

RECEIVED MAR 14 2016

JOSEPH ZAREMBA,
Plaintiff,

vs.

Consolidated Cases:

CASE NO. 2014 CA 001932 NC

CASE NO. 2014 CA 001934 NC

CASE NO. 2014 CA 001936 NC

ORTHOPEDICS, INC; et al.,
Defendants.

RECOMMENDED ORDER OF MAGISTRATE

This matter came on for hearing before the Magistrate on March 1, 2016, on the **Plaintiff's Motion to Compel Biomet, Inc., to Produce Audio and Video Files and Notice of Need for In-Camera Inspection**. The Magistrate has jurisdiction pursuant to Fla. R. Civ. P. 1.490. After further consideration of the parties' argument, the Magistrate recommends the Court rule as outlined below.

This motion concerns Biomet's response to Plaintiffs' Request for Production served on March 24, 2015. The Request sought two admittedly broad categories of audio/visual files created by Biomet to: (a) market the Magnum System; and (b) train or instruct Biomet employees, sales people, patients, and surgeons about the Magnum System. Biomet served a timely response, but produced only six videos (when duplicates were discounted). When asked to confirm all AV files had been produced, Biomet responded on May 11, 2015, that all AV files responsive to the Plaintiff's request had been produced.

Plaintiffs, however, have subsequently reviewed numerous documents referencing other AV files that may exist. This discovery prompted a letter from Plaintiffs to Biomet dated December 6, 2015. Plaintiffs contended they received no response explaining why these files have not been produced. Accordingly, Plaintiffs seek a court order requiring Biomet to respond and produce all files responsive to its March 24, 2015, Request for Production.

Biomet contends this motion is premature because it has "repeatedly informed" Plaintiffs' counsel that it is investigating to see whether additional AV files exist. On February 23, 2016, Biomet produced another 131 AV files discovered in the course of its investigation. At the hearing, however, Biomet's counsel could not confirm to the Magistrate that these are all of the files that are responsive. In fact, counsel indicated that they are still identifying locations to look for AV files.

After *in camera* review of the documents provided by Plaintiffs' counsel at the hearing, the Magistrate recommends the Court **GRANT** Plaintiffs' Motion. These documents indicate that there are other AV materials that were, and still may be, in existence. Biomet has had almost one year now to search for these materials, yet Plaintiffs are still awaiting confirmation that all materials have been produced. Biomet cannot utilize its "confusion" or its production of discovery materials from the MDL litigation as a smokescreen¹ for failing to respond to the Plaintiffs' discovery requests in this action.

Acknowledging that Biomet is a large corporation with a nationwide presence and the fact that AV files on the Magnum System may extend back some ten years, Biomet has had Plaintiffs' production request in hand for almost one year. Despite that, it seems as though Biomet has just recently "unilaterally undertaken to search for and produce additional responsive documents." This is what Biomet should have been doing since receipt of the Plaintiffs' production request.

Accordingly, Biomet shall have 30 days from the date the Court adopts this Recommended Order to produce all remaining AV files that are responsive to the Plaintiffs' March 2015 request.


IF YOU WISH TO SEEK REVIEW OF THE REPORT AND RECOMMENDATION MADE BY THE MAGISTRATE, YOU MUST FILE EXCEPTIONS IN ACCORDANCE WITH FLORIDA RULE OF CIVIL PROCEDURE 1.490(i). YOU WILL BE REQUIRED TO PROVIDE THE COURT WITH A RECORD SUFFICIENT TO SUPPORT YOUR EXCEPTIONS OR YOUR EXCEPTIONS WILL BE DENIED. A RECORD ORDINARILY INCLUDES A WRITTEN TRANSCRIPT OF ALL RELEVANT PROCEEDINGS. THE PERSON SEEKING REVIEW MUST HAVE THE TRANSCRIPT PREPARED IF NECESSARY FOR THE COURT'S REVIEW.

✓

03/10/2016



Magistrate Deborah Bailey

 Copies furnished to: As per attached service list

¹ Notably, Biomet's instant response contends that Biomet has already produced responsive AV files, "in addition to having already provided the entire production of 2.5 million documents from the MDL, which also contains responsive documents." The problem with this assertion is that Biomet fails to identify one document or file from the MDL production that was responsive to the Plaintiffs' March 2015 production request. In its response, Biomet also attempts to divert the Court's attention by assailing "Plaintiffs' unduly aggressive discovery conduct" and calling into question Plaintiffs' motives in seeking discovery.

2014 CA 1932

ZAREMBA V. ORTHOPEDICS

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