

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

In re: STRYKER REJUVENATE AND
ABGII HIP IMPLANT PRODUCTS
LIABILITY LITIGATION

MDL No. 13-2441 (DWF/BRT)

PRETRIAL ORDER NO. 42

**STIPULATED ORDER REGARDING
UNREVISED PLAINTIFFS**

Pending before this Court are certain filed cases involving Plaintiffs who have not undergone a surgery to remove either an ABG II or Rejuvenate Modular System (“Affected Product(s)”) (the procedure also known as a “Revision Surgery”). The Court also anticipates future filings during the pendency of this multidistrict litigation (“MDL”) by individuals who have not undergone a Revision Surgery. Collectively, these existing and future unrevised Plaintiffs shall be referred to herein as “Unrevised Plaintiffs.”¹

To date, these Unrevised Plaintiffs have had limited discovery obligations in this MDL. However, MDL Plaintiffs’ Lead Counsel assert that the claims of these Unrevised Plaintiffs should be preserved while their respective medical courses continue.

Defendant Howmedica Osteonics Corp. (“HOC”) maintains that Unrevised Plaintiffs do not have a cognizable claim. Under the unique circumstances of this litigation, and in an effort to address this situation without prejudice to the positions of either side, HOC and MDL Plaintiffs’ Lead Counsel hereby stipulate to the following:

¹ “Unrevised Plaintiffs” as referenced herein, who are eligible for the tolling provisions, specifically do not include, and, in fact, exclude, those unrevised claimants/plaintiffs who have otherwise enrolled in and qualified for the Covered, Unrevised Infirm portion of the prior 2014 and 2016 Global Settlement Programs.

A. A tolling of the statute of limitations of the claims asserted by Unrevised Plaintiffs conditioned on the dismissal of such claims without prejudice and subject to the terms herein; and

B. During the tolling period, Unrevised Plaintiffs shall not file Affected Product-related claims in *any court* pursuant to Paragraph 2 below.

IT IS HEREBY ORDERED BY THE COURT:

1. **MANDATORY ELECTION OBLIGATIONS:**

A. **Unrevised Plaintiffs with Existing Filed Affected Product MDL Cases:**

Unrevised Plaintiffs with an existing filed ABG II/Rejuvenate case in this MDL shall each, together with any of their derivative plaintiffs, serve **within forty-five (45) days of this Order** the Election Form attached hereto as Exhibit A indicating whether they elect to either (i) dismiss their case without prejudice subject to the tolling provisions set forth below, or (ii) continue with their case and fulfill all obligations as set forth in Paragraph 3 below.

B. **Unrevised Plaintiffs with Subsequently Filed Lawsuits:** In the event that an Unrevised Plaintiff files a Complaint involving an Affected Product in this MDL (or his or her case is transferred to this MDL) *after* the entry of this Order, then **within thirty (30) days of such filing or transfer**, he or she shall each, together with any of their derivative plaintiffs, serve the Election Form attached hereto as Exhibit A indicating whether they elect to either (i) dismiss their case without prejudice subject to the tolling provisions set forth below, or (ii) continue with their case and fulfill all obligations as set forth in Paragraph 3 below.

C. **Service of Election Forms:** Unrevised Plaintiffs shall satisfy the election obligations set forth in this Order by completing the Election Form attached as Exhibit A and timely serving it on Defendants' Lead counsel, Kim M. Catullo (GIBBONS), and Plaintiffs' Lead Counsel, Peter J. Flowers (MEYERS & FLOWERS).²

D. **Failure to timely serve an Election Form:** Sanctions, including dismissal of the matter with prejudice, may be entered upon failure to timely serve a completed Election Form as required herein.

2. **ELECTION – DISMISSAL WITHOUT PREJUDICE WITH TOLLING:**

A. **Tolling:**

i. For each of the Unrevised Plaintiffs who elect to dismiss their cases without prejudice, HOC has agreed to the following tolling provisions: tolling of the applicable statute of limitations and statute of repose as to all HOC/Stryker-related defendants identified by name in the caption of the Plaintiffs' Complaints until such time as revision surgery of the Affected Products occurs and extending for one year from the date of such revision surgery, or until ten (10) years following the date of the surgery implanting the Affected Products, whichever is sooner.

ii. For those Unrevised Plaintiffs who elect to dismiss their cases subject to this agreement, but who have already reached or will reach their ten (10) year implant surgery date less than two (2) years from the entry of this Order,

² Under no circumstances will the terms of this Order, including the tolling provisions set forth in Paragraph 2, apply to any pending or future cases filed in this MDL that are related to a product other than the Affected Products.

