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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF INDIANA  
SOUTH BEND DIVISION

IN RE: BIOMET M2a-MAGNUM CAUSE NUMBER  
HIP IMPLANT PRODUCTS LIABILITY 3:12MD02391  
LITIGATION

FRIDAY, NOVEMBER 16, 2012

TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE ROBERT L. MILLER, JR.

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*DEBRA J. BONK*  
*Federal Certified Realtime and Registered Merit Reporter*  
*United States District Court*  
*204 South Main Street - Room 323*  
*South Bend, Indiana 46601*  
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*574-246-8039*

*Proceedings reported in machine shorthand. Transcript  
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## CERTIFIED TRANSCRIPT - NOVEMBER 16, 2012

## APPEARANCES

**For Plaintiffs:**

MR. W. MARK LANIER  
MR. THOMAS R. ANAPOL  
MR. DANIEL C. BURKE  
MR. LAWRENCE L. JONES, II  
MR. JASPER WARD  
MR. RICHARD D. MEADOW  
MR. PAUL CORDELLA  
MR. FREDERICK HOVDE  
MR. ROBERT DASSOW  
MS. GENEVIEVE ZIMMERMAN  
MS. ANNE ANDREWS  
MS. PAMELA BORGESS for MS. MICHELLE L. KRANZ  
MR. BEAU DARLEY for MR. NAVAN WARD, JR.  
MR. JOSEPH H. SAUNDERS  
MS. STACY K. HAUER  
MS. AMANDA THOMPSON for MR. JOSEPH A. OSBORNE  
MR. LARRY P. BOYD  
MR. MIKE BOLLINGER  
MR. JOHN R. CLIMACO  
MS. MARGARET METZINGER  
MR. DERRIEL C. McCORVEY  
MR. DOUGLAS A. KREIS  
MS. SHELLY HUTSON  
MR. MICHAEL L. McGLAMRY  
MR. PETER A. MILLER  
MR. BRIAN DEVINE  
MS. ELLEN RELKIN  
MR. RICHARD ARSENAULT  
MR. DANIEL S. ROBINSON  
MR. DAN KOTIN  
(see docket for addresses)

**For Defendant:**

MR. JOHN LaDUE  
MR. JOHN D. WINTER  
MR. BLAINE DART  
MR. ADAM DEUTSCH  
(see docket for addresses)

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1           **THE COURT:** Good afternoon.

2           There's a lot more people on this side of the room  
3 than on that side.

4           I'm Judge Miller, for those of you that I haven't  
5 seen before. I do see some familiar faces from the MDL  
6 hearings, and it's good to see you folks here. Welcome to  
7 South Bend.

8           I have to lead off with a sincere apology. I was so  
9 busy trying to figure out just exactly when to time this  
10 hearing so we could get everything up and running without  
11 too much delay but still give everybody time, and I didn't  
12 look at the football schedule, and I can promise you that I  
13 will never again set anything on the Friday of a home-game  
14 weekend. I hope you all found someplace, if you were  
15 staying, to stay and planes in.

16           Let me ask you to state your appearances, for the  
17 record, please, if you could.

18           **MR. DEVINE:** Good afternoon, Your Honor.

19           Brian Devine, interim liaison counsel.

20           **THE COURT:** Mr. Devine.

21           **MR. LANIER:** Good afternoon, Your Honor.

22           Mark Lanier, proposed counsel.

23           **MR. ANAPOL:** Good afternoon, Your Honor.

24           Thomas Anapol, also proposed lead counsel.

25           **MR. DASSOW:** Good afternoon.

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1 Rob Dassow, Your Honor.

2 **MR. HOVDE:** Judge, Rick Hovde.

3 **THE COURT:** Mr. Hovde.

4 **MR. KREIS:** Good afternoon, Your Honor.

5 Doug Kreis on behalf of Plaintiffs.

6 **MR. JONES:** Good afternoon, Your Honor.

7 Larry Jones on behalf of Plaintiff Edelen.

8 **MR. KOTIN:** Good afternoon.

9 Dan Kotin on behalf of the Plaintiffs.

10 **THE COURT:** What was the last name, again? I'm  
11 sorry.

12 **MR. KOTIN:** K-O-T-I-N.

13 **THE COURT:** K-O-T-I-N. All right.

14 **MR. BOLLINGER:** Good afternoon, Your Honor.

15 Mark Bollinger for Plaintiff.

16 **MS. METZINGER:** Good afternoon, Your Honor.

17 Margaret Metzinger for the Plaintiff.

18 **MR. CLIMACO:** Good afternoon, Your Honor.

19 John Climaco for the Plaintiffs.

20 **THE COURT:** Okay. Well, yeah. That's fine. We can  
21 loop around.

22 **MS. RELKIN:** Good afternoon, Your Honor.

23 Ellen Relkin from Weitz & Luxenberg for Plaintiff.

24 **MS. BORGESS:** Good afternoon, Your Honor.

25 Pamela Borgess for the Plaintiff. I'm actually here

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1 for my partner, Michelle Kranz, who apologizes because she  
2 couldn't be here.

3 **THE COURT:** Okay.

4 **MS. ZIMMERMAN:** Your Honor, Genevieve Zimmerman for  
5 the Plaintiff.

6 **MR. JASPER WARD:** Jasper Ward for the Plaintiffs.

7 **MR. MILLER:** Good afternoon, Your Honor.

8 Pete Miller for Plaintiff.

9 **THE COURT:** Let me just stop for one moment because  
10 it sounds like -- Mr. Ward, you are David, but you go by  
11 "Pete"?

12 **MR. JASPER WARD:** I'm sorry. I'm Jasper, Larry  
13 Jones' partner.

14 **THE COURT:** Oh, okay. I'm sorry. Then I marked off  
15 the wrong name. Excuse me.

16 And, Ms. Zimmerman, are you Genevieve Zimmerman?

17 **MS. ZIMMERMAN:** Yes.

18 **THE COURT:** And you go by what?

19 **MS. ZIMMERMAN:** "Genevieve" is fine.

20 **THE COURT:** Okay.

21 **MR. MILLER:** Pete Miller, sir.

22 **MS. HAUER:** Stacy Hauer, Your Honor.

23 **MR. McGLAMRY:** Your Honor, Mike McGlamry for  
24 Plaintiff.

