

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN RE: BIOMET M2a MAGNUM HIP IMPLANT PRODUCT LIABILITY LITIGATION (MDL 2391))))))))	CAUSE NO. 3:12-MD-2391-RLM-CAN Judge Robert L. Miller, Jr.
		This Document Relates to All Cases

**DEFENDANTS' BRIEF IN SUPPORT OF DEFENDANTS'
PROPOSED SCHEDULING ORDERS**

I. MAIN MDL BELLWETHER TRACK

Biomet has proposed a schedule in which the first bellwether trial will commence late in 2014. This is different from Plaintiffs' proposal, in which the first bellwether trial will commence in March 2016, approximately two-and-a-half years from now. Biomet believes that the interests of *all* Parties are best served by beginning the bellwether trial process in 2014, as the delay incorporated into Plaintiffs' proposed schedule will foster uncertainty and deny repose to all involved.

a. Biomet's Document Production and Depositions of Biomet Witnesses

Biomet understands that bellwether scheduling is partly dependent on when discovery will be completed. To this point, Biomet continues to produce documents on a rolling basis, and anticipates completing its document production by **January 31, 2014**. In order that Plaintiffs may commence their depositions of Biomet witnesses, Biomet will certify the Custodian Files of 28 custodians on **November 29, 2013**, at which point Plaintiffs may begin deposing those custodians as they see fit. Biomet has also agreed to produce documents from 39 additional custodians, which it will do on a rolling basis until it completes its document production on **January 31, 2014**. Biomet expects to certify the Custodian Files for some of the additional custodians earlier than **January 31, 2014**, which will allow Plaintiffs more time to plan depositions. In all, Biomet's schedule allows

Plaintiffs approximately three months to depose Biomet witnesses. While Biomet does not anticipate that Plaintiffs will be deposing all 67 custodians, Biomet's proposed schedule would allow for that should the need arise. In fact, the greater burden concerning these depositions rests with Biomet and its counsel; Plaintiffs should not have any issues taking these depositions, considering Plaintiffs' Steering Committee has representatives from no less than 22 different law firms. *See* Dec. 5, 2012 Order Concerning Plaintiffs' Counsel Organizational Structure, Dkt. No. 127.

Biomet's three-month period for depositions of its personnel is consistent with the deposition schedule adopted by the court *In re: Wright Medical Technology Inc., Conserve Hip Implant Products Liability Litigation*, No. 1:12-md- 2329 (N.D. Ga. consolidated Feb. 24, 2012) ("*Conserve*")¹. In *Conserve*, the court established a three-month window for employee depositions following the completion of defendants' document production. *See Conserve*, Amended Detailed Discovery Plan at 6, No. 320 (10/16/2012).² Here, Biomet will certify the custodian files for nearly half of its custodians by **November 29, 2013**, and will be prepared to commence depositions soon after deponents are identified. For the remaining custodians, Biomet plans to have many of their Custodian Files certified in advance of **January 31, 2014**, and will similarly be ready to commence depositions soon after each file is certified. Biomet's proposed three-month deposition window for depositions of its employees is practical and necessary to keep the MDL moving.

Biomet has also proposed that Plaintiffs provide an initial list of all requested deponents in order of priority by **December 6, 2013**, and that Plaintiffs provide an updated list of requested deponents on **December 20, 2013**. *See In re DePuy Orthopaedics, Inc. Pinnacle Hip Implant Products Liability Litigation*, No. 3:11-md-2244 (N.D. Tex. consolidated May 24, 2011) ("*Pinnacle*") (Case

¹ *Conserve* involves a metal-on-metal hip device developed by Wright Medical Technology, Inc.

² The period for company depositions was subsequently extended by two-and-a-half months to complete depositions of certain former employees and third-parties. *See Conserve*, Second Amended Detailed Discovery Plan at 7-8, No. 541 (5/15/2013).

