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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

MONDAY, JANUARY 7, 2013

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

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*Proceedings reported in machine shorthand. Transcript
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APPEARANCES

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For Plaintiffs:

MR. W. MARK LANIER
MR. THOMAS R. ANAPOL
MR. RICHARD D. MEADOW
MR. ROBERT DASSOW
MR. RICHARD ARSENAULT (telephonically)
MR. PETER FLOWERS (telephonically)
(see docket for addresses)

For Defendant:

MR. JOHN D. WINTER
MS. ERIN LINDER
MR. BLAINE DART
(see docket for addresses)

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1 **THE COURT:** Good afternoon.

2 This is 12MD2391, **In Re: Biomet M2a-Magnum Hip**
3 **Implants Products Liability Litigation.**

4 Whoever's listening on the phone, please be careful
5 not to rustle papers.

6 If I could ask you to state your appearances for the
7 record, please.

8 **MR. ANAPOL:** Good afternoon, Your Honor. Thomas
9 Anapol.

10 **MR. DASSOW:** Hi, Judge. Rob Dassow.

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

12 **MR. WINTER:** Good afternoon, Your Honor. John
13 Winter.

14 **MS. LINDER:** Good afternoon, Your Honor. Erin
15 Linder.

16 **MR. DART:** Good afternoon. Blaine Dart.

17 **THE COURT:** Okay. First of all, congratulations to
18 both sides on the work you did and thank you. It looks like
19 you narrowed things down considerably for what we have to
20 talk about today, but, obviously, we do have some things to
21 talk about today. But I was impressed, as I ran through the
22 submissions over the weekend, how much you have agreed on,
23 and I know, on a couple of them, you said you were still
24 talking or there might be some additional things.

25 Have any additional agreements been reached since

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1 you submitted your material?

2 **MR. ANAPOL:** Yes, Your Honor. We reached -- there's
3 some language, I think, in the protective order that we've
4 also agreed to. And depending upon how Your Honor wants to
5 go through this, we can maybe approach it as we go through
6 the various individual issues that we have to cover. So I
7 think there's more ground together where we're in full
8 agreement, and we've also, I think, better identified where
9 we have significant issues that we need Your Honor's
10 assistance.

11 **THE COURT:** Okay. Well, let me invite you folks to
12 start, and we'll work our way down through it.

13 **MR. ANAPOL:** Okay. Thank you. Your Honor, thank
14 you.

15 **THE COURT:** Let me ask that you get near a
16 microphone for the sake of the people who are listening.

17 **MR. ANAPOL:** Okay. Thank you, Your Honor.

18 So I do think we've had real good success in working
19 with each other, and we've come to an agreement, as Your
20 Honor's already stated, on the overwhelming majority of the
21 issues that Your Honor asked us to look at for purposes of
22 this case management conference.

23 One request I would have, and I'm not quite sure how
24 to approach this. We have one discrepancy as to actually
25 how we presented everything to you. We have a CMO-2, which

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1 is pretty basic, and then we've broken all of the various
2 subtopics into separate CMOs, and it looks like it would
3 seem to make a little bit more sense because we do have
4 disagreement, and some certain areas are not going to fit
5 well, so --

6 **THE COURT:** So the reason you were proposing that
7 was just to break out the areas of disagreement?

8 **MR. ANAPOL:** I think so and to treat them
9 individually, as opposed to trying to lump it all together
10 into one CMO.

11 **THE COURT:** Okay.

12 **MR. ANAPOL:** So if Your Honor would like me to start
13 with CMO-2, we have agreed -- one of the areas that we were
14 still unclear on, the language is in the plaintiffs'
15 proposed CMO-2, service of complaints, the addition of
16 Biomet U.S. Reconstruction, LLC. The defendant has agreed
17 that that's proper, and they will accept service on that
18 defendant.

19 **THE COURT:** Okay.

20 **MR. ANAPOL:** One issue that the parties, I think,
21 wanted to address -- we're in fairly full agreement as to
22 the request that, if there is a direct file, the cases be
23 remanded back to the proper venue jurisdictions, assuming
24 Your Honor is okay with that. I think we have different
25 reasons why we want the plaintiffs to have an opportunity to

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1 have their case heard in their home jurisdiction. And
2 there's language that we've proposed, which was consistent
3 with language Judge Fallon used in the Vioxx litigation.
4 We're comfortable with that. Mr. Winter proposed his own
5 language, which, I think, also, spells out really what we're
6 trying to do, which is to have the cases remanded back at
7 the right time and place.

8 **THE COURT:** So either set of language is okay with
9 you?

10 **MR. ANAPOL:** We prefer ours, but, again, as long as
11 Your Honor is on board, I think it's kind of a non-issue.

12 **THE COURT:** Let me ask this, as well. We talked at
13 the last conference about the possibility of bellwether
14 trials, and everybody thought that, at some point in the
15 process, that would be useful. This just occurred to me
16 over the weekend during a half time. And would Lexecon
17 affect the ability to try as a bellwether trial -- I'm not
18 talking about cases that somebody is insisting on a trial
19 back home, even if the case hasn't been back home yet -- but
20 would that allow the use of such a case for a bellwether
21 trial -- again, if the parties were to agree -- that
22 Lexecon, otherwise, would prohibit, if the case started
23 here, in other words, with the idea that it was going to
24 leave later?

25 **MR. ANAPOL:** My understanding, Your Honor, is the

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1 parties can agree to anything they want. It's up to Your
2 Honor to, ultimately, make that decision, and so I think
3 that the intent of the parties, at this point, is -- there's
4 case law that, I think, could spin either way, but I think
5 that the intent of the parties is always looked at, as I
6 understand it -- and Mr. Winter can correct me if I'm wrong.
7 The parties do agree that wherever these bellwether cases
8 go, it ought to be in the proper jurisdiction of, you know,
9 the venue, wherever that may be.

10 **THE COURT:** Okay. We'll circle back around. I'll
11 invite your comment on all of this later after we hear from
12 the plaintiff.

13 **MR. ANAPOL:** Shall I go forward with my CMO-2, stick
14 with that, Your Honor?

15 **THE COURT:** Yeah.

16 You said that there was a question -- in your
17 supplement to the agenda, you said that there was a
18 severance of parties issue, that basically everybody agreed
19 it should happen, but --

20 **MR. ANAPOL:** It's a question of how Your Honor
21 thinks it's appropriate, and you've read our papers. I
22 don't think either side -- I don't want to speak for
23 Mr. Winter. You know, that's your role, Your Honor,
24 whatever you think is the appropriate method. We've told
25 you what we think is right. It's not a big issue.

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1 **THE COURT:** Anything that works?

2 **MR. ANAPOL:** And the only other issue that we've got
3 in our preliminary CMO-2 is just a very clear, detailed
4 explanation for those not involved in the PSC that are
5 filing cases, making sure that they understand the
6 electronic filing requirements that Your Honor sets forth.

7 **THE COURT:** Okay.

8 **MR. ANAPOL:** So, you know, with respect to the
9 CMO-2, the only other significant issue that is still
10 unclear -- let me just make sure I've got this right -- is
11 just communications with the Court and among the parties.
12 We've got some language that we've proposed. I'd want to
13 hear from Mr. Winter, if he's opposed to that, because I
14 think we kind of didn't circle back and discuss that issue.

15 **THE COURT:** Did not circle back?

16 **MR. ANAPOL:