25 **MR. DARLEY:** Your Honor, Beau Darley on behalf of

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1 Navan Ward, who can't be here today, on behalf of the  
2 Plaintiff.

3 **THE COURT:** Okay.

4 **MS. THOMPSON:** Good afternoon, Your Honor.

5 Amanda Thompson on behalf of Joseph Osborne, who  
6 could not be here today, for Plaintiff.

7 **THE COURT:** Thank you.

8 **MS. HUTSON:** Good afternoon.

9 Shelly Hutson, also on behalf of Plaintiffs.

10 **THE COURT:** Ms. Hutson.

11 **MS. ANDREWS:** Good afternoon, Your Honor.

12 Anne Andrews on behalf of Plaintiffs.

13 **THE COURT:** Ms. Andrews.

14 **MR. CORDELLA:** Good afternoon, Your Honor.

15 Paul Cordella on behalf of the Plaintiffs.

16 **MR. MEADOW:** Good afternoon, Judge.

17 Rick Meadow from Lanier law firm for Plaintiffs.

18 **MR. ARSENAULT:** Richard Arsenault, Judge,

19 Plaintiffs.

20 **MR. McCORVEY:** Good morning, Your Honor.

21 Darriel McCorvey, Plaintiffs.

22 **MR. BOYD:** Good morning, Your Honor.

23 Larry Boyd from Houston for Plaintiffs.

24 **MR. ROBINSON:** Good afternoon, Your Honor.

25 Dan Robinson for Plaintiffs.

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1           **MR. BURKE:** Good afternoon, Your Honor.

2           Daniel Burke for Plaintiffs.

3           **MR. SAUNDERS:** Joseph Saunders for Plaintiffs.

4           **MR. LaDUE:** Good afternoon, Judge.

5           John LaDue, liaison counsel for Biomet.

6           And with me today is John Winter, also liaison  
7 counsel for Biomet, and in-house counsel for Biomet, Adam  
8 Deutsch, and Blaine Dart is with us, as well.

9           **MR. WINTER:** Good afternoon Your Honor.

10          **THE COURT:** Thank you.

11          Let me introduce to you who's sitting next to me.  
12 You may have been wondering that.

13          I indicated in the first order that I intend to  
14 handle nearly everything myself, if I can. We'll see how  
15 the thing goes, but there will be times when I'm  
16 unavailable. This is Magistrate Judge Christopher  
17 Nuechterlein, who works in this building and with whom I  
18 work regularly, so you may, on occasion, find yourself  
19 working with him, as well. I thought it might be helpful to  
20 have a face to go with a name since we'll probably be doing  
21 a lot of this with distances.

22          Let me introduce to you some of the other people  
23 with whom you will probably be dealing over the course of  
24 the life of this docket.

25          Seated at the far end of that table from me is

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1 Ms. Jennifer Darah. She is the Court's MDL Clerk, so you  
2 may have dealt with her already without knowing who she was  
3 or what she looked like.

4 Seated to her left is DeAndra Kirkwood. Ms.  
5 Kirkwood is the Courtroom Deputy Clerk for this courtroom.

6 Seated to her left is one of our law clerks, Sheri  
7 Potts.

8 Seated to her left is Meghan Pitcher, who's one of  
9 our law clerks.

10 And --

11 **MS. FLEMING:** I'm new. Laurell Fleming. I'm the  
12 assistant to the MDL Clerk.

13 **THE COURT:** Oh, okay.

14 And at the far -- seated at the far table, first, is  
15 Ms. Linda Walker. She is the South Bend Chief Deputy Clerk.

16 And at the far end of the table from her is Suzanne  
17 Shead, another one of the law clerks.

18 Seated here is, obviously, the court reporter,  
19 Ms. Debra Bonk.

20 As time goes on through this, you may be dealing  
21 with any of them.

22 I don't really have a lot to say before we turn to  
23 discussion. I guess I want to -- first of all, I'm glad so  
24 many people were able to get here, given the travel  
25 challenges.

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1           What I would propose to do, unless somebody has a  
2 better idea -- let me just run through some of the things  
3 that I would propose to do. One is to do conferences about  
4 every month -- although, next month, we'd be hitting  
5 Christmas so we'd probably move it into the first of  
6 January -- and alternate between in-person and telephonic  
7 conferences. That may be more often than you folks think  
8 you're going to need to come. Obviously, I can tell from  
9 everything that was submitted, you folks have a lot of MDL  
10 experience, and you may realize -- you may know that we  
11 don't have to meet in person every two months. It seemed to  
12 me like it might be about right to get started without  
13 making you take two or three hops to get to South Bend every  
14 month.

15           We're all in this together, trying to move this  
16 along, and I hope -- and it looks to me like, from  
17 everything I've seen, people are going be able to work  
18 together. I know I'm going to have some judicial services  
19 to perform more you as the case goes on with some rulings,  
20 but I hope we can keep it on a professional level so that  
21 this is not one of those experiences that people leave and  
22 wish they had never gotten into this one, but, hopefully,  
23 we'll be able to do that.

24           I made one error, I guess, inconsistency, in Case  
25 Management Order Number 1. I directed the Plaintiffs'

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1 counsel to submit applications for the Plaintiffs' counsel  
2 structure directly to chambers and gave everybody else a  
3 week in which to file any objections, and it occurred to me  
4 after I received your submission that nobody else would know  
5 who to object to, so I guess what I would propose to do is  
6 to direct that the submission, the ninety-nine pages with  
7 all the applications, be deemed filed today and then would  
8 give the rest of the world until November 30th, which is a  
9 little over a week -- but next week, we lose a day or two --  
10 to file any objections.

11 I didn't just do that unilaterally because I wanted  
12 to see if anybody wanted to amend the letter they submitted  
13 or something of that sort, but unless somebody does have an  
14 objection, I would propose to do that so that we can then  
15 get the structure in place with other attorneys having had a  
16 chance to object.

17 Nobody else applied. We received no other  
18 applications other than the one joint submission that  
19 Mr. Devine submitted.

20 Does anybody have any problem with my doing that?

21 (No response.)

22 **THE COURT:** The second thing having to do with that,  
23 the Court Management Order indicated that no pro hac vice  
24 admissions would be necessary. We could do that for the  
25 cases as they arrived. You're not -- what I need to do is

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1 to have something in place, though, for you folks and for  
2 the people who appear in cases after they get here. The  
3 reason is this. I guess we had some interesting issues a  
4 few years ago where people appeared in court, and nobody  
5 checked, and they turned out not to be lawyers or were  
6 suspended lawyers.

