UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

MELVIN TODACHEENE,	)	
	)	
Plaintiff,	)	No. 1:21-cv-00809-LF-KK
	)	
v.	)	Honorable Laura Fashing
	)	
	)	
BG MEDICAL, LLC, *et al.*,	)	
	)	
Defendants	)	
	)	

JOINT STATUS REPORT AND PROVISIONAL DISCOVERY PLAN

Pursuant to FED. R. CIV. P. 26(f), a telephonic meeting was held on December 15, 2021 and was attended by:

Adam M. Evans for Plaintiff;

Ryan C. Edwards and Nicole T. Russell for Defendant BG Medical, LLC.

NATURE OF THE CASE

This case arises from injuries Plaintiff Melvin Todacheene ("Plaintiff") suffered following implantation of the Surgimesh XB mesh product ("Mesh product") designed, manufactured, and/or distributed by Defendants. Plaintiff underwent a hernia repair surgery on or about August 28, 2017 in which doctors implanted the Mesh product in Plaintiff's abdominal wall. On or about August 23, 2018, Plaintiff underwent surgery to remove the Mesh product, which had become infected. Plaintiff brings products liability claims sounding in Negligence, Strict Liability, and Breach of Warranty. Plaintiff's specific allegations are contained in his Complaint filed with the Court. Defendant BG Medical denies Plaintiff's allegations and assert defenses as noted in the Answer filed with the Court.

AMENDMENTS TO PLEADINGS AND JOINDER OF PARTIES

Plaintiff intends to file:

Plaintiff(s) should be allowed until February 1, 2022 to move to amend the pleadings and until March 1, 2022 to join additional parties in compliance with the requirements of Fed. R. Civ. P. 15(a).

Defendant intends to file:

Defendant BG Medical does not currently intend to file an amended pleading or to move to join other parties, but submits that Defendants should be allowed until March 1, 2022 to move to amend the pleadings and until April 1, 2022 to join additional parties in compliance with the requirements of Fed. R. Civ. P. 15(a).

STIPULATIONS

The parties hereto stipulate and agree that venue is properly laid in this District; that the United States District Court for the District of New Mexico has jurisdiction over the subject matter and over BG Medical.

PLAINTIFF'S CONTENTIONS:

Plaintiff contends that the Mesh product was designed and manufactured in a defective manner and that Defendant Aspide was negligent for not conducting the appropriate testing and post-market safety analysis. Plaintiff contends that the product safety warnings which Defendants prepared and/or delivered to Plaintiff's healthcare providers were inadequate and that Defendants breached express and implied warranties in connection with the sale of the Mesh product. Plaintiff contends that the aforesaid conduct proximately caused his injuries.

DEFENDANT'S CONTENTIONS

All of the named parties to this case have not yet been properly joined and served. Aspide Medical, the French manufacturer of the Surgimesh hernia mesh product that Plaintiff received and which is the subject of his claims, has not yet been served or otherwise appeared in this action. If and when that occurs, BG Medical expects that Aspide Medical will file a motion to dismiss for lack of personal jurisdiction over it in New Mexico. Aspide Medical has previously been dismissed on jurisdictional grounds in Surgimesh-related litigation in another jurisdiction.

BG Medical did not design Plaintiff's Surgimesh product. BG Medical did not manufacture Plaintiff's Surgimesh product. And BG Medical did not draft any of the warnings that accompanied Plaintiff's Surgimesh product. Instead, BG Medical served as a distributor-seller in the United States of Surgimesh products manufactured by Aspide Medical in France. Plaintiff and BG Medical have agreed upon the general parameters of the case schedule as set forth herein, but BG Medical submits that if Aspide Medical does not appear until months down the road, the case deadlines may require adjustments.

BG Medical has not been provided with any of Plaintiff's medical records, and therefore cannot evaluate the medical merits of Plaintiff's claims at this juncture. It is BG Medical's position, however, that the Surgimesh product that Plaintiff received was not defective in design or manufacture, did not include inadequate warnings, and that no warranties were breached related to the product. Plaintiff appears to claim infection-related complications, which is a well-known, warned-of risk that is not unique to Surgimesh, hernia mesh, or any other medical device. BG Medical denies all liability and contends that either or both Plaintiff's co-morbidities and the conduct of Plaintiff's healthcare providers caused the alleged injuries to Plaintiff.

PROVISIONAL DISCOVERY PLAN

The parties jointly propose to the Court the following discovery plan:

Witnesses who, at this time, the Parties reasonably anticipate to testify or be deposed:

- Susana Samaniego, M.D., professional address: Highway 491 North Shiprock, NM 87420. Dr. Samaniego was the surgeon who implanted the Mesh product in Plaintiff and is expected to testify as to Plaintiff's fitness for surgery, surgical risks known and delivered to Plaintiff, and the surgical technique utilized for implantation of the Mesh product.
- James Boyd, M.D., professional address: 630 W Maple St, Farmington, NM 87401. Dr. Boyd was the surgeon who performed the mesh removal surgery and is expected to testify as to his observations and etiology of Plaintiff's complications.
- Other treating providers of Plaintiff;
- Plaintiff and Plaintiff's spouse, care of counsel;
- Current or former employees of BG Medical, LLC, care of counsel, including but not limited to John Huelskamp, President, BG Medical, 21805 W. Field Pkwy., Suite 160, Deer Park, IL 60010;
- Current or former independent contractor Surgimesh sales representatives;
- Current or former employees of Aspide Medical, care of counsel;
- Multiple expert witnesses likely to be identified by the parties, including but not limited to:
    - Surgeon expert. Expected to testify as to plaintiff's medical care, causation, and warnings relating to the hernia mesh at issue.
    - Biomaterials expert. Expected to testify as to the hernia mesh at issue and offer opinions relating to design defect, manufacturing defect, or lack thereof.

