

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
	)	
	)	
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This Document Relates to All Cases	)	
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PRETRIAL ORDER #1

It appearing that civil actions listed on Schedule A, attached hereto, which the Judicial Panel on Multidistrict Litigation transferred to this court by its order of October 2, 2012, merit special attention as complex litigation, I enter this Pretrial Order No. 1.

**1. Applicability of Order.** Until I enter a comprehensive case management order governing all further pretrial proceedings in this docket, this order’s provisions are to govern the practice and procedure in all actions the Judicial Panel on Multidistrict Litigation transferred to this court pursuant to its Order of October 2, 2012. This order also will apply to any tag-along actions later filed in, removed to, or transferred to this MDL court under Rule 7.4 of the Rules of the Judicial Panel on Multidistrict Litigation.

**2. Consolidation.** By this order, I am consolidating the civil actions listed on Schedule A for pretrial purposes. Any “tag-along actions” later filed in, removed to, or transferred to this court, or directly filed in the Northern District of Indiana, will automatically be consolidated with this action without the need for future motions or orders. This consolidation does not constitute a determination that the

cases should be consolidated for trial, nor does it have the effect of making any entity a party to any action in which he/she/it has not been named, served or added in accordance with the Federal Rules of Civil Procedure.

Any orders, including protective orders, previously entered by this court or any transferor district court or state court before removal shall remain in full force and effect, unless expressly vacated by my subsequent order.

**3. Initial Case Management Conference Date.** I have scheduled this matter for an **initial case management conference on November 16, 2012 at 1:00 p.m. (E.S.T.)**, in the third floor courtroom of the Robert A. Grant Federal Courthouse, 204 S. Main Street, South Bend, Indiana. At that time, I will, among other things, appoint liaison counsel for plaintiffs and defendants. Until then, I appoint interim liaison counsel, as follows:

Plaintiffs' Liaison Counsel	Defendants' Liaison Counsel
Brian J. Devine Kenneth M. Seeger Seeger Salvas LLP 455 Market Street Suite 1530 San Francisco, CA 94105 (415) 981-9260 <a href="mailto:bdevine@seegersalvas.com">bdevine@seegersalvas.com</a>	John D. Winter Patterson Belknap Webb & Tyler 1133 Avenue of the Americas New York, NY 10036 (212) 336-2836 <a href="mailto:jwinter@pbwt.com">jwinter@pbwt.com</a>  John D. LaDue LaDue Curran & Kuehn LLC 200 First Bank Building 205 West Jefferson Boulevard South Bend, IN 46601 (574) 968-0760 <a href="mailto:jladue@lck-law.com">jladue@lck-law.com</a>

Each party represented by counsel is to appear at the initial case management conference through the party's attorney who will have primary responsibility for the party's interest in this litigation. Parties not represented by

counsel can appear in person or through an authorized and responsible agent. To minimize costs and facilitate a manageable conference, parties with similar interests can agree, to the extent practicable, to have an attending attorney represent their interest at the conference. Designating an attorney to represent its interest at the conference will not preclude a party from other representation during the litigation. Attendance at this initial case management conference will not waive objections to jurisdiction, venue, or service.

I will arrange a participatory webcast or conference call for the benefit of counsel who can't attend the case management conference; details will be sent once the arrangements are in place. Counsel who participate by way of conference call **MUST** mute their telephone at all times, unless they are addressing the court.

Counsel in cases in which conditional transfer orders are pending also are welcome to attend in person or electronically.

**4. Pre-Conference Submissions.** Interim liaison counsel are to meet and confer before the case management conference and submit to my chambers miller\_chambers@innd.uscourts.gov no later than **November 9, 2012**, written statements 25 pages or less indicating their preliminary understanding of the facts involved in the litigation and the critical factual and legal issues. The parties' statements are to list all pending motions, as well as all related cases pending in state or federal court, together with their current status, including any discovery taken to date, to the extent known, and a prediction of the number of cases that might become part of MDL 2391 and the number of related cases to remain in state courts. The parties are limited to one such submission for all plaintiffs and one such submission for all defendants. These statements will not be filed with the clerk, will not be binding, will not waive claims or defenses, and may not be offered in evidence against a party in later proceedings.