7 I don't think we've got that problem here, but  
8 Washington has asked all the district courts to, please, be  
9 sure when an attorney appears that he or she really is a  
10 lawyer, which, I guess, is a modest request, and that  
11 involves trying to be sure that everybody's in good standing  
12 in all the states in which they're admitted to practice,  
13 and, obviously, there's a lot of states in which you folks  
14 are all admitted to practice, so what I've done is -- what  
15 we've done is devise a modified pro hac vice, no fee, but  
16 just basically so you wind up certifying that you are in  
17 good standing in every Bar in which you are admitted to  
18 practice so that we can get that on file and do what  
19 Washington probably pretty reasonably wants us to do.

20 There's one thing I'd like to talk to you about --  
21 two things -- before I turn it over to you folks for the  
22 things you want to talk about. My hope is to get rulings  
23 out quickly as the issues come in. I know the worst thing  
24 that any MDL judge can do is to sit on something waiting to  
25 get out a fifty-page opinion on a discovery dispute or

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1 something of that sort. I don't propose to do that.

2 One thing I would toss out as a possibility -- and I  
3 don't need an answer now because I know we don't have people  
4 who are in a position to speak for the Plaintiffs yet -- but  
5 if you could consider the possibility of a fifteen- or  
6 twenty-page limit on briefs for the more routine, the  
7 discovery issues and that sort of thing. Obviously, when we  
8 get to **Daubert** or substantive dismissal motions based on the  
9 law, based on sort of summary judgment motions but perhaps  
10 not quite to that level, then we can go back to a larger  
11 page limit, but it would help us get rulings out more  
12 quickly if we had fewer pages to read, so let me throw that  
13 out to ask you folks to talk about it.

14 Secondly, again, in furtherance of getting rulings  
15 out quickly -- I don't ordinarily do this, but I know a lot  
16 of judges do -- and that is to make myself available for  
17 telephonic hearings on discovery disputes if you find  
18 yourself in the middle of a deposition and need a ruling.  
19 Everybody has to understand that for me to do that, there  
20 may be no record other than -- there would be no record  
21 other than a memorandum that I would put together after it  
22 saying, "This is what the issue was, and this is how I  
23 ruled." I assume that that will be acceptable -- and,  
24 again, I know nobody can speak for the Plaintiffs yet --  
25 simply so we can keep the thing moving along, and that's my

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1 goal. I don't know how long it's going to take while you  
2 guys are here, but I hope I don't make it any longer than it  
3 has to.

4 With that, let me turn to the Plaintiffs' counsel  
5 and ask you this, and I guess not just Mr. Devine, but also  
6 Mr. Anapol and Mr. Lanier. You proposed two coordinating  
7 lead counsel, a six-person executive committee, and then a  
8 larger steering committee. How do you envision that  
9 structure working so that I know what I'm appointing people  
10 to?

11 **MR. LANIER:** Your Honor, Mark Lanier.

12 **THE COURT:** Oh. I had one request from the Court  
13 Reporter.

14 I love this courtroom, and I hope you folks enjoy  
15 it, as well, but it swallows sound, so if I could ask you to  
16 move to the lecturn so that the microphone --

17 **MR. WINTER:** Your Honor, Mark Lanier.

18 Tom Anapol looked at me like, "Okay. Get up there,"  
19 so I'll get up there first, though I hope I can adequately  
20 answer.

21 Thank you for the honor of appearing in your court.  
22 I know I speak on behalf of all the Plaintiffs' Bar. We  
23 appreciate that and are excited to be in South Bend,  
24 10-and-0 country.

25 We would anticipate that the large PSC is to try and

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1 increase as much activity as possible in terms of momentum  
2 into filing into the MDL. We've tried to put together a PSC  
3 that's open for everybody who would consider filing, with  
4 the idea that you've got to have some type of mass effort to  
5 make the MDL most efficient. Will that work? You never  
6 know, but it's certainly something that we're endeavoring to  
7 do.

8           However, when you have such a large PSC, while  
9 you've got a lot of momentum, you also lose some efficiency,  
10 and so the goal would be to have a smaller executive  
11 committee that's charged with the more regular meetings that  
12 can more efficiently, in essence, divvy up and take  
13 responsibility for the different aspects of the PSC that  
14 would fall under the ambit of the divided authority.

15           Lead counsel, Tom, is a great fellow. Everybody  
16 loves him and respects him. He could probably do this  
17 without me. I just have been put up here, as well.

18           It's an honor to be up here and to have a chance to  
19 do it, but I really think lead counsel is basically just  
20 people who have responsibility of making sure that someone's  
21 always ready to talk to you, to give the answers that you  
22 need to hear, to be present at every hearing, to make sure  
23 all the trains are running on time, and to make sure that  
24 it's run -- you know, the biggest problem from the  
25 Plaintiffs' Bar is, aside from the fact we're all working

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1 together, technically, we all compete against each other.  
2 We're all after the same cases. We're all after the best  
3 results.

4 And most Plaintiffs' lawyers are lone wolves by  
5 nature. They're not pack animals, per se. But having said  
6 that, you've got probably the best collection of lone wolves  
7 turned pack animals possible, and I think Tom's  
8 responsibility and my responsibility, if anything, would be  
9 to make sure that we all play well together in the sandbox  
10 and all get a chance to do our own thing in the midst of  
11 this.

12 **THE COURT:** So the executive committee then would be  
13 where everybody would look first for things that have  
14 developed into other committees in some other MDL, such as  
15 science or a particular facet of discovery, that you would  
16 look to the executive committee, to one of those members, to  
17 head up such an undertaking?

18 **MR. LANIER:** Yes, Your Honor, I think that's exactly  
19 right, and the executive committee would probably sit down  
20 -- in a litigation like this, I suspect we're going to wind  
21 up with something on the order of seven to ten committees,  
22 and so the executive committee people will all have a  
23 responsibility within each of those committees to make sure  
24 that they're all represented at executive committee  
25 meetings.

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1           **THE COURT:** Okay. And what will be the role then of  
2 the steering committee? I'm a little foggy on that.