Management Order No. 8 at 1, No. 190 (8/14/2012)). These lists will allow Biomet to prioritize completion of individual Custodian Files and ease negotiation of a deposition schedule that works for all Parties.

b. Selection of Eight Cases to the Representative Case Pool for Purposes of Bellwether Discovery

It appears that Biomet and Plaintiffs are in accord that the Parties will each select four cases that will together form a "Representative Case Pool" for purposes of bellwether discovery, and that the cases should involve the M2a Magnum or M2a 38 devices. It also appears that the Parties are in accord that all cases selected for the Representative Case Pool should involve plaintiffs who have undergone revision surgery. The Parties differ on the breakdown, by plaintiff, of the type of device at issue in the Representative Case Pool. Plaintiffs want each Party to select two M2a Magnum and two M2a 38 cases. Biomet wants each Party to select three M2a Magnum cases and one M2a 38 case. Because 75% of the cases in the MDL as of today involve a claim relating to the M2a Magnum and 21% relate to the M2a 38, Biomet believes its 3:1 ratio more reasonably reflects the inventory of cases in the MDL.

Biomet's proposal that the Parties exchange their respective Representative Case Pool choices by **January 24, 2014** is a reasonable one. There should be at least 668 cases with completed Plaintiff Fact Sheets as of December 13, 2013. A pool of almost 525 revision cases should give the Parties ample options to select representative cases for potential inclusion in the bellwether trial process.

c. Core Discovery

Biomet and Plaintiffs are largely in agreement as to what should constitute "core discovery" for the eight cases selected for the Representative Case Pool. All Parties agree that Biomet will depose the Plaintiffs and their implanting and explanting surgeons. Under Biomet's proposal, Plaintiffs may then depose one sales representative directly associated with the sale of the device at

issue for each case, and the Parties may depose one additional fact witness of their choosing. This core discovery proposal is consistent with the core discovery ordered by the court in *In re: DePuy Orthopaedics, Inc. ASR Hip Implant Products Liability Litigation*, No. 1:10-md-2197 (N.D. Ohio consolidated Dec. 7, 2010) ("*ASR*") (*see* Case Management Order No. 14 at 1, No. 457 (7/26/12)), except that Plaintiffs will be permitted to also depose one Biomet sales representative per case. Under Biomet's proposal, core discovery will be completed by **April 4, 2014**, which will give the Parties sufficient time to evaluate the core discovery that was taken and meet-and-confer on the selection of four cases to the "Bellwether Pool."

d. Selection of Four Cases to the Bellwether Pool

Biomet proposes that by **April 18, 2014**, the Parties will either have agreed upon the four cases that will form the Bellwether Pool and the order in which they will be tried, or the Parties will have submitted briefs to the Court explaining which cases the Parties respectively believe should be included and the order in which they will be tried. This proposal for selection to the Bellwether Pool was adopted from the protocol employed in *Pinnacle*. *See Pinnacle*, Special Master's Report Relating to Bellwether Trial Selection Protocol at 2-3, No. 257 (1/16/2013); *see also ASR*, Case Management Order No. 14 at 2, No. 457 (7/26/2012). Biomet thinks this selection protocol is beneficial because it will (a) hopefully avoid burdening the Court, and (b) require the Parties to discuss substantive case-specific details that should aid in streamlining expert reports, and, hopefully, the bellwether trials themselves. Should the Court have to determine the Bellwether Pool and order of trials, Biomet believes the Court's decision should be final, barring dismissal or settlement of any of the cases selected for the Bellwether Pool. A mechanism for disputing the Court's determination, as advocated by Plaintiffs, would lead to unnecessary delay. Further, the Parties would already have had the opportunity to explain themselves in the briefing submitted prior to the Court's decision.

e. **"Replacement" Protocol for Representative Case Pool and Bellwether Pool Cases**

