had closed to request access to discovery that other non-MDL plaintiffs had requested and received in state courts, *e.g.*, PSC’s March 19, 2019 Motion to Modify Future Remand/Transfer Orders” [Doc. No. 3767]. Both

sides ask me to modify the March 12 order to suit their own objectives, frankly with little regard for the orders, procedures, and protocols already in place.

The March 12, 2020 order requires no clarification or modification or reconsideration. It clearly and unequivocally provides that:

(1) Biomet must provide the Plaintiffs' Steering Committee with the common issue discovery that it provided to state-court plaintiffs before March 12, 2020, for dissemination to plaintiffs' counsel in the current, remanded, and transferred MDL member cases;

(2) With that limited exception, all common issue discovery relating to the M2a hip implant has been completed, and any representation to the contrary is inaccurate and inconsistent with the law of the case;

(3) This court and other federal and state courts have consistently prohibited global sharing of discovery materials among plaintiffs' counsel in Biomet M2a cases; and

(4) Device-specific common issue discovery relating to Biomet's Taper and ReCap devices wasn't completed in the MDL and, indeed, never started. [Doc. No. 3833].

Other requirements and restrictions the parties seek to impose upon one another were not "mutually negotiated" or agreed upon (as was the case in the MCTNF cases), are unnecessary in light of prior orders that govern the issues presented, and/or are inconsistent with those orders, including the Case

Management Order and stipulations entered on February 15, 2013 [Doc. No. 242], Case Management Order No. 2 [Doc. No. 835], the December 21, 2015 scheduling order [Doc. No. 3047], the state court coordination letter issued in December 2016 [Doc. No. 3266], the orders denying Biomet's motions for summary judgment and remanding and transferring the Taper and ReCap cases [Doc. Nos. 3511, 3595, and 3707], the August 7, 2019 opinion and order denying the PSC's motion to modify future remand/transfer orders [Doc. No. 3786], and the Explanations to Receiving and Transferor Courts [Doc. Nos. 3836 and 3837].

When I agreed to the Plaintiffs' Steering Committee's request for the additional common issue discovery that had been produced in state court proceedings prior to March 12, 2020, it was with the understanding that common issue discovery was complete upon submission of those documents. The Explanations to Receiving and Transferor Courts that were entered in March 2020 made that abundantly clear, and expressly provided that:

I reopened generic discovery in the MDL [on March 12, 2020] for the limited purpose of ordering Biomet to 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 March 12, 2020.

The plaintiffs have had a full opportunity to seek generic discovery from Biomet in this MDL, and no further generic discovery was contemplated by the December 15, 2015 scheduling order. Accordingly, I consider generic discovery complete. 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 don't presume to tell the remand/transfer courts the law of their circuits.

[Doc. Nos. 3836 and 3837]. To the extent Plaintiffs' Lead Counsel, Navan Ward, suggested otherwise in Hardison v. Biomet Inc., Case No. 5:19cv-69 (M.D. Ga.) and Hix v. Biomet, Inc., 3:18cv437-RCJ-WGC (D. Nv.), he must correct the error on the record in those case.

Consistent with my prior rulings, I decline the plaintiffs' renewed invitation to expand the scope of the March 12 order to allow global sharing of all discovery. The proposed protective order and discovery efficiency agreement submitted by the Plaintiffs' Steering Committee exceeds the scope of discovery authorized in this case and agreed to by the parties.

For the foregoing reasons,

(1) Biomet's amended motion for protective order [Doc. No. 3846] is DENIED;

(2) Biomet is GIVEN 14 days from the date of this order to comply with the March 12, 2020 order [Doc. No. 38333];

(3) Plaintiffs' Lead Counsel, Navan Ward, is ORDERED to file a copy of this order and the March 12, 2020 order [Doc. No. 3833] in Hardison v. Biomet Inc., Case No. 5:19cv-69 (M.D. Ga.) and Hix v. Biomet, Inc., 3:18cv437-RCJ-WGC (D. Nv.), and to file a certificate of compliance in this court; and

(4) The parties are ORDERED to submit their case management plans for the two remaining cases in Discovery Group 8B by August 28, 2020.

SO ORDERED.

ENTERED: August 10, 2020

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