Interim liaison counsel also are to prepare and submit to my chambers miller\_chambers@innd.uscourts.gov no later than **November 9, 2012**, proposed organizational structures governing each group of parties whose interests are similarly aligned, including proposed permanent lead counsel, permanent liaison counsel, and federal-state liaison counsel if appropriate. There shall be one, and only one, such submission for all plaintiffs and one, and only one, such submission for all defendants. These organizational structures are subject to my approval, and I might change any or every portion of the proposed organizational structures. Unless an organizational structure is unanimously recommended, I will review applications for lead counsel, liaison counsel, executive and steering committee membership, and so on.

**5. Initial Case Management Conference – Topics for Discussion.** I expect a discussion of the conference of procedures that might facilitate the expeditious, economical, and just resolution of this litigation. I will invite discussion (in addition to matters the parties include in the joint proposed agenda) on the following topics:

*Expectations for the MDL Proceedings.* I will invite counsel's views on such matters as:

- (a) whether it would be helpful for me to receive from each side tutorials on the scientific and technical issues involved in this case; and if so, the appropriate format;
- (b) whether *Daubert* motions are anticipated, and if so, about how many experts will have their opinions challenged;
- (c) whether any summary judgment motions not linked to *Daubert* motions are anticipated;

- (d) whether there are any other non-discovery-related issues (other than remand motions based on improper removal and statute of limitations issues) counsel expect to need me to resolve;
- (e) at what point in the case's timetable the parties might find mediation or settlement discussions to be helpful;
- (f) whether there are known differences in state substantive law that might affect the pretrial process in any of the constituent cases;
- (g) what privileges are expected to affect discovery, including whether the parties anticipate seeking an order under Federal Rule of Evidence 502(d) or 502(e);
- (h) whether the parties wish to conform their electronic discovery to the principles of the Seventh Circuit's Electronic Discovery Project, which can be reviewed at <http://www.discoveryпилot.com/> and which I endorse.

*Case Management Order.* I will hear suggestions on the content and timing for submission of a proposed case management order. The parties can submit proposed draft case management orders. In addition to the normal array of deadlines and other issues, I suggest that any proposed case management order address the following:

- (a) establishment of a document repository, and agreement on a document production format that is search-capable;
- (b) stipulations regarding service of process;
- (c) coordination with state court litigation;
- (d) whether a master complaint should be filed, and, if class action litigation is expected, how best to deal with it;
- (e) use of medical releases and fact sheets;
- (f) the content and timing of a proposed protective order;

- (g) the use of a special master pursuant to Fed. R. Civ. P. 53(a)(1)(A&C), if appropriate;
- (h) use of a tolling agreement, if appropriate;
- (i) use of a preservation order and the subjects of any such order, if appropriate;
- (j) the timing of “seasonal” supplementations of discovery responses; and
- (k) whether bellwether trials might be helpful, and if so, what factors should determine the number of bellwether trials.

**6. Extension and Stay.** By this order, I am staying all outstanding discovery proceedings in all constituent cases in this MDL docket; no further discovery is to be initiated until the case management order is entered. Similarly, by this order I am tolling the time requirements to perform any act or file any papers, under Federal Rules of Civil Procedure 26 through 37, until I set a discovery schedule. Discovery served by the parties in any constituent case before transfer to this court that has yet to be answered is quashed and need not be answered. The parties can use and rely on discovery responses served in any case before transfer. All depositions noticed in any case before transfer to this court are quashed, but depositions taken before a constituent case’s transfer are not subject to re-notice or re-examination and can be used and relied upon in this MDL docket. Until I have entered a case management order, no motion can be filed under Rule 11, 12, or 56 without my leave and unless it includes a certificate that the movant has conferred with opposing counsel in a good-faith effort to resolve the matter without court action.

**7. Master Docket File.** The clerk of court will maintain a master docket case file under the style "In Re: Biomet M2a Magnum Hip Implant Products

Liability Litigation" and the identification "MDL 2391". All orders, pleadings, motions, and other documents are to bear the same caption as this order. The caption of a document that applies generally to all consolidated actions is to include the notation that it relates to "ALL CASES," and the Clerk will file and docket the document only in the master record, case no. 3:12-md-2391. A document meant to apply only to a particular case or cases is to be specifically captioned (the primary or first case, if applicable), and all cases to which the document applies shall be listed as "Related Cases" in an appendix to the document, separately tabbed and made easily identifiable to the clerk of this court. Any document filed in any case in MDL 2391 is to be filed with the clerk of this court and not with the transferor district court.