Biomet's proposed "replacement" protocol is meant to prevent the Parties from "gaming" the selection processes. Put simply, should Plaintiffs voluntarily dismiss a case from either pool, that case will be dismissed with prejudice and Biomet would pick a replacement case to fill the empty slot. Likewise, should Biomet settle a case in either pool, Plaintiffs may pick a case to fill the empty slot. *See Pinnacle*, Special Master's Report Relating to Bellwether Trial Selection Protocol at 3, No. 257 (1/16/2013). Biomet's proposed protocol maintains the integrity of the Representative and Bellwether Pools.

f. **Expert Discovery for the Bellwether Pool**

It appears that Plaintiffs' and Biomet's scheduling proposals concerning expert discovery for bellwether cases are largely the same. Each allows Biomet one month to respond to Plaintiffs' expert reports. Under Biomet's proposal, all expert depositions will be completed by **August 8, 2014**, within 45 days after Biomet will have served its responsive expert reports. Biomet believes this time period is more than sufficient for conducting expert depositions.

Biomet thinks that one round of expert reports for each Party is sufficient, as the Parties' respective positions on the science are relatively clear. The Parties both presented at Science Day, where they had the opportunity to review the general scientific issues surrounding their competing case theories. Further, the Parties will have met-and-conferred regarding bellwether selection, which should include discussion on the merits and issues surrounding each individual bellwether candidate. Biomet believes that rebuttal reports will be duplicative and waste the time and resources of the Parties.

g. Summary Judgment/Daubert Motions

Biomet has proposed that summary judgment and Daubert motions be served on **August 22, 2014**, two weeks after the close of expert discovery. Considering the number of law firms representing Plaintiffs in these cases, Biomet does not believe this schedule will present timing problems for the Parties.

h. Venue

Biomet is willing to waive its right to contest venue under *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998) to allow all bellwether cases to be tried in the Northern District of Indiana. However, Plaintiffs have indicated that they will not be waiving their *Lexecon* rights, meaning that each bellwether case will be tried in the "appropriate" district court. If Plaintiffs will not revisit their *Lexecon* position, then the bellwether trial order should provide that this Court preside over all of the bellwether trials, no matter the venue, and the Parties agree that they will not raise objections concerning this procedure.

i. Biomet's Proposed Schedule is Consistent with the ASR Court's Schedule

Biomet's proposed bellwether schedule conforms to the example set by the court in *ASR*. The *ASR* court scheduled exchange of bellwether trial candidates for **August 8, 2012**. Core discovery was to be completed by **November 1, 2012**, and bellwether trial cases were to be determined by **December 15, 2012**. The first bellwether trial was to begin on **May 6, 2013** and the second on **July 8, 2013**. See *ASR*, Case Management Order No. 14 at 1-3, No. 457 (7/26/12).

The *ASR* schedule had a nine-month span between exchange of bellwether candidates and the first bellwether trial, and a four-and-a-half-month span between bellwether selection and the first bellwether trial. By contrast, Biomet's proposal allows more time: there would be a ten-month span between selection of the Representative Case Pool and the first bellwether trial, and a seven-month span between selection of the Bellwether Pool and the first bellwether trial.

II. "STATUTE OF LIMITATIONS" BELLWETHER TRACK

Biomet has proposed a separate summary judgment bellwether track for cases where there is a strong question whether a plaintiff's claims are barred by the applicable statute of limitations (the "SOL Bellwether Track"). Biomet believes between 15% and 20% of the cases in this MDL are time-barred and identified more than eighty SOL cases for Plaintiffs almost two months ago.

The SOL Bellwether Track will provide a useful mechanism for testing the merits of cases that may be time-barred. Biomet believes that addressing this issue early by way of summary judgment motions for cases selected to the SOL Bellwether Track could reduce the size of the MDL significantly and aid in the efficient resolution of the MDL as a whole.