3           **MR. LANIER:** The Plaintiffs' steering committee sort  
4 of is the next layer down. So if you've got the executive  
5 committee -- let's take, for example, science, the issue of  
6 science. The issue of science involves a number of  
7 different layers. It, obviously, integrates with the issue  
8 of discovery. It integrates with the issue of experts,  
9 getting your experts lined up, as well as dealing with the  
10 other side's experts, as well as preparing any presentations  
11 to the Court, so there's a lot involved there. And to take  
12 a member of the executive committee and say, "Okay. You're  
13 in charge of science," doesn't really do anything to spread  
14 out those responsibilities. So for that person to say,  
15 "Okay. I need a science committee, PSC, five of you that  
16 are interested in science who have the people with you.  
17 Let's form that committee," and then they work as a module  
18 themselves that then are always funneled into the leadership  
19 team.

20           **THE COURT:** All right. I think I understand. Thank  
21 you.

22           **MR. LANIER:** Thank you, Your Honor.

23           **THE COURT:** I would tell you, speaking of lone wolf  
24 versus pack, I did -- one of the advantages of having been  
25 on the MDL panel is I know most of the judges who have your

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1 MDLs, and so I emailed them this week, gave the list of  
2 names that had been submitted, and said, "Tell me anybody  
3 who I should not appoint," and I haven't gotten a negative  
4 thing yet, so you should all be -- if I asked, "Tell me  
5 about these people," I wouldn't get responses until January,  
6 but -- so you all come highly recommended, I guess, in the  
7 sense that -- but I do think that's a compliment.

8 I think, basically, I understand the Defendant's  
9 position on most of the things that I asked for discussion  
10 of today, and I know the Plaintiffs couldn't answer those  
11 questions because we don't have the structure in place yet,  
12 but what I would like to do is to run down through some of  
13 the topics -- some of them clearly have to wait until we  
14 have a structure in place -- and get just initial thoughts,  
15 nobody speaking formally for the whole set of Plaintiffs or  
16 even a significant group of Plaintiffs, just get your  
17 thoughts, and would invite then Mr. Winter to follow up with  
18 anything that the Defense would say.

19 I guess, let me turn, first, to Mr. Winter.

20 The Plaintiffs anticipated more than one thousand  
21 cases in the MDL, ultimately.

22 Do you have a feel, more than that, less than that?

23 **MR. WINTER:** Am I being heard or do you want me to  
24 go to --

25 **THE COURT REPORTER:** (Nods head.)

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1           **THE COURT:** Yeah.

2           **MR. WINTER:** Okay. Your Honor, I have no idea.

3           **THE COURT:** Okay.

4           **MR. WINTER:** We know we have approximately one  
5 hundred cases, I think, as of yesterday, either here or with  
6 the CTO. There's a few other cases that have been filed  
7 that are, you know, going to be removed or maybe stay in  
8 state court. We've got a couple of cases here where there  
9 are multiple Plaintiffs, two of them, so they would have to  
10 be broken down, at least that's what we would be advocating  
11 for, but, you know, what will happen in the next three to  
12 six months, Your Honor, I would suggest, is going to be  
13 indicative of how many cases we ultimately have.

14           **THE COURT:** Okay. Okay. So you really don't have a  
15 feel for it yet?

16           **MR. WINTER:** No, Your Honor.

17           **THE COURT:** Okay. Do the Plaintiffs have any better  
18 feel than the one thousand you've -- more than one thousand  
19 that you've put in? And I know we're just guessing at  
20 things here, but --

21           **MR. ANAPOL:** Your Honor, Thomas Anapol.

22           Our estimate comes, I think, from an overview of  
23 speaking with at least the folks that have sought leadership  
24 with the PSC. In following with other litigations and  
25 seeing how -- as the litigation becomes more into the public

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1 knowledge, the sense is that more and more will come.

2           The only other issue that I think -- whether we  
3 address it now or not, is the scope of the MDL, which I know  
4 the sides may not agree to, as to whether these are just  
5 going to be Magnum cases or going back in time with some of  
6 the other earlier devices, and it's premature there, so I  
7 think it's a bit of a guessing game, but we're confident  
8 from the group that's in your courtroom this afternoon, we  
9 have well over five hundred cases that we believe will be in  
10 this litigation. It should, in fact, exceed one thousand,  
11 would be my strong suspicion.

12           **THE COURT:** Okay. The reason I'm asking so early --  
13 I mean, it doesn't make any difference to what I do -- but  
14 as far as the possible need to get additional help for the  
15 Clerk' Office from the Circuit and that sort of thing. If  
16 we know it's going to be four digits, then I can tell them  
17 one thing. And if we don't, I can tell them something else.

18           Let me ask you to just briefly talk about the issue  
19 of, I guess, what we have as a potential initial issue, the  
20 M2a-38.

21           I don't know, Is that M squared? I've never -- I  
22 haven't heard this spoken. Is it M2a?

23           **MR. ANAPOL:** As I understand it, it's M2a.

24           **THE COURT:** M2a?

25           **MR. WINTER:** M2a.

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1           **THE COURT:** Okay. I understand the M2a-38, we've  
2 gotten some cases that came in, and Biomet isn't -- will be  
3 deciding whether to move to remand, and I don't know whether  
4 the Plaintiffs wanted to be here with it either.

5           I have to tell you that during the last few years  
6 that I was on the panel, I became concerned because the  
7 panel -- and I, obviously, wasn't involved in this decision.  
8 I'm off it -- but the panel works very hard to figure out  
9 what the scope of the MDL should be, and then uncontested  
10 CTOs come in and just basically kick down all the walls that  
11 the panel tried to set up, and that had been a concern of  
12 mine when I was on the panel, and I have to warn you that I  
13 have that -- I've developed that concern not having anything  
14 to do with these hips but just as far as MDLs, so it is  
15 something that I'm cognizant of.

16           I guess, if both sides agree that it would be  
17 expeditious for everybody and less expensive if we deal with  
18 them all at once, that would be one thing. But having told  
19 you at least what my experience was on the panel, what frame  
20 of mind that puts me in, let me go ahead and let you talk  
21 about it.

22           **MR. ANAPOL:** So there are a number of different  
23 MDLs, and there are different litigations going back in time  
24 with heart devices and the like.