  - Vocational expert, if necessary. Expected to testify as to plaintiff's ability to work and obtain gainful employment post-injury.
  - Economist, if necessary. Expected to testify as to plaintiff's damages.
- Records custodians as necessary to establish evidentiary foundations, including but not limited to Plaintiff's healthcare providers
- Witnesses listed by other parties in this action, including Aspide Medical, once served;
- Witnesses identified during the discovery process;
- Rebuttal witnesses, as necessary.

Documents which, at this time, the parties believe will be exhibits at trial:

Neither party has completed an exhaustive identification of all relevant documents. However, if they exist, one or both parties are likely to introduce:

- Plaintiff's Medical Records;
- Photographs depicting Plaintiff's injuries;
- Documents relating to the design, manufacture, and/or testing of the Mesh product as well as any possible safer alternative designs;
- Marketing materials utilized by Defendants in the promotion, sale and distribution of the Mesh product;
- Documents reflecting policies and procedures for communications with healthcare providers;
- Documents reflecting (1) communications among Defendants and (2) the business/financial relationship(s) among Defendants;
- The package insert for Plaintiff's Surgimesh product;
- Documents relating to surgical technique for implantation of Surgimesh;

- Published medical studies, articles, and literature relating to Surgimesh and competitive hernia mesh;
- Distributor Agreement between BG Medical and Surgimesh, to be produced upon entry of a Protective Order;
- 510k submissions and accompanying correspondence with FDA relating to Surgimesh;
- Medical records relating to Plaintiff's hernia surgeries and other relevant medical care;
- Surgimesh sale representative communications and training materials;
- Documents relating to FDA compliance;
- Documents listed by other parties in this action, including Aspide Medical, once served.

Experts who, at this time, the parties believe will testify at the trial:

Neither party has yet identified testifying experts. However, as listed above, both parties are likely to engage separate experts in biomedical engineering, general surgery, infectious disease, and damages.

Discovery will be needed on the following subjects:

Defendants intend to take discovery on:

- The potential causes of Plaintiff's injuries, including Plaintiff's underlying health condition(s);
- Plaintiff's condition and treatment after and prior to his injuries; and
- The nature and extent of Plaintiff's injuries.

Plaintiff intends to take discovery on:

- The design, manufacture, development, marketing, and testing of the Mesh product and any other comparable products relevant to the claims made in this case;

- The knowledge of Defendant Aspide as to safer alternative designs which may have prevented the injuries and damages complained of; and
- Affirmative defenses asserted by any Defendant.

The parties do not necessarily agree to all of the discovery that the opposing party intends to take. The parties acknowledge that discovery regarding additional subjects may be necessary as litigation proceeds and as more information is revealed during investigation and discovery; however, generally speaking, at this time, discovery is anticipated to be focused on the above particular issues.

Proposed Written Discovery

Maximum of 25 interrogatories by each party to any other party. (Responses due 30 days after service).

Maximum of 25 requests for admission by each party to any other party. (Responses due 30 days after service).

Maximum of 10 depositions by Plaintiff and 10 by Defendants. Each deposition limited to maximum of 7 hours unless extended by agreement of parties. Reports from retained experts under Rule 26(a)(2) due:

from Plaintiff by October 28, 2022;

from Defendant(s) by November 25, 2022.

Supplementation under Rule 26(e) due by February 10, 2023.

All discovery commenced in time to be complete by February 10, 2023.

Other Items:

Plaintiff and Defendant BG Medical are in the process of negotiating a Protective Order to be submitted for approval and entry by the Court. The parties intend to exchange drafts and comments and expect to submit a proposed Protective Order in the coming weeks.

Plaintiff and Defendant BG Medical will meet and confer regarding the necessity, scope and content of a protocol for the preservation and production of Electronically Stored Information ("ESI"). If warranted, the parties will submit a proposed ESI order to the Court.

PRETRIAL MOTIONS

Plaintiff intends to file: A motion for summary judgment, one or more motions to exclude expert testimony, and motions in limine.

Defendants intend to file: A motion for summary judgment, one or motion motions to exclude expert testimony, and motions in limine.

ESTIMATED TRIAL TIME

The parties estimate trial will require ten days.

This is a jury case.

The parties request a pretrial conference in Spring of 2023.

SETTLEMENT

The possibility of settlement in this case cannot be evaluated prior to conducting fact discovery and the disclosure of expert reports. The parties request a settlement conference in or around December, 2022, and submit to the Court that they will in good faith consider and evaluate settlement possibilities through other means, including an outside mediation, if and when appropriate.

APPROVED WITHOUT EXCEPTIONS:

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