This Court, as the transferee court, has the authority to decide all pretrial matters, including summary judgment. *See In re African-American Slave Descendants Litig.*, 471 F.3d 754, 756-57 (7th Cir. 2006) ("the transferee court can indeed decide the entire case at the pretrial stage"); *In re Worldcom, Inc. Sec. Litig.*, No. 02 Civ. 3288 (DLC), 2005 U.S. Dist. LEXIS 21771, at *9-12 (S.D.N.Y. Sept. 30, 2005) (transferee court may decide pretrial proceedings including dispositive motions). Indeed, "[o]nce transferred and consolidated or coordinated by order of the Panel, an action can be remanded to its court of origin prior to the completion of pretrial proceedings 'only upon a showing of good cause.'" *Wang v. Bear Stearns Companies, Inc.*, No. 11 Civ. 5643, 2013 U.S. Dist. LEXIS 97794, at *4 (S.D.N.Y. July 7, 2013) (citing *In re Integrated Res., Inc.*, 851 F. Supp. 556, 562 (S.D.N.Y. 1994) (quoting *In re South Central States Bakery Prods. Antitrust Litig.*, 462 F. Supp. 388, 390 (J.P.M.L. 1978))).

Biomet believes that having the Court address the SOL issues, as the transferee court as part of pretrial proceedings, will prevent potential inconsistent rulings in transferor courts on an issue where the various applicable statutes exhibit a significant amount of uniformity. The SOL Bellwether Track will further serve the interests and efficiencies outlined in *Wang*, 2013 U.S. Dist. LEXIS 97794, at *4-5; *see In re Merrill Lynch Auction Rate Sec. Litig.*, No. 09 MD 2030 (LAP), 2010

U.S. Dist. LEXIS 60254, 2010 WL 2541227, at *2 (S.D.N.Y. June 11, 2010) (quoting *In re Heritage Bonds Litig.*, 217 F. Supp. 2d 1369, 1370 (J.P.M.L. 2002)).

Under Biomet's proposed SOL Bellwether Track, Plaintiffs will select three cases, and Biomet will select three cases, all six of which will form the SOL Bellwether Pool. The Parties will exchange their selections on **December 27, 2013**.

Cases selected for the SOL track must fulfill the following criteria: (a) Plaintiff must have been implanted with an M2a Magnum or M2a 38 device, and (b) Plaintiff must have had revision surgery prior to 2010, but filed his/her lawsuit one or two years after August 2010. All potential cases for the SOL Bellwether Pool must have been filed into the MDL by **December 13, 2013**.

Similar to the Bellwether Track Trial Pool selections, a case in the SOL Bellwether Pool only may be dismissed by Plaintiffs with prejudice, and Biomet will select a replacement. For any case in the SOL Bellwether Pool that is dismissed as a result of settlement, Plaintiffs may select a replacement.

a. Core Discovery

Core Discovery for each case selected for the SOL Bellwether Pool will be completed by **March 7, 2014**. Core Discovery will be limited and will include the following:

1. Defendants may depose the Plaintiff(s);
2. Plaintiffs(s) will produce complete answers to questions Nos. 4, 5, and 54 of Defendants' originally proposed Plaintiff Fact Sheet.
3. Plaintiff(s) will produce all documents that are responsive to document requests Nos. 1 and 2 of Defendants' originally proposed Plaintiff Fact Sheet.

b. Summary Judgment Motions

The SOL Bellwether Track will culminate in summary judgment motions being served on **March 21, 2014**. Responsive briefs will be served on **April 21, 2014**, and reply briefs will be served on **May 1, 2014**.

c. Conclusion

Biomet believes that the SOL Bellwether Track is an efficient way to test the merits of cases that may be barred by the applicable statute of limitations. Should Biomet obtain summary judgment for the cases in the SOL Bellwether Pool, it believes that the number of cases in the MDL will be reduced significantly. This process will assist in the ultimate resolution of this MDL.

DATE: November 1, 2013

Respectfully submitted:

By: /s/ Erin Linder Hanig

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CERTIFICATE OF SERVICE

I certify that on November 1, 2013, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which provided electronic service upon all counsel of record.

/s/ Erin Linder Hanig _____
Erin Linder Hanig (29113-71)