

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN RE: BIOMET M2a MAGNUM)
HIP IMPLANT PRODUCT)
LIABILITY LITIGATION)
(MDL2391))
)
)
)
This Document Relates to All Cases)

CAUSE NO. 3:12-MD-2391-RLM-CAN
Judge Robert L. Miller, Jr.

PLAINTIFFS PROPOSED SCHEDULING ORDER

1. Custodian File Production. Biomet will continue to produce Custodian Files in Appendix A and documents responsive to Plaintiffs Steering Committee's Requests for Production of Documents on a rolling basis. Once production of a Custodial File begins, Biomet will complete the production of the materials relevant to that custodian within 45 days and will certify to Plaintiffs when the production of the entire Custodial File is complete. Within sixty (60) days of completing any production, Biomet shall produce a privilege log based on the agreed-to form.

2. Completion of document production. Biomet will complete its production for four custodians in the month of December 2013, for five custodians in the month of January 2014, for six custodians in the month of February 2014, and thus continue, producing documents for an even larger number of custodians each month. Biomet will produce the largest custodian files early on and the smaller custodian files later in the rolling production. The parties anticipate that all such production will be complete in _____.

3. Depositions of Biomet Witnesses. Forty-five (45) days after certification of the completion of a Custodial File, Plaintiffs may take the deposition of the Custodian. All depositions of former employees shall occur in the former employee's jurisdiction, at a location to be determined, or such other locations as agreed upon by counsel and the witness. Plaintiff

may continue to depose Biomet employees as long as Biomet Custodial Files are being produced.

4. Representative Case Pool. The representative case pool (“case pool”) will consist of eight total cases selected from all cases filed in this MDL. As to these eight cases, Plaintiffs and Defendants will not waive their respective rights under *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998), and request a transfer once the case is ripe for trial to the appropriate district court for each case to be tried before that court. Each side will select four cases: 2 cases involving M2a Magnum implants and 2 cases involving an M2a-38 implant.

5. Selection of Cases for Case Pool. Plaintiffs and Defendants will file their respective selections of cases from this MDL to fill slots in the Case Pool on July 4, 2014 at Noon Eastern Standard Time. Neither Party may select a case from the Case Pool unless the Plaintiffs supplied to counsel for Biomet both 1) substantially completed medical record authorizations (meaning authorizations from at least the implanting and explanting physicians and hospitals, and the primary care physician or physicians) by no later than June 8, 2014, and 2) a Plaintiff’s Fact Sheet by no later than June 8, 2014. Any case voluntarily dismissed after the Case Pool or Bellwether selection may be replaced by the Party that selected that case.

6. Case-Specific Discovery. Case-Specific discovery on cases selected for the Case Pool shall commence on July 4, 2014 and will be completed by January 9, 2015 with discovery in each case being governed by the Federal Rules of Civil Procedure, the local rules of this Court, and any further discovery order of this Court. Case-specific discovery shall be limited to the following until the Court identifies the representative trial cases:

- a. The implanting surgeons or surgeons;
- b. The explanting/revising surgeon or surgeon;

- c. The Plaintiff[s]; and
- d. All sales reprehensive/distributor directly associated with the sale of the product to the surgeon or present in the operating room during the implantation or revision.

In the event either party requires additional medical provider depositions to make an adequate case selection for the First Bellwether Tranche (discussed in paragraph 7), the parties shall meet and confer to discuss the relevancy/need of said medical provider(s). If the parties are unable to reach an agreement on the need for said deposition, the party seeking the deposition may seek leave of court to take the additional deposition. Case-specific discovery shall not include witnesses called solely for purposes of establishing damages, but damages testimony will be within the scope of the depositions listed above. Damages witnesses shall be deposed after the court identifies the representative trial cases. Plaintiffs will, however, respond to written and document discovery regarding damages during case-specific discovery; however, such written discovery shall not duplicate information provided in the Plaintiff's Fact Sheet.

7. Selection of Cases for First Bellwether Tranche. At 4:00 p.m. Eastern Standard Time on February 11, 2015, each party shall file with the Court its proposals for two cases from the Case Pool to be selected for the first wave of bellwether dispositive motions and trials (the "First Bellwether Tranche"). From these submissions the Court will select a total of two representative cases to populate the First Bellwether Tranche. The Court shall select these representative cases as follows:

- a. One from the Plaintiffs proposed pool;
- b. One from the Defendants' proposed pool; and

- c. With due regard for diversity among types of cases, strength of cases and geographic locations of cases.

The order of Bellwether trials shall alternate between the Plaintiffs' and Defendants' picks, with a plaintiffs' pick being the first Bellwether trial. In the event a Bellwether case is voluntarily dismissed or settled before trial, the party which selected that case may substitute another case into that party's position in the trial sequence. Delay in any will be limited to that reasonably necessary to prepare the new pick for trial.

8. On or before February 25, 2015, each party may file a response directed to the Court's selection of the cases from those proposed by the parties.

9. Completion of Discovery. Immediately upon the court's selection of the First Bellwether Tranche, the parties may complete up to three (3) additional depositions of the Plaintiff's family physician and/or other treating physicians who reasonably may have information relating to the liability. In the event either party believes additional doctor/medical provider depositions are required in connection with their general causation or case specific expert report, the Parties shall meet and confer to discuss the relevancy of said witness. If the parties are unable to reach an agreement regarding the additional witness, the party seeking to take the deposition may seek relief from the Court, each party may depose up to ten (10) total witnesses in each case in the First Bellwether Tranche, with the combined depositions of the plaintiffs' non-case-specific experts counting as one deposition in each case.

10. Non-Damages Expert Reports and Expert Discovery for Cases in the First Bellwether Tranche.

- a. On or before April 27, 2015, Plaintiffs will disclose in writing the identities of experts as required by Fed.R.Civ.P. 26(a)(2)(A) and will serve the reports and

other materials required by Fed.R.Civ.P. 26(a)(2)(B), for the cases in the First Bellwether Tranche.

- b. On or before May 27, 2015, Defendant will disclose in writing the identities of experts as required by Fed.R.Civ.P. 26(a)(2)(A) and will serve the reports and other materials required by Fed.R.Civ.P. 26(a)(2)(B), for the cases in the First Bellwether Tranche.
- c. Plaintiff's expert rebuttal reports, if any, shall be served on or before June 12, 2015.
- d. Plaintiffs will make their designated experts available for deposition between June 17, 2015 and July 24, 2015.
- e. Defendants will make their designated experts available for deposition between August 7, 2015 and September 11, 2015.

11. Motion Practice. All motions to exclude or limit non-damages expert testimony and all dispositive motions shall be filed no later than October 30, 2015. All responses to those motions shall be filed no later than November 30, 2015, and all replies shall be filed no later than December 14, 2015. The Court will hold a hearing to consider these motions on January ____, 2016.

12. Final Discovery. The parties shall complete all remaining discovery of cases set for trial within 60 days before trial.

13. Trial Schedule. The First Bellwether case is anticipated to be ready for trial in March 2016, at which time the case will be transferred to the agreed-to proper District Court. The parties will meet and confer to determine the agreed-to proper jurisdiction as to where the case should be transferred for trial and advise the Court.

SO ORDERED.

UNITED STATES DISTRICT JUDGE