**8. Electronic Filing.** All filings shall be done electronically using the Case Management/Electronic Case Files system, in accordance with the electronic filing policies and procedure manual for the United States District Court for the Northern District of Indiana, which is available at <http://www.innd.uscourts.gov/docs/CMECF/User%20Manual.pdf>. Attorneys submitting a new Attorney ECF Registration Form to this court should indicate they are counsel of record in MDL 2391. Service through ECF will be considered sufficient with no additional service required, except for new complaints filed and subpoenas issued, which are to be served in accordance with the Federal Rules of Civil Procedure. Questions about filings in this case may be directed to the MDL clerk, United States District Court:

Jennifer Darrah  
MDL Coordinator  
Northern District of Indiana  
Clerk of Court's Office  
(574) 246-8004  
[jennifer\\_darrah@innd.uscourts.gov](mailto:jennifer_darrah@innd.uscourts.gov)

Service of all documents not required to be filed with the court shall be sent electronically to liaison counsel for the parties. Printed courtesy copies are not to be sent to chambers unless specifically requested.

**9. Duplicative Filings.** Any paper filed in any case in MDL 2391 that is substantially identical to any other paper filed in another case in MDL 2391 is sufficient if it incorporates by reference the paper to which it is substantially identical. If counsel for more than one party plan to file substantially identical papers, they are to join in the submission of those papers and shall file only one paper on behalf of all so joined.

**10. Attorney Appearances.** No additional appearance in this court is needed from counsel who had appeared in a transferor court before transfer, but counsel should review the docket to be sure their appearances have been entered. I will expect all counsel appearing in MDL 2391 to familiarize themselves with all previous orders and proceedings, with this court's Local Rules (<http://www.innd.uscourts.gov/generalorders.asp>), with the Standards for Professional Conduct within the Seventh Federal Judicial Circuit (<http://www.ca7.uscourts.gov/Rules/rules.htm#standards>), and with the current edition of the Manual for Complex Litigation, to which the court will look for general guidance. Attorneys admitted to practice and in good standing in any United States District Court are admitted to practice in this litigation pursuant to Rule 1.4 of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation. The pro hac vice requirements of Local Rules 83-5 and 83-7 are waived. Association of local counsel is not required. The provisions of this order supersede any inconsistent provisions of this court's Local Rules.



**11. Role of Magistrate Judge.** I am fortunate to work with United States Magistrate Judge Christopher A. Nuechterlein. I do not intend to make a general reference to Judge Nuechterlein; I intend to be the judge who handles nearly all of this MDL docket. I am sure, though, that there will be times counsel will need a ruling more quickly than I can produce it, and I will call on Judge Nuechterlein on those occasions. Because of that, his name will be on the docket sheet and he will attend the initial case management conference.

**12. Remand.** I anticipate that, apart from jurisdictional/ removal issues, I will not remand any case to the transferor court until the discovery period has ended and I have had the opportunity to rule on any pretrial motions and/or objections to pretrial filings then appropriate for decision. The procedures and deadlines set forth in this order do not apply and are not intended to limit any party's right to take non-duplicative, case-specific discovery after remand, except that additional discovery can be taken from the Biomet defendants only with leave of court for good cause shown.

Upon remand of any action from this MDL court to the transferor court, or to state court, the parties might be required to provide to that court copies of any documents previously filed. Similarly, the parties might be required to provide copies of documents to this court that were filed before the case was transferred into the MDL.

**13. Preservation of Evidence.** All parties are to take reasonable steps to preserve documents and other records (including electronic documents) containing information potentially relevant to the subject matter of this litigation.

**14. Filing of Discovery Requests.** I assume all counsel are aware of Federal Rule of Civil Procedure 5(d)(1), but I also recognize that some federal

districts and divisions have their own local practices. So to clarify, initial disclosures, discovery depositions, interrogatories, requests for documents, requests for admission, and answers and responses thereto are not to be filed with the court unless I order otherwise, except that discovery materials used in support of a motion or at trial are to be filed.