25           Sticking with the hips for the time being, and when

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1 we look at the Magnum and we look at the 38, it's important  
2 for Your Honor to note that it is a very similar device.  
3 One is a predecessor to the other. It's a mono block. It's  
4 one unit. While we go back in time, I think it's 2000 or  
5 2001 when the 38 was first approved, the Magnum comes years  
6 later. It's a very similar device.

7           Where there is a greater distinction, at least from  
8 the Plaintiffs' perspective, is the modular devices and  
9 whether the earlier, smaller-headed devices belong in this  
10 MDL or not, and, frankly, it's an issue that I think we're  
11 going to have to deal with collectively, and I'm not in a  
12 position, I don't think, to speak on behalf of others, but I  
13 think that there's probably a better delineation between  
14 that than the 38 and the Magnum. I think that the  
15 overwhelming consensus from the Plaintiffs' perspective is  
16 that they're very similar devices. They belong together.

17           When you look at, by example, Pinnacle, there are a  
18 number of devices, and Judge Kincaid in that litigation has  
19 kept everything under his umbrella, at least for the time  
20 being. He may decide to do things down the road, but he's  
21 even keeping non-metal on metal at this point until he's --  
22 until there's -- you know, the litigation has progressed.

23           **THE COURT:** All right. When we do get to the  
24 issue -- and it sounds like we will, but, again, we need  
25 somebody to be speaking for the Plaintiffs when we do -- I

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1 will need to know what's different about those units than  
2 what the panel saw, because I know there were a couple --  
3 and I haven't gone back over the transcript or even the  
4 motion or the papers filed with the panel, but it looks to  
5 me from the transfer order that there were a couple that the  
6 Plaintiffs were talking about getting in that the panel  
7 seemed to think, "No. Let's just do these models for now,"  
8 so I will be asking, when we do get to that issue, "Tell me  
9 what's different, what the panel misunderstood," something  
10 of that sort, because we do have at least part of a ruling  
11 in place that I'll be looking at.

12           Let's see. There was -- Biomet's submission  
13 indicated that it might be helpful for me to view a tutorial  
14 and sooner rather than later. I know the -- and I think I  
15 know -- from the Plaintiffs' submission, I think you folks  
16 were basically trying to tell me the common contentions,  
17 rather than being able to answer these, so I have some sense  
18 of what's going on, but, obviously, seeing a video or  
19 something is different.

20           Do the Plaintiffs have a general feel? And I'm not  
21 asking to commit anybody.

22           Also, by the way, if anybody -- you folks all came a  
23 long distance. If you have anything you want to say that's  
24 different from what Mr. Anapol says or something like that,  
25 please, let me know because we don't have a lead counsel

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1 yet.

2 But since you're standing there, Mr. Anapol, let me  
3 start with you.

4 **MR. ANAPOL:** All right, Your Honor. Thank you.

5 And we did have an opportunity to meet in person.  
6 We met for an hour or so before your hearing this afternoon.

7 I think that the general consensus is the timing is  
8 more important. I think the tutorial is, obviously, going  
9 to be something that's going to be beneficial to the Court.  
10 It's a question of how soon and when. We have no discovery  
11 yet, and that's really going to drive this, and I think  
12 that, down the road, it's absolutely going to be essential,  
13 particularly before any **Daubert** hearings, but I think to do  
14 it too early may not be, at least from the Plaintiffs'  
15 perspective, appropriate.

16 **THE COURT:** Okay. And, again, knowing you're not  
17 speaking to anybody -- speaking for anybody, but when we get  
18 down to it, let me ask that you consider whether it would be  
19 helpful to me in ruling on the discovery disputes because  
20 that's one of the concerns that I had, how I'm going to know  
21 what really is relevant to the issues here. I've got a  
22 better idea than I did before you folks filed your  
23 submissions, obviously.

24 Biomet's submission listed the -- did you want to be  
25 heard on that before I move on, Mr. Winter? I know --

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1           **MR. WINTER:** Well, I think we said, "Sooner" --

2           **THE COURT:** Sooner, right.

3           **MR. WINTER:** -- "rather than later," and I think  
4 it's important for that to happen.

5           **THE COURT:** Okay. Well, if you folks can work out  
6 timing, that's great. If not, submit something that you'd  
7 like me to do it sooner, and I'll take a response and see  
8 where we stand.

9           Biomet anticipated that there would be some  
10 non-**Daubert** summary judgment motions, some **Daubert** motions,  
11 and listed several other non-discovery related issues that  
12 I'll have to resolve, forum non conveniens, improperly named  
13 defendants, allegedly improperly named -- I don't want to --  
14 statute of limitations, loss or premature disposal of  
15 explanted devices, and severing multi-Plaintiff cases. I'm  
16 not asking for comments on that.

17           Are there other issues that you folks know of that  
18 I'm going to have to brush up on from a substantive  
19 standpoint? Obviously, discovery is all federal law. Does  
20 that pretty well cover it? I mean, obviously, when we get  
21 down to the science and summary judgment, that's a different  
22 issue.

23           Mr. Lanier?

24           **MR. LANIER:** Please, Your Honor.

25           Mark Lanier.

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1           The only thing that I can think of substantively  
2 that you may want to look at is there is an FDA interplay  
3 with -- one of the compelling issues for all of us is making  
4 sure explanted devices are properly saved and preserved in a  
5 way where there's a chain of custody where we're able to use  
6 them. There's an overlay of that right now in that we  
7 believe that the FDA has ordered, in essence, a 522  
8 proceeding, which, under the FDA rules, means that the  
9 manufacturer is responsible for doing some post-surveillance  
10 study, for lack of a better word, but it's got to be  
11 something that's done in conjunction with the FDA where the  
12 FDA approves of the protocol. I think that it probably,  
13 from a substantive angle, is something that's going to come  
14 rising to the surface pretty quickly because we've got to  
15 make sure that explanted devices are being maintained in an  
16 adequate way, so I would urge the Court to consider getting  
17 one of the brilliant clerks or someone to start figuring out  
18 the 522 angle, as well, from the FDA.

19           **THE COURT:** Okay. So when I spoke of loss or  
20 premature disposal of explanted devices, it's really just  
21 disposal that it's going to be with a lot of different  
22 sub-issues?

23           **MR. LANIER:** Right, right, and also with the overlay  
24 of what may be required by the FDA.

25           **THE COURT:** Part of it.

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1 Two other things. And, again, it's too early, but I  
2 was just looking for your thoughts on it. Well, three  
3 things, and then I'll turn it over to you folks, but these  
4 were listed in Case Management Order Number 1, and I'm just  
5 interested in your thoughts on it.