tolling of the applicable statute of limitations and statute of repose as to all HOC/Stryker-related defendants identified by name in the caption of the Plaintiffs' Complaints shall be until such time as revision surgery of the Affected Products occurs and extending for one year from the date of such revision surgery, or until two (2) years from the date of this Order, whichever is sooner.

iii. The tolling of the applicable statute of limitations and statute of repose by HOC, if applicable, shall not for any purpose be deemed to limit or adversely affect any defense, other than a statute of limitations and/or a statute of repose defense, that HOC and any other named Defendant have, may have, or would have had in the absence of this tolling. Upon completion of the tolling period, the Defendants will have all defenses as available to them on the day the Unrevised Plaintiff's case was originally filed, including any statute of limitations or statute of repose defenses existing as of that date. If, following the expiration of the tolling period, the statute of limitations and/or statute of repose runs before a new lawsuit is commenced, the Defendants specifically reserve their right to raise a statute of limitations and/or statute of repose defense.

iv. Following the Affected Product Revision Surgery, Plaintiffs may move to re-open the case in this Court and file an amended complaint. Such an amended complaint that is timely filed pursuant to the terms of Paragraphs 2(A)(i) or 2(A)(ii) of this tolling agreement will be deemed a continuation of the previously filed suit for purposes of remand, and all other discovery obligations, including those related to the Plaintiffs Fact Sheet (PFS) and Defendants Fact

Sheet (DFS) under Third Amended PTO-8 and PTO-20,³ respectively, will remain unchanged. If such an amended complaint is not timely filed pursuant to the terms of this tolling agreement, then the benefits of this tolling agreement, including the relation back provision, will not apply to the amended complaint.

v. Plaintiffs who accept the tolling and, therefore, are subject to the tolling agreement *shall not* file a separate lawsuit in any other court alleging claims arising out of substantially the same facts and circumstances stated in the subject Complaint, including but not limited to any claims against one or more of the Defendants.

B. **Order of Dismissal:** Lead Counsel for HOC and Plaintiffs shall jointly prepare and submit to the Court an Order of Dismissal encompassing the cases of those Unrevised Plaintiffs who elect to dismiss their case without prejudice subject to tolling.

3. **OBLIGATIONS OF UNREVISED PLAINTIFFS WHO REJECT**

TOLLING:

A. **Order to Show Cause:** Within thirty (30) days of the election deadline, HOC shall file a notice before this Court in the Master Docket identifying those Unrevised Plaintiffs who have affirmatively elected *not* to dismiss their case.⁴ This Court

³ The service obligations of Second Amended PTO-11 remain unchanged, with the exception that a copy of the encrypted/password protected PFS *must* be emailed to Plaintiffs' Liaison Counsel at tnemo@meshbesh.com. Counsel must also send a *separate* email to Plaintiffs' Liaison Counsel with the password to the document.

⁴ HOC may file additional subsequent motions of this type in connection with Unrevised Plaintiffs who file their cases in, or have their cases transferred to, this MDL

will then issue an Order to Show Cause requiring those identified Unrevised Plaintiffs to file a brief with the Court showing cause for why his or her specific case should proceed in this MDL despite being unrevised. As part of the Order to Show Cause, this Court shall set a briefing schedule and hearing dates for *each* of the identified continuing Unrevised Plaintiffs. An appearance in person before this Court by the attorneys of record and the Unregistered Plaintiff(s) will be required, unless ordered otherwise for good cause. Following a hearing and full briefing, this Court shall make a finding of whether or not the Unrevised Plaintiff has shown cause for why his or her specific case should proceed in this MDL despite being unrevised.

B. **Unrevised Plaintiffs Who Have *Not* Shown Cause:** Following a hearing and full briefing, this Court shall enter an Order dismissing the complaints of those Unrevised Plaintiffs who *have not* adequately shown cause (such dismissals being without prejudice pursuant to the tolling provisions set forth in this Stipulated Order Regarding Unrevised Plaintiffs).

C. **Unrevised Plaintiffs Who Have Shown Cause:** For those Unrevised Plaintiffs who *have* been found to have adequately shown cause, this Court shall enter an Order allowing those Unrevised Plaintiffs to proceed and fulfill the following discovery obligations within forty-five (45) days of such Order:

- i. Service of a fully completed Plaintiff Fact Sheet (“PFS”) accompanied by *all* required document production, including medical

after the date of this Order and affirmatively elect not to dismiss their complaints pursuant to these terms.

authorizations, pursuant to Second Amended Pretrial Order No. 11.⁵ The service requirements of the PFS shall be consistent with Second Amended Pretrial Order No. 11; and

ii. Fully completed answers to Damage Interrogatories as set out in Exhibit B, which shall be served in accordance with Second Amended Pretrial Order No. 11.

4. **JURISDICTION:**

This Court shall maintain jurisdiction to enforce the tolling provisions with respect to those Unrevised Plaintiffs who elect to dismiss their cases subject to the tolling provisions set forth herein.

AGREED TO BY COUNSEL:

/s/ Peter J. Flowers, Esq.
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/s/ Kim M. Catullo, Esq.
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SO ORDERED:

Dated: September 12, 2019

s/Donovan W. Frank
DONOVAN W. FRANK
United States District Judge

⁵ See n. 3, *supra*.

EXHIBIT A

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

In re: STRYKER REJUVENATE AND ABGII
HIP IMPLANT PRODUCTS LIABILITY
LITIGATION

MDL No. 13-2441 (DWF/FLN)

Individual Case No. _____

This Document Relates to Case:

**ELECTION FORM FOR
UNREVISED PLAINTIFF(S)**

Pursuant to the Stipulated Order Regarding Unrevised Plaintiffs and after consultation and due consideration, Plaintiff(s) in the above-referenced individual case, through authorized counsel below, make the election indicated (*check only one*):

_____ Plaintiff(s) elect to dismiss the case without prejudice subject to the stipulated tolling provisions in Paragraph 2A of the Stipulated Order Regarding Unrevised Plaintiffs and hereby consent to filing of a stipulation of dismissal without prejudice by Defendants.

OR

_____ Plaintiff(s) elect to continue with the case subject to the proof, hearing and discovery obligations set forth in Paragraph 3 of the Stipulated Order Regarding Unrevised Plaintiffs.

Dated: _____, 2019

Plaintiff(s)
By Authorized Counsel:

Insert Attorney Name
Insert Firm Name
Insert Firm Address
Insert Firm Address

Counsel for Plaintiff(s)

EXHIBIT B

**INTERROGATORIES FOR UNREVISED PLAINTIFFS FOUND TO SHOW
CAUSE PURSUANT TO PARAGRAPH 3 OF THE STIPULATED ORDER
REGARDING UNREVISED PLAINTIFFS**

INTERROGATORY NO. 1:

Has any healthcare professional specifically told you that you need to have a revision surgery to remove your ABG II and/or Rejuvenate Modular Hip? If your answer is “yes,” then identify in detail:

- a. What you were told.
- b. The name and address of the healthcare professional who told you that you need to have your ABG II and/or Rejuvenate Modular Hip removed.
- c. When you were told you needed to have your ABG II and/or Rejuvenate Modular Hip removed.

Also, provide *all* documents supporting your assertion that a health care professional told you that you needed to undergo a revision surgery to remove your ABG II and/or Rejuvenate Modular Hip.

ANSWER:

INTERROGATORY NO. 2:

If you have been told by a healthcare professional that you need to have your ABG II and/or Rejuvenate Modular Hip removed, then state why you have not done so yet.

Also, provide *all* documents supporting your decision not to undergo a revision surgery of your ABG II and/or Rejuvenate Modular Hip.

ANSWER:

INTERROGATORY NO. 3:

Since your implant surgery, what have your healthcare professionals told you about your ABG II and/or Rejuvenate Modular Hip? (Identify the healthcare provider by name and address and the date of the conversation.)

Also, to the extent not already provided in response to Interrogatory Nos. 1 or 2, please provide all documents regarding your discussions with your healthcare professional regarding your ABG II and/or Rejuvenate Modular Hip.

ANSWER:

INTERROGATORY NO. 4:

State the dollar amount that you contend you are out-of-pocket (that is, amounts you have paid and not been otherwise reimbursed for) as a direct result of having received an ABG II and/or Rejuvenate Modular Hip, and identify and itemize each category of out-of-pocket expense.

Also, provide *all* documents identifying each such out-of-pocket expense claimed as a direct result of having received an ABG II and/or Rejuvenate Modular Hip.

ANSWER:

VERIFICATION

I declare under penalty of perjury that all of the information provided in these Interrogatories is true and correct to the best of my knowledge upon information and belief, that I have supplied all the documents requested in these Interrogatories, to the extent that such documents are in my possession, custody, or control (or in the possession, custody, or control of my lawyers), and that I have supplied signed copies of the authorizations attached to Second Amended Pretrial Order No. 11.

Date: _____

[Signature of Plaintiff(s)]