

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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ORDER

At the September 23 status conference, the plaintiffs explained to the court their thought that appointment of a discovery master would help move this docket forward more expeditiously. They said they anticipated a variety of discovery disputes needing my resolution despite the parties' good faith meet-and-confer efforts. Biomet disagreed, believing that counsel's meet-and-confer efforts would resolve most discovery disputes without going through the process of appointing and working with a special master. Biomet also explained that it had been complying very well with the timetable we all discussed in earlier conferences, and believes that the time has come to put in the place the framework for resolution of issues on FEDERAL RULE OF EVIDENCE 702, the selection of bellwether cases, and individualized discovery in the bellwether cases. The plaintiffs disagreed, saying they haven't been able to get through enough of the discovery to allow them to consider setting such deadlines.

I told counsel I would think about their suggestions and let them know my thinking. This order is meant to satisfy that promise.

I think a realistic framework of deadlines should be possible, and that Biomet's request for such a schedule is reasonable. The Judicial Panel on Multi-District Litigation created this docket little more than a year ago, and a scheduling order seems as though it could be in order.

I am less convinced with respect to the appointment of a special master. The attorneys' meet-and-confer efforts in this docket have impressed me. Counsel have resolved many issues without coming to me, and when they have come to me, their efforts to resolve the issue among themselves already have crystalized their positions. Nevertheless, bumps in the road can occur even when everyone is giving their best efforts to engage in cooperative discovery. When a docket involves more than 725 hip implants performed on more than 725 patients by hundreds of physicians in any number of medical facilities, the bumps can require a great deal of attention. It could well be a special master might be able to smooth those bumps, speeding discovery and limiting the time the parties will have to wait on rulings from me. Or the appointment of a master might add another procedural level and increase cost enough to offset any benefit.

This record doesn't allow me to balance those costs and benefits. The plaintiffs' suggestion of the appointment of a special master was painted in very broad strokes. Before I can consider an order of any sort, I need a better handle on the scope of the authority that would be given a special master at this stage. I can't really decide anything until I see what the plaintiffs seek. I also need a better explanation of the sort and extent of the future discovery disputes that

concern the plaintiffs: FEDERAL RULE OF CIVIL PROCEDURE 53(a)(1)(C) authorizes the appointment of a pretrial master to deal with “matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district.” It hasn’t been necessary even to call on Magistrate Judge Christopher Nuechterlein’s services to this point, so I need to understand the basis for the finding required under that rule.

Further, appointment of a special master is authorized only after notice and an opportunity to be heard, FED. R. CIV. P. 53(b)(1), and I doubt that our informal, off-the-record discussion on September 23 does the trick.

Finally, it would be helpful to have the parties’ assessment of reasonable deadlines if a special master (with a proposed level of authority) is overseeing discovery, and an assessment of reasonable deadlines if I am overseeing discovery alone or with one or more of this district’s magistrate judges.

To sum up, I am open to, but so far unpersuaded as to the need for, appointment of a special master. I am largely persuaded that the time is ripe for a scheduling order. For these reasons, I invite the plaintiffs to submit, by October 25, 2013, a proposed form of order that would appoint a special master and establish a scheduling order covering events to the point of trial readiness of the first bellwether trial (including a schedule for mediation if the plaintiffs think mediation should occur during that time period). I invite Biomet to respond, by November 1, 2013, with any objections to the appointment of the pretrial master proposed by the plaintiffs – to the appointment of any master and/or to the

appointment of a master with the authority set forth in the plaintiffs' proposed order – and to the plaintiffs' alternative proposed scheduling orders. I will either enter an order or invite further comment at the November 18 telephonic conference.

SO ORDERED.

ENTERED: October 9, 2013

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