6 One is whether bellwether trials might be useful,  
7 and I know Biomet said they think they would be.

8 Do I understand correctly that there have been -- I  
9 know this is not the beginning, the genesis of Biomet  
10 litigation on this. Have there been trials under either of  
11 these models before?

12 **MR. WINTER:** No, Your Honor. We just had summary  
13 judgment, and it was a **Daubert**-related summary judgment.

14 **THE COURT:** Okay. Because the panel said that there  
15 had been litigations that had been settled.

16 **MR. WINTER:** Yes.

17 **THE COURT:** So none of these have gone to trial?

18 **MR. WINTER:** None have gone to trial, Your Honor.

19 **THE COURT:** Okay. How many -- as long as you're  
20 there, Mr. Winter, how long -- how many would you think we  
21 would need in order to cover the various different types of  
22 Plaintiffs?

23 **MR. WINTER:** I'm going to follow the order, Your  
24 Honor.

25 **THE COURT:** Yeah, I know.

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1 Mr. Anapol, if you could, step aside and let  
2 Mr. Winter grab the microphone, but don't go far because  
3 I'll get you back up here.

4 **MR. ANAPOL:** (Complies.)

5 **THE COURT:** Also, it's important -- we do have  
6 several people, I think, listening on the phone, and it's  
7 important for them to hear.

8 **MR. WINTER:** Your Honor, as we said in our  
9 submission, we have two issues, I think, when it comes to  
10 **bellwethers.** One: What type of case are we going to try?

11 **THE COURT:** Right.

12 **MR. WINTER:** Are we going to try a case where there  
13 **has been no revision?** Because I think that's, right now,  
14 about a **third of the inventory.** Are we going to try a case  
15 where the **explanted device is available for analysis?** Are  
16 we going to try a case that involves an **implant in 2003?**  
17 Because, as we pointed out to Your Honor, we have some  
18 serious **state-of-the-art issues** which plague two sides as to  
19 whether an orthopedic surgeon in 2011, who's implanting a  
20 device after substantial information, is a totally different  
21 case, so we have a lot of work to do collectively to try and  
22 define what would be representative cases once we know what  
23 the inventory is, so I think we've got a dynamic there which  
24 we may not be able to really grapple with until we know with  
25 some degree of certainty what the number is and what the

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1 cases look like.

2 **THE COURT:** So you can identify three, at this  
3 point, and there may be more?

4 **MR. WINTER:** Right.

5 And then our real strong concern, on top of that,  
6 Your Honor, is we're an Indiana corporation, so there's  
7 going to be no diversity jurisdiction for an Indiana  
8 Plaintiff here, and we have some real concerns about trying  
9 a case where the key witnesses, the implanting surgeon and  
10 the explanting surgeon, will not be a live witness. We've  
11 laid that out to you, and we're going to have to figure out  
12 some way to solve that because we think, you know,  
13 bellwether trials should be representative, and a  
14 representative trial, generally, is going to be one where  
15 you have both of those individuals testifying live.

16 And if I can go back to the 522 issue, because  
17 Mr. Lanier does raise a good point, the FDA issued an order  
18 back in 2011 requiring all orthopedic manufacturers to come  
19 up with a plan, post-marketing plan. Biomet, actually, was  
20 the first company to have their 522 plan, which is the  
21 acronym we all use, approved, and it's moving forward, so  
22 there are requirements in there about analysis of explanted  
23 devices, which we're scrupulously adhering to, so that's  
24 fine.

25 I think one of our big issues is devices for these

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1 existing cases, which we have no idea where most of them  
2 are, and we need to come up with an understanding as to  
3 what's left and when did it leave.

4 **THE COURT:** Okay. Thank you.

5 From the bellwether standpoint, sir?

6 **MR. ANAPOL:** I have a lot I'm going to try and cover  
7 here.

8 So with respect to prior lawsuits, I just want to  
9 back up for a moment, if I can. This whole litigation,  
10 metal-on-metal hip litigation, is evolving, has been  
11 evolving. We have at least two other, if not three other,  
12 four other MDLs where the bellwether process is up and  
13 running, particularly an ASR.

14 I think, from the Plaintiffs' perspective, it's not  
15 going to be that difficult to identify representative cases.  
16 We have some disagreements with respect to the  
17 characterization of the existing inventory with respect to  
18 really what our world of cases are that are out there. We  
19 suspect -- particularly with these non-revisions. There are  
20 some cases that were filed that are non-revisions. Many of  
21 them, I think, have evidence of cobalt and chromium  
22 poisoning, evidence of device loosening. There's an  
23 indication that these devices are going to come out, that  
24 they haven't yet and they will, and the issue as to whether  
25 the device is available or not won't be an issue in those

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1 cases.

2           There may be some rogue cases that are older that  
3 there's some **statute of limitations**. Case specific,  
4 individual cases may or may not be an issue, but I think  
5 that there will be, absolutely, the availability, both with  
6 the 38, with the Magnum, and depending upon where the  
7 litigation goes, they'll be representative cases. I think,  
8 collectively, the consensus from the Plaintiffs' side is  
9 we're in favor of bellwether. It makes sense.

10           With respect to the live witnesses that Mr. Winter  
11 spoke about, you know, as these cases are transferred from  
12 all over the country, and those treating doctors are in  
13 other jurisdictions, we're more than happy to set up shop in  
14 those jurisdictions and try those cases there.

15           **THE COURT:** Okay. I'll follow up on that.

16           Judge Frederick Motz of the District of Maryland is  
17 currently the head of the Judicial Conference's  
18 Inter-Circuit Assignment Committee. I'm not sure how many  
19 there are on that committee other than Judge Motz, but he,  
20 of course, served on the panel, as well, and he has  
21 expressed at least a preliminarily favorable view about  
22 assigning **inter-circuit transfers**, assuming the circuit  
23 chiefs agree, of an MDL judge to an area where a trial has  
24 to be conducted, and I don't have any problem with doing  
25 that, if that's how it all plays out. Obviously, I don't

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1 want to do a couple dozen bellwether trials that way, but to  
2 do it for a few, I think, I'd be happy to do that.

3 Again, just off the cuff, Biomet indicated that it  
4 didn't think that a special master would be appropriate, at  
5 least as things look now.