**15. Organization of Plaintiffs' Counsel.** Unless persuaded otherwise, I intend to appoint liaison counsel for the plaintiffs and a plaintiffs' steering committee, and to do so soon after the initial case management conference. I am quite open to suggestions for additional needs for an organizational structure at the initial case management conference.

Applications/nominations for the plaintiffs' steering committee positions must be filed electronically with the Northern District of Indiana's Clerk's Office on or before **November 13, 2012**. In deciding on my appointments, I will consider willingness and availability to commit to a time-consuming project, ability to work cooperatively with others, and professional experience in this type of litigation. Applications/nominations should succinctly address each of those criteria as well as any other relevant matters. I will not consider submissions longer than three pages. I will only consider attorneys who have filed a civil action in this docket or a case in which the Panel had entered a conditional transfer order.

Objections may be made to the appointment of a proposed applicant/nominee, but must be in writing and be filed with the clerk on or before **November 20, 2012**. Any objections must be short, yet thorough, and must be supported by any necessary documentation.

**16. Communications Between Counsel.** Communication, transmission, or dissemination of information in connection with this case among and between plaintiffs' counsel, or among and between defendants' counsel, will not, by itself,

be deemed a waiver of the attorney-client privilege, the protection afforded by the work-product doctrine, the protection afforded to material prepared for litigation, the joint-prosecution or joint-defense privilege, or any other privilege to which a party may be entitled. Cooperative efforts between the parties and counsel are not in any way to be: (1) used against any of the parties, (2) cited as purported evidence of a conspiracy, wrongful action, or wrongful conduct, or (3) communicated to the jury at the trial of any action. Nothing in this paragraph affects in any way the applicability of any privileges or protection against disclosure otherwise available under law.

I expect communications between counsel to follow the principles set forth in the Standards for Professional Conduct Within the Seventh Federal Judicial Circuit (<http://www.ca7.uscourts.gov/Rules/rules.htm#standards>).

**17. Attorney Time Records.** Any counsel who might seek to recover court-awarded attorneys' fees are to keep a daily record of their time and expenses incurred in connection with this litigation, indicating with specificity the hours, locations and particular activity and shall, by the fifteenth day of each month after lead counsel have been appointed, submit to plaintiffs' steering committee a report of their time and expense records for the preceding month.

**18. Agreements Between Parties.** All parties must (and will continue under this duty) make prompt disclosure to me (and, unless excused for good cause shown, to other parties) of the existence and terms of all agreements and understandings, formal or informal, absolute or conditional, that relate to settling or limiting their rights or liabilities in this litigation. This obligation includes not only settlements, but also such matters as loan receipt agreements, Mary Carter agreements, and insurance, indemnification, contribution, and damage-sharing agreements.

**19. Communications with the Court.** Unless I order otherwise, all substantive communications with me are to be in writing, with copies to opposing liaison counsel. Liaison counsel are responsible for disseminating information to other counsel as appropriate.

**20. Hearings on Motions.** I don't hold hearings on motions routinely, but I expect to conduct some in-person hearings in this docket.

**21. Modifications.** Nothing in this order is meant to limit any party's opportunity to seek the order's amendment or other relief from me should this order prove to be unworkable for any reason or fail effectively to manage case preparation.

**22. Court reporters.** I want to establish an arrangement whereby court reporters are fairly and adequately compensated for the work they will do while, at the same time, transcripts are made publicly available on a timely basis. In other MDL dockets, counsel have accomplished these goals by agreeing to pay court reporters for an agreed number of transcript copies. I recommend that once the plaintiffs' steering counsel is selected, they contact Debra Bonk, my courtroom reporter, at 574-246-8039, [debra\\_bonk@innd.uscourts.gov](mailto:debra_bonk@innd.uscourts.gov) to discuss potential transcript distribution.

Temporary liaison counsel for plaintiffs and defendants are to provide a copy of this order to attorneys in all cases that are newly filed with or transferred to MDL 2139 and to all counsel in cases in which conditional transfer orders related to MDL 2391 have been entered.

IT IS SO ORDERED.

ENTERED: October 12, 2012

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