

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS**

**IN RE: HAIR RELAXER MARKETING
SALES PRACTICES AND PRODUCTS
LIABILITY LITIGATION**

MDL No. 3060

Case No. 23 C 818

Judge Mary M Rowland

Magistrate Judge Beth W. Jantz

This document relates to:

All Cases

**PLAINTIFFS' SUPPLEMENTAL BRIEFING REGARDING
DISCOVERY OF STATE COURT MATERIALS IN THE MDL**

The issue before the Court is whether the Defendants should be required to: (1) produce documents already gathered, reviewed, and produced in a parallel state court litigation into this MDL, and (2) produce deposition transcripts of current and former employees taken in the state court litigation. The objection is not and cannot be a burden; the documents and deposition transcripts exist in a document review platform already and can be made available to the MDL plaintiffs at absolutely no burden on Defendants. The objection is not, and cannot be, a relevance or responsiveness issue; the documents were produced in state court litigation pursuant to document requests that are substantially identical to the requests served in the MDL. Similarly, the depositions were (and will be) of witnesses related to their experience with hair relaxing products.

Instead, Defendants ask this Court to allow them to sidestep common MDL practice, the requirements of the Federal Rules of Civil Procedure, and judicial efficiency and create a universe in which “a state court plaintiff and a federal court plaintiff, with the same lawyer, the same allegedly defective product and the same cause of action should head into trial with different bodies of evidence.....” *In re Biomet M2a Magnum Hip Implant Prods. Liab. Litig.*, MDL 2391, 2020

WL 10355017, at *6 (N.D. Ind. Mar. 12, 2020). As the *Biomet* court correctly held, this is “unsatisfactory to a sense of justice.” *Id.*

Defendants’ reliance on both the October 2022 cutoff for the collection of electronic documents and this Court’s end of written discovery for refusing to allow the MDL litigants access to these documents are misplaced at best. It is common in all litigation to have a collection date for documents and an end of written discovery; indeed, in this case those limitations were imposed in response to pleas from the Defendants concerning the “burden” of producing documents or continuing to produce witnesses for deposition. However, those Court imposed deadlines do not negate a party’s continuing duties to supplement discovery under the Rules; particularly when that last collection was over four years ago, and the first trial is still just over one year from now. For each of the reasons set forth below, the Plaintiffs respectfully request that this Court order the Defendants to produce the post-2022 documents that have been produced in state court and state court depositions in this litigation.

I. SCOPE OF THE DOCUMENT REQUEST

As this Court is aware, there are several parallel actions in state court concerning chemical hair relaxer use. The documents obtained by the MDL Plaintiffs through discovery in the MDL were produced in each of those state court actions. In the Cook County litigation, the Cook County Plaintiffs served requests for production on the Defendants that were substantively identical to those served in the MDL. In response to those RFPs, Defendants only produced documents from the MDL, meaning documents collected through October 2022. The Cook Plaintiffs filed a motion to compel production of post-October 2022 documents that were responsive to their document requests, and the Cook Court granted that motion in part. The Cook Plaintiffs’ motion to compel is attached as Exhibit 1, the hearing transcript is attached as Exhibit 2, and the Cook Court’s order is attached as Exhibit 3.

The Cook Court ordered production of post-2022 documents in four categories, all of which are covered by RFPs in the MDL: (1) internal communications regarding product reformulation, ingredient substitution, or withdrawal decisions made after 2022, including any decisions to remove products from the market;¹ (2) safety testing, toxicology studies, or epidemiological research conducted or received by Defendants after 2022 bearing on the risks of their hair relaxer products (only for 2022 and 2023);² (3) documents reflecting any post-2022 changes to product labeling, warnings, or usage instructions;³ and (4) board or executive level documents or communications regarding whether, when, how, or why to (a) continue manufacturing, selling, or marketing hair relaxer products; (b) discontinue manufacturing, selling, or marketing hair relaxer products; or (c) modify the formulation, labeling, or marketing of hair relaxer products.⁴ *See* Exhibit 2 (transcript) at 14-16; Exhibit 3 at 1. Defendants thereafter produced collectively over 30,000 documents in compliance with the court's order.⁵

¹ *See, e.g.*, MDL 3rd Set, RFP No. 5: ALL statements, whether internal or external, and drafts thereof, issued by YOU regarding any actual or proposed safety warnings, label changes, recall (or non-recall), or market withdrawal (or non-withdrawal) of any HAIR RELAXER PRODUCT(S).

² *See, e.g.*, MDL 5th Set, RFP No. 7: ALL DOCUMENTS and COMMUNICATIONS regarding whether to conduct epidemiological or other types of scientific studies to determine if any HAIR RELAXER PRODUCT may cause or is associated with hormone-sensitive cancers, hormonal alterations, immunological changes, or other human health effects, risks, or hazards.

³ *See, e.g.*, MDL 1st Set, RFP No. 6: ALL final LABELS for YOUR HAIR RELAXER PRODUCT(S) sold in the United States and/or outside of the United States; MDL 1st Set, RFP No. 7: ALL INSTRUCTIONS FOR USE for YOUR HAIR RELAXER PRODUCT(S) sold in the United States and/or outside of the United States.

⁴ *See, e.g.*, MDL 1st Set, RFP No. 16: ALL Meeting Minutes and/or Presentations by or to YOUR Board of Directors concerning the following: 1. The Safety of YOUR HAIR RELAXER PRODUCT(S). 2. LABEL Changes for YOUR HAIR RELAXER PRODUCT(S). 3. Regulatory actions concerning YOUR HAIR RELAXER PRODUCT(S). 4. Warnings concerning the safety of YOUR HAIR RELAXER PRODUCT(S). 5. Scientific Studies concerning the potential health effects of YOUR HAIR RELAXER PRODUCT(S). 6. Consumer Concerns or Complaints related to YOUR HAIR RELAXER PRODUCT(S). 7. Analysis of the market share and/or increase or decrease of market share for YOUR HAIR RELAXER PRODUCT(S).

⁵ Additionally, Plaintiffs are informed by counsel for the Cook Plaintiffs that their preliminary review of the Cook County documents reveals that (1) Defendant Avlon produced approximately 351 documents that appear to pre-date the 2022 cutoff; (2) Defendant Luster – approximately 228; (3) Defendant SON –

II. MDL COURTS ROUTINELY ORDER THE PRODUCTION OF STATE COURT DISCOVERY MATERIALS INTO THE MDL, AND THIS COURT SHOULD AS WELL

Plaintiffs' request, that the documents produced in state court also be produced into this MDL, is typical of MDL practice. It is typical for the MDL and parallel state court litigation to have documents and discovery collected in one litigation produced into the other; it ensures that all litigants have access to all relevant information and it eases the burden on defendants. For example, the following list, while not exhaustive, but spans 20 years (from 2005 to 2026) is illustrative of this point:

- *In re Lyft, Inc., Passenger Sexual Assault Litig.*, MDL No. 3171, No. 3:26-md-03171-RFL, ECF No. 88 (N.D. Cal. Apr. 2, 2026) (entering stipulated Pretrial Order No. 6 ordering that defendant “shall substantially complete its production of documents, as produced in the Judicial Council Coordinated Proceeding (‘JCCP’) No. 5061 pending in the Superior Court of California for the County of San Francisco, to Plaintiff Co-Lead Counsel by May 1, 2026.”) (attached – Ex. 4)
- *In re National Prescription Opiate Litig.*, MDL No. 2804, No. 1:17-md-2804, ECF No. 3178 (N.D. Ohio Feb. 21, 2020) (noting that court previously ordered defendants to produce in the MDL all documents previously produced in any civil investigation or litigation, as well as requiring production of “copies of all sworn statements, testimony, video-taped testimony, written response and discovery, expert reports, and other documents and discovery that they produce in any court case...”, and clarifying that this requirement “shall apply to all defendants in all MDL cases.”) (Ex. 5)
- *In re Paraquat Prods. Liab. Litig.*, MDL 3004, No. 3:21-md-3004-NJR, ECF No. 203 (S.D. Ill. July 23, 2021) (ordering defendants to “submit the [parallel state court] document production, including all discovery, deposition transcripts, expert reports, and pleadings, to a document depository.”) (Ex. 6)
- *In re Paraquat*, ECF No. 462, ¶ 24 (Oct. 26, 2021) (“All parties to the MDL Proceeding or the Coordinated Actions who are subject to the MDL Protective Order or its substantial equivalent shall be entitled to receive copies of generally applicable (i.e., non-plaintiff specific) responses to interrogatories, responses to depositions on written questions, responses to requests for admission, and documents produced in any Coordinated Action,” subject to cost reimbursement) (Ex. 7)

approximately 54; (4) Defendant HOC – approximately 19; (5) Defendant Namaste 6; and (6) Defendant L’Oreal – approximately 1. These are documents that should have been produced in the MDL but were not, and even Defendants acknowledge “we would have an obligation to produce that.” (8/20/26 Hrg. Tr. at 27)

- *In re Biomet* 2020 WL 10355017, at *7 (“Biomet shall produce to the Plaintiffs’ Steering Committee the common issue written discovery and common issue depositions provided and taken in state-court Biomet M2a hip implant cases and produced to the state-court plaintiffs.”)
- *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657, Pretrial Order No. 17 ¶ E (E.D. La. June 21, 2005) (“Merck will generally attempt to produce in these proceedings all non-case-specific documents and information that it produces in Vioxx-related litigation in other courts, on the same schedule or as near thereto as practicable.”) (Ex. 8).

See also *In re Am. Med. Sys., Inc., Pelvic Repair Sys. Prods. Liab. Litig.*, No. 2:12-MD-2325, 2012 WL 2601880, at *8 (S.D. W. Va. July 5, 2012) (MDL No. 2325) (ordering documents produced in parallel state court cases to be produced in the MDL).

Production of state court documents into an MDL is as much a practical consideration as an equitable one: maintaining a single “production” of documents in all related proceedings avoids confusion over which documents were produced where, and which are subject to what protective order. It ensures that experts common to both litigations are working from the same set of documents and that their opinions can be challenged based on a complete record in the case. And it ensures that juries in all jurisdictions have complete access to all available information and facts, the foundation of the civil jury system in the country. Many of the MDL Plaintiffs’ counsel, including many on the Court-appointed leadership team, are also counsel for Cook County Plaintiffs. Those lawyers will have access to the Cook County documents for their Cook County clients, but not for those clients who have their cases in federal court. Such a result is “unsatisfactory to a sense of justice,” as the *Biomet* court held, and makes no sense. *In re Biomet*, 2020 WL 10355017, at *6.⁶

The temporal scope of the document collection in this case, and the close of written

⁶ While some of the orders discussed above involved the MDL court ordering production of documents previously collected and produced in state court, the *Biomet* court was on the same footing as this Court: documents produced in state court *after* the MDL productions occurred, but not available to MDL litigants.

discovery, do not compel a different result. Dating back to Judge Finnegan’s May 7, 2024, the Defendants were not generally required to collect or produce post-2022 documents. Dkt. 644. That order, however, was not a definitive prohibition on production of any post-2022 documents into the MDL; instead, as Judge Finnegan acknowledged, the October 2022 cut off for collection of documents made sense because “it would be more helpful maybe to get the collection going and see what’s helpful and what isn’t and... fine-tune it . . . there might be certain categories where it makes sense to go ahead and collect past the date of the lawsuit”. Dkt. 655 at 15 – 16. While this Court has previously denied Plaintiffs’ requests to require the Defendants to search for, collect, and produce additional post-2022 documents, in each of those situations, the Court weighed the need for the requested documents against the burden on Defendants of complying. Dkt. No. 1169 at 4; Dkt No. 1000 at 4 – 5. Here, there is no burden; rather than seeking a new *collection* of potentially responsive documents, Plaintiffs seek a discrete, already existing and responsive set which can be made available to MDL Plaintiffs with zero additional work by Defendants.⁷ Furthermore, the order did not hold that post-2022 documents could be withheld from production if a Defendant knew of such documents; instead, it simply held that the collection of ESI for the initial collection was through October 2022. In fact, the ESI Protocol entered in this case specifically provides that it “does not alter or affect the applicability of the Federal Rules of Civil Procedure”, and also states that “[t]he use of a search methodology does not relieve a party from its obligations under Federal Rules 34 and 26 to produce responsive documents, and accordingly documents or ESI known to be responsive to a discovery request or otherwise subject to production

⁷ The post-2022 documents were produced and currently reside on the discovery platform (Everlaw) used by both the MDL Plaintiffs and the Cook Plaintiffs. The only thing preventing the MDL Plaintiffs from accessing them is that they are “walled off” within that platform. Production in the MDL merely requires that the MDL Plaintiffs be granted access by the vendor hosting the production; which requires nothing more than a one sentence authorization from the Defendants.

or relevant to the claims or defenses shall be produced without regard to whether it was returned by any search methodology used in accordance with this Order or otherwise agreed upon by the parties unless there is a claim for privilege.” *See* CMO 4, Dkt. 109, at 10-11.

Furthermore, the fact that these documents *were* collected and produced puts them squarely within the duty to supplement in Rule 26. Defendants contend that they are not required to supplement their productions because discovery has closed. This is a flawed position. This Court has directly held that “there is an ongoing obligation to supplement or correct discovery responses, even after the close of discovery.” *Block Elec. Co., Inc. v. Jozsa*, No. 23-CV-00795, 2024 WL 6859588, at *6 (N.D. Ill. June 25, 2024); *see also MemberSelect Ins. Co. v. Electrolux Home Prods., Inc.*, No. 13 CV 4097, 2015 WL 6083201, at *6 (N.D. Ill. Oct. 15, 2015) (“a party’s obligation to supplement discovery under Rule 26(e) does not end when discovery closes.”) Judge Rowland has also previously held that Rule 26’s duty to supplement extends beyond the close of discovery. *Rao v. JPMorgan Chase Bank, N.A.*, No. 21-CV-1361, 2026 WL 1113685, at *3 (N.D. Ill. Apr. 24, 2026) (“it is axiomatic that a party’s obligation to supplement discovery under Rule 26(e) does not end when discovery closes,” citing cases from several other federal courts.)

Furthermore, in this MDL itself, each bellwether plaintiff has been required to supplement their discovery responses after the close of written discovery; additional medical records and damages information is routinely collected and provided up to the time of trial notwithstanding the close of discovery imposed by the Court (*See* Dkt. No. 1849 at 1 – 25; Dkt. No. 1930 at 5 – 26). That obligation – enforced against Plaintiffs by Defendants – equally applies under these circumstances. The requirement to sign an additional authorization for new or updated medical records is no harder or less relevant than one sentence authorization needed to allow the MDL plaintiffs access to these documents from our online document platform where they already sit.

Finally, the documents sought are not a means to re-open discovery. While the defense has seized on framing these documents as “new discovery” that is being “sought after the close of discovery,” that argument is false. This is information that is responsive and relevant to discovery requests served prior to the close of fact discovery; they are documents that are responsive to the MDL Plaintiffs’ discovery requests that happen to post-date October 2022 (for most of the documents). There is no genuine argument that the documents are not relevant to the litigation. Furthermore, upon information and belief, almost 92% of the documents collected were collected from MDL custodians; therefore, the argument that this is a means to backdoor discovery from new custodians is not only legally infirm, it is simply false under the actual facts here.

The documents at issue are plainly relevant under Rule 26 and the duty to supplement, there is no burden to produce them, they are available to certain MDL counsel (though their existing plaintiffs with cases in state court), and there is no basis for Defendants to withhold them.

III. DEPOSITIONS TAKEN IN PARALLEL STATE COURT LITIGATION ARE DISCOVERABLE AND SHOULD BE PRODUCED IN THE MDL

Fed. R. Civ. P. 26(b)(1) permits discovery of any non-privileged matter relevant to a claim or defense and proportional to the needs of the case. Testimony given by any defense witness in a parallel state court case is clearly relevant to the claims and defenses in this case. Production of those deposition transcripts is also proportional to the needs of this MDL. It will take virtually no effort for the Defendants,⁸ and, at the same time, it is imperative that the MDL Court have access to a complete and full record as it advances toward bellwether trials.