6 Do you have any differing views on that?

7 **MR. ANAPOL:** It's probably premature. You know, I  
8 think we do need to know how many cases are out there. If  
9 it is more than one thousand or two thousand, I think Your  
10 Honor may wish for a special master. If it's five hundred  
11 or one thousand, maybe not. I think it's premature.

12 **THE COURT:** Okay. And then the last thing that I  
13 have, understanding that you folks want to talk about the  
14 proposed case management order a little bit today but work  
15 it out then between now and the next session, obviously, I  
16 want to work you through mediation or settlement discussions  
17 at some point while you're here. I don't want to waste  
18 everybody's time by sending you there before you're ready to  
19 talk. I don't want to slow down the MDL by putting it off  
20 so far that you're cooling your heels, and I know Biomet  
21 didn't have a good feel yet for when that might be helpful.

22 Is that fair?

23 **MR. WINTER:** That's definitely correct, Your Honor.

24 **THE COURT:** Do you folks have any feel as to what  
25 point -- I'm not asking for, you know, six months out, nine

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1 months out -- but at what point in the process, the  
2 discovery process, what all will you need to cover or to get  
3 discovery on before we should be talking about a mediator or  
4 something of that sort?

5 **MR. ANAPOL:** That's a tough question, Your Honor. I  
6 think that it's premature today, obviously, and I think we  
7 really need to better define the scope of the MDL. We need  
8 a better understanding of which cases are involved and  
9 included. We need to fight through some of these issues  
10 that Mr. Winter raised about revision versus non-revision,  
11 whether there's devices or not, and so it's going to take  
12 some time, and the litigation is going to mature, as has the  
13 other hip litigations, and we can see a distinct difference  
14 from the beginning of any one of those three or four cases  
15 as a year goes by. It's really speculative to say a year.  
16 It's, obviously, premature now.

17 **THE COURT:** Okay. All right. I was just looking  
18 for a feel, if anybody had one, and, obviously, it's too  
19 early to even have a feel.

20 The only other thing that I wanted to do is see if  
21 there's anything I can be working on now that would be  
22 helpful to you, and, obviously, let you folks raise whatever  
23 you wanted to raise because I know there's other issues than  
24 what I have thought of, and also then to schedule the next  
25 case management conference.

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1           **MR. ANAPOL:** Your Honor, there is one issue that I  
2 don't -- I'm still somewhat unclear or uncertain about, the  
3 electronic filing in South Bend as far as if cases are  
4 transferred. Obviously, we have to get that certificate of  
5 good standing in our jurisdictions.

6           But is there a mechanism set up in South Bend that  
7 will notify all attorneys that are attorneys of record  
8 because, at this point, I think, other than Mr. Devine, the  
9 Plaintiffs have not been copied?

10           **THE COURT:** Really?

11           **MR. ANAPOL:** No.

12           **THE COURT:** Is there any -- maybe that's just  
13 something we overlooked.

14           Ms. Walker, is there any problem -- or Ms. Darah --  
15 any problem, if an attorney has a constituent case in the  
16 MDL, receiving notice?

17           I mean, so far, frankly, all we've had are a few  
18 orders and a lot of CTOs and "Here's a new case," so I don't  
19 think you've missed out on anything.

20           **MR. ANAPOL:** And, Your Honor, I don't mean to cut  
21 you off. You know, I know we haven't missed anything yet,  
22 but a concern --

23           **THE COURT:** Sure.

24           **MR. ANAPOL:** There was something in one of your  
25 orders that suggested that lead counsel may be responsible

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1 to notify people until they're in and so forth, and it just  
2 concerned me a little bit. I don't know what the process is  
3 here yet.

4 I know the other MDLs kind of routinely do it, but  
5 --

6 **MS. DARRAH:** At this point, the only attorneys  
7 listed in the lead MDL case, the 2391, are the interim  
8 liaison counsel. They are the only ones being noticed.  
9 However, if you want everyone noticed, that's not a problem.  
10 We'll make arrangements.

11 **THE COURT:** Okay. Well, why don't we go ahead and  
12 do everyone then so that we'll flood your in-boxes for a  
13 while.

14 **MR. ANAPOL:** We can do it prospectively, Your Honor.

15 **THE COURT:** Was there anything else that you folks  
16 on the Plaintiffs' side wanted to talk about?

17 (No response.)

18 **THE COURT:** Mr. Winter, anything for --

19 **MR. WINTER:** Just two small matters, Your Honor.  
20 One, an apology.

21 Exhibit J to our submission omitted two  
22 fully-submitted motions that have been transferred to you.

23 **THE COURT:** Okay.

24 **MR. WINTER:** There's no urgency to them, but they  
25 were motions to dismiss filed in two cases that were

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1 transferred. One's Modrey and one's Selby from the Western  
2 District and the Eastern District of Pennsylvania.

3 If you want, Your Honor, we'll give you a revised  
4 Exhibit J Monday to put those two cases on there.

5 **THE COURT:** That would be helpful.

6 I do want to tell you that out of the eight you  
7 listed, by the way, one of them -- there has been an  
8 objection to the CTO, so we don't have that -- one of them,  
9 I think there's some issue about another manufacturer having  
10 been named -- I think it was DePuy -- so the panel is still  
11 looking at that. One just got here after it was sent to the  
12 Northern District of Illinois, so they're getting here, but  
13 I just wanted to let you know the status of those.

14 **MR. WINTER:** And, actually, Your Honor, to update  
15 what you just told us, two of those motions that are on  
16 Exhibit J -- one of them, there is an objection, and that's  
17 to the CTO for that case. There's, actually, the second one  
18 from the Northern District of Illinois, the **Millman** case,  
19 where an objection to the transfer was filed last week on  
20 that matter, as well, so that may have gotten to you, but  
21 that one is on hold, as well.

22 **THE COURT:** Oh, I see. Okay.

23 **MR. WINTER:** Those are the two cases which have been  
24 tagged but objections have been filed that we're aware of.

25 The only other ministerial question we have, Your

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1 Honor, is we have a group of cases which complaint filed,  
2 tag along, they're moving here, and a time to answer is  
3 coming up, you know, in the near term. What we've suggested  
4 to the Plaintiffs' counsel in those cases is an informal  
5 agreement to adjourn the time to answer until we get to a  
6 point here, whether we have a master complaint, whether we  
7 don't have a master complaint, and we can file all the  
8 answers we need to file once the cases are here, but  
9 logistically it's a little difficult to be filing an answer  
10 in a case that's already been tagged, so if that's  
11 acceptable to Your Honor -- and I'm assuming our colleagues  
12 are amenable to that -- we'll just continue to do that.

13 **THE COURT:** Any problem with that approach as to --

14 **MR. ANAPOL:** They're not my cases, but I have no  
15 problem.

16 **THE COURT:** So, basically, as part of today's order  
17 then, I would order answers that are due or as they become  
18 due but have not yet been filed, that that time be stayed  
19 and set it until the next case -- a week after the next case  
20 management conference, and we can pin it down a little  
21 better then.

22 Would that be agreeable to both sides?

23 **MR. WINTER:** That would be agreeable to us, Your  
24 Honor, and, actually, I think it's Paragraph 6 of your first  
25 pretrial order stayed everything but the time to answer.

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1           **THE COURT:** But not the answers, right.

2           **MR. ANAPOL:** One of my colleagues raised one other,  
3 I think, very useful and important process that I think  
4 Mr. Winter would agree to. I should ask him, obviously, but  
5 I think it will help both of us understand better what is in  
6 this MDL, what cases are out there, and it's worked very,  
7 very well in some of the other litigations, and that is a  
8 preliminary disclosure form that will be the responsibility  
9 of the Plaintiffs to fill out relatively quickly, and the  
10 timing with respect to the filing of an answer and so forth,  
11 however we do it, very brief, one-page preliminary  
12 disclosure where we identify the device, whether there's a  
13 revision or the revision date, and just a handful of other  
14 topics that will help both sides understand what this  
15 litigation -- you know, what the cases are in the  
16 litigation.

17           **THE COURT:** All right. I'm assuming that would be  
18 all right with Biomet.

19           **MR. ANAPOL:** I would assume you'd love it, with the  
20 caveat that it's shared with -- you know, it's the  
21 responsibility of a filing attorney to share it with  
22 Plaintiffs' Bar, as well, not just to the Defendants, and  
23 that's the issue, so that we know what's going on, also.

24           I can't imagine you would have an objection. I  
25 don't want to speak for you, but --

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1           **THE COURT:** Okay. Well, let me ask that -- and  
2 this, I guess, leads to the next issue -- you folks try to  
3 work out a particular sheet or questionnaire, whatever you  
4 want to call it --

5           **MR. WINTER:** Sure.

6           **THE COURT:** -- and then we could include that in  
7 what we do at the next case management conference.

8           There was --

9           **MR. WINTER:** That would be acceptable to Defendants,  
10 Your Honor.

11           **THE COURT:** Okay. I thought it probably would be.

12           Do you want to talk at this point -- I couldn't tell  
13 from the agenda that both sides submitted whether you wanted  
14 to talk about the case management order at this point or you  
15 folks need to talk first. I'd understand if it's the  
16 latter, but if anybody wanted to talk about it today, I'm  
17 happy to.

18           **MR. WINTER:** If I can speak first, I think --

19           **THE COURT:** Again, this is for the sake of the  
20 people on the phone, as well (indicating).

21           **MR. WINTER:** Your Honor, once the leadership is  
22 established on the Plaintiffs' side, there's a couple of  
23 necessary issues that get resolved that go into a pretrial  
24 order, and then there's a whole series that follow that.

25           I think we all know enough to realize what we're

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1 going to have to do. So once this committee is formed on  
2 the other side, in pretty short order, we can get many of  
3 the preliminary issues resolved and come up with an order  
4 that we can submit at the next, hopefully, pretrial  
5 conference.

6 **MR. ANAPOL:** We would agree.

7 **THE COURT:** Okay. Well, let's talk about when the  
8 next one will be.

9 Again, I don't -- I don't want to -- I want to keep  
10 myself available to you and keep the thing moving, but, on  
11 the other hand, I don't see any reason to have you all try  
12 to get here. Unless global warming is going to continue  
13 through January, this is a tough place to get to.

14 How about if we were to have a telephonic conference  
15 on, say, January 7th at 1:00 Eastern Time? And I assume  
16 that the Plaintiffs would be at least the coordinating  
17 colead counsel and whatever executive committee members you  
18 want to participate. In fact, I guess, the best thing to do  
19 would be to ask the Plaintiffs to set up the call because  
20 you would know who from your end would need to be on, and,  
21 obviously, there's fewer noses to count at the other table.

22 Would that time and date work for you? Anybody for  
23 whom that just doesn't work by telephone?

24 **MR. ANAPOL:** Your Honor, I'm still turning my phone  
25 on.

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1           **THE COURT:** Okay.

2           **MR. ANAPOL:** Did you say January 7th?

3           **THE COURT:** January 7, Monday.

4           **MR. ANAPOL:** And was that for a call or in person?

5           **THE COURT:** That would be for a call.

6           **MR. LANIER:** It'll work.

7           **MR. ANAPOL:** Absolutely. Thank you, Your Honor.

8           **THE COURT:** The Apple people would want to know that  
9 he had a chance.

10          **MR. LANIER:** The answer is "yes."

11          **THE COURT:** Okay. All right. So we'll do January  
12 7th, 1:00, Eastern Standard Time, with the Plaintiffs'  
13 counsel to place the call, and we'll have an order in place  
14 saying who that is.

15                 If there's anything you want me to look over  
16 beforehand, proposed orders or anything of that sort, please  
17 submit it to chambers by January 2nd so I've got a couple  
18 days to look at it and evaluate it.

19                 You people came a long way for a forty-five minute  
20 hearing.

21                 Is there anything else that would be helpful to talk  
22 about?

23   **(No response.)**

24          **THE COURT:** Thanks.

25                 And, again, if you can get tickets, it might be

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1 worth staying another day.

2 Thank you, folks.

3 MRS. POTTS: All rise.

4 (Proceedings concluded.)

5 \*\*\*

6 CERTIFICATE

7 I, DEBRA J. BONK, certify that the foregoing is a  
8 correct transcript from the record of proceedings in the  
9 above-entitled matter.

10 DATED THIS 20TH DAY OF NOVEMBER, 2012.

11 S/S DEBRA J. BONK

12 DEBRA J. BONK  
13 FEDERAL CERTIFIED REALTIME REPORTER  
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