

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE: ETHICON PHYSIOMESH	:	MDL DOCKET NO. 2782
FLEXIBLE COMPOSITE	:	ALL CASES
HERNIA MESH PRODUCTS	:	
LIABILITY LITIGATION	:	
	:	
	:	CIVIL ACTION NO.
	:	1:17-MD-02782-RWS

PRACTICE AND PROCEDURE ORDER NO. 12

Updated Plaintiff Profile Form Order

The Plaintiff Profile Form and authorizations attached hereto as Exhibit A are hereby adopted for use in this litigation. It is further **ORDERED** as follows:

- a. This Order shall govern: (1) all cases transferred to this court by the Judicial Panel on Multidistrict Litigation, including those cases subsequently transferred as tag-along actions; and (2) all cases directly filed in, or removed to, this MDL.

- b. For any case where a Plaintiff Profile Form is due on or after June 5, 2018, Plaintiffs shall serve the updated Plaintiff Profile Forms, executed authorizations, and responsive materials attached hereto. For any cases where a Plaintiff Profile Form is due before June 5, 2018, the previous Plaintiff Profile Form (attached to DE #298) shall remain in effect.

- c. The deadline for serving Plaintiff Profile Forms, executed authorizations, and responsive materials remains unchanged – such information shall be served within sixty (60) days of the filing of the Complaint or the transfer of the case into this MDL.
- d. Pursuant to the agreement of the parties, all Plaintiff Profile Forms described in this Order shall be completed electronically and served to Defendants using the Ankura Consulting Group, LLC (“Ankura”) “MDLOnline” system. Signed authorizations and responsive documentation shall also be uploaded using MDLOnline.

Counsel for Plaintiff are required establish an MDLOnline account by selecting “Sign Up” at <https://mdl-2782.mdl.online/>. Instructions for establishing an Ankura MDL Online account and using the Ankura MDLOnline system should be directed to physiomesh_plaintiffs@ankura.com.

- e. Ankura shall maintain a secure, confidential and searchable database available to Defendants, Plaintiffs, and the third-party records vendor retained by the parties to obtain the records specified in the

authorizations from the records custodians. The manner in which each party accesses or utilizes the data and the database shall be strictly confidential and not disclosed in any manner by Ankura.

- f. Every Plaintiff is required to provide defendants with a Plaintiff Profile Form that is substantially complete in all respects, answering every question in the Plaintiff Profile Form, even if a Plaintiff can answer the questions in good faith only by indicating “not applicable.” If a Plaintiff is suing in a representative or derivative capacity, the Plaintiff Profile Form shall be completed by the person with the legal authority to represent the estate or person under legal disability.
- g. The Plaintiff Profile Form shall be completed without objections as to the question posed in the agreed upon Plaintiff Profile Form. This section does not prohibit a Plaintiff from withholding or redacting information from medical or other records provided with the Plaintiff Profile Form based upon a recognized privilege. If information is withheld or redacted on the basis of privilege, Plaintiff shall provide defendants with a privilege log that complies with Rule 26(b)(5) simultaneously with the submission of the Plaintiff Profile Form.

- h. Contemporaneous with submission of the Plaintiff Profile Form, each Plaintiff shall upload via MDLOnline copies or electronic files of all medical records in their possession, custody, or control (including any medical records in their attorney's possession) related to the claims and/or alleged injuries in this case, including, but not limited to, records that support product identification.
- i. Contemporaneous with submission of the Plaintiff Profile Form, each Plaintiff shall upload via MDLOnline signed authorizations, which are attached to the Plaintiff Profile Form. Plaintiffs who are not making a claim for lost wages, lost earning capacity, and/or lost future earnings do not need to sign or return the authorizations related to IRS records, employment records or education records. If an individual Plaintiff is not claiming mental anguish which necessitated psychiatric treatment due to alleged Physiomesh injuries and not claiming that (s)he sought mental health treatment (including treatment for anxiety/depression) due to alleged Physiomesh injuries, then that Plaintiff is not required to sign or return the psychiatric authorization; provided however, that Defendants reserve the right to request such an authorization to collect such records if they have a good faith basis to believe such records should be produced

in that case. If a plaintiff does not sign and return to Defendants an executed psychiatric authorization by the deadline set forth in this Order, such failure shall indicate that such plaintiff does not assert any claims for mental anguish which necessitated psychiatric treatment due to alleged Physiomesh injuries or any claims for other mental health treatment (including treatment for anxiety/depression) due to alleged Physiomesh injuries.

- j. The signed authorizations shall be undated and the recipient line shall be left blank. These blank, signed authorizations constitute permission for a third-party records vendor retained by the parties to obtain the records specified in the authorizations from the records custodians. In the event an institution, agency, or medical providers to which a signed authorization is presented refuses to provide responsive records, the individual Plaintiff's attorney shall attempt to resolve the issue with the institution, agency, or medical provider such that the necessary records are promptly provided. Any records that pertain to psychiatric related care, whether by a psychiatrist or psychologist, shall first be available to counsel for the Plaintiff who shall have 10 days to assert a recognized privilege and notify both the vendor and counsel for the requesting

Defendants, with an appropriate privilege log, in accordance with Practice and Procedure Order No. 8 (Records Collection). Absent notification within 10 days of the assertion of such a privilege, the vendor shall then provide the records to the requesting Defendants. Signing an authorization for release of mental health treatment records shall not constitute waiver of any claim of privilege or any other legal protection for such records under applicable law. The provisions of in Practice and Procedure Order No. 8 (Records Collection) shall apply to such records. The authorizations provided by Plaintiff become null and void when his or her case is resolved, and any use of the authorizations beyond that date is prohibited.

- k. The Plaintiff Profile Form will not be interpreted to limit the scope of inquiry at depositions nor will it affect whether evidence is admissible at trial. The admissibility of information in the Plaintiff Profile Form is governed by the Federal Rules of Evidence, and objections to admissibility are not waived by virtue of the completion and service of a Plaintiff Profile Form.
- l. Plaintiff is under a continuing obligation to timely supplement or amend Plaintiff Profile Forms and responsive documentation.

- m. In any case where a deposition of the Plaintiff is scheduled, Plaintiff must submit any supplement and/or amendments, to the extent applicable and to the extent the material is within the Plaintiff's or his/her attorney's possession, at least 21 days before the date of Plaintiff's deposition.
- n. Any Plaintiff who undergoes revision surgery or other surgical procedure related to the claims at issue in the case after completing and serving a Plaintiff Profile Form must complete and serve an updated Plaintiff Profile Form (including providing any additional responsive documentation) within 90 days after the date of the surgery or 90 days after Plaintiff's counsel becomes aware of such surgery or procedure, whichever is later.
- o. Any Plaintiff who fails to fully comply with the requirements above shall be provided notice of such failure by email from Defendants' Counsel and shall be provided 14 additional days to cure such deficiency ("Cure Period") to be calculated from the receipt of such notice of deficiency from counsel for the Defendants.
- p. Other than as set forth herein, *no other extensions will be granted unless agreed to by all parties. Requests for extensions of time to serve the*


Plaintiff Profile Form, authorizations and responsive documents should be submitted to Defendants via MDLOnline.

- q. *If a Plaintiff fails to cure the deficiency within the Cure Period, Defendants may file a Motion to Dismiss without any further efforts to meet-and-confer and without any need to obtain leave of Court.*
- r. Plaintiff shall thereafter have 10 days to file a Response to the Motion and show good cause why the case should not be dismissed. Defendants may file a Reply brief within 7 days of Plaintiff's Response. *Any failure by Plaintiff to respond to the Motion within the specified period shall result in dismissal of the case.*
- s. In addition to the above provisions, after receiving a Plaintiff Profile Form, authorizations, and responsive documentation, Defendants may file any motion available under the Federal Rules of Civil Procedure that is dispositive in whole or in part of the action, including but not limited to any Rule 12 or Rule 56 motion based on lack of product identification, statute of limitations, or improper party/representative. Such motion(s) shall be in addition to, and not in lieu of, dispositive motions set by current, prior, or subsequent Case Management Orders. Such motion shall comply with this Court's Practice and Procedure Order and Notice

of Initial Conference (Case No. 1:17-md-2782-RWS, Doc. 148, June 21, 2017), paragraph 4(d) (“Motions”), which provides that no motion (including a motion to dismiss under Rule 12) shall be filed without leave of Court and unless it includes a certificate that the movant has conferred with opposing counsel in a good-faith effort to resolve the matter without Court action.

The Court **DIRECTS** the Clerk to file a copy of this Order in 1:17-MD-02782-RWS and it shall apply to each member related care previously transferred to, removed to, or filed in this Court. In cases subsequently filed in this Court, it shall be the responsibility of the parties to review and abide by all pretrial orders previously entered by the Court. The orders may be assessed through the CM/ECF system and the Court’s website at <http://www.gand.uscourts.gov/17md2782>.

SO ORDERED, this 4th day of ~~May~~^{June}, 2018.


RICHARD W. STORY
United States District Judge