Whether those transcripts are ultimately admissible at trial or in some other proceeding is not the question. Rule 26 expressly states that information “need not be admissible in evidence to

⁸ Deposition transcripts are typically produced in electronic format, so production requires little more than transferring files Defendants already possess.

be discoverable.” The transcripts of depositions taken in the parallel state court hair relaxer cases concern the same products, formulations, and corporate conduct at issue here; they are plainly relevant. There simply is no basis for withholding production.

A magistrate judge presiding over discovery in one of the pelvic mesh MDLs was faced with a similar request in *In re Am. Med. Sys., Inc., Pelvic Repair Sys. Prods. Liab. Litig.*, No. 2:12-MD-2325, 2012 WL 2601880 (S.D. W. Va. July 5, 2012) (MDL No. 2325). The MDL plaintiffs sought the transcripts of a defendant’s witnesses from depositions taken in another federal district court as well as a state court. The MDL court ordered the defendant to produce transcripts of all of its “employees, corporate representatives and expert witnesses” in both cases. *Id.* at *10. The court noted that there were “several good reasons to require [the defendant] to produce the [other case] depositions to the MDL depository,” including some that are directly on point here:

- “without the depositions, the plaintiffs will not be able to determine if AMS employees and corporate representatives have altered their testimony in a material respect as a result of their review of additional documents.” *Id.* at *9.
- “production of the depositions now resolves an issue which would otherwise arise with respect to trial; that is, whether Rule 32 or Rule 804 entitles the plaintiffs to discover the witnesses’ prior statements. This reason is particularly persuasive with respect to AMS’s Rule 30(b)(6) witnesses.” *Id.* at *10.
- “the production of the depositions eliminates the plaintiffs’ concern that material differences in testimony are being concealed. As noted during pretrial hearings, these pelvic mesh MDLs are a matter of considerable public interest; the bellwether trials should provide a complete picture of the products and their effects on women without the nagging worry that important facts are not known.” *Id.*
- the defendant “has not persuasively shown that it will suffer prejudice or harm (other than that which it has inflicted on itself) as a result of its production to the MDL depository of the [other case] depositions. Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test.” *Id.*

In an analogous situation, Judge Goodwin entered a pretrial order in MDL No. 2327 ordering that “[t]he transcript of any deposition(s) of current or former [...] company witnesses or representatives taken in the New Jersey Litigation or any other related State or Federal action(s)

prior to the date of this Order shall be provided to Plaintiffs' Liaison Counsel upon their request, and may be utilized in MDL 2327 as if the deposition were originally taken in these proceedings.” *In re Ethicon, Inc., Pelvic Repair Sys. Prods. Liab. Litig.*, No. 2:12-md-2327, Dkt. 409 (S.D. W. Va. Feb. 9, 2013). *See also Clinic Realty LLC v. Lexington Ins. Co.*, No. 2:22-CV-05724, 2024 WL 945324, at *6 (W.D. La. Mar. 5, 2024) (compelling a repeat defendant's corporate deposition transcripts from other related cases); *Axcan Scandipharm Inc. v. Ethex Corp.*, No. CV 07-2556 (RHK/JSM), 2008 WL 11349882 (D. Minn. Dec. 31, 2008) (“there can be no doubt that the deposition testimony of employees from the [other case] will contain pertinent information regarding claims, defenses and subject matter of the Axcan suit, not to mention possible impeachment material—all information that is ‘reasonably calculated to lead to the discovery of admissible evidence.’”)

Defendants' argument that these depositions were taken “in a different case, in a different jurisdiction, with different rules” (*see* 8/20/26 Hrg. Tr. at 20) goes to whether the state court transcripts might be *admissible* in this case. It does not answer whether the transcripts must be produced. Plaintiffs are not seeking to re-depose anyone. They are merely asking that Defendants produce transcripts of depositions taken in state court cases of witnesses who were not cross-noticed in the MDL. Plaintiffs need not establish admissibility to obtain production, and the Court has correctly noted that admissibility will ultimately be for Judge Rowland to decide and will depend on the circumstances present at the time of their proposed use. Because the state court deposition transcripts easily satisfy the relevance and proportionality threshold in Rule 26, and there is no privilege to withhold them from production, the transcripts should be produced.

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Respectfully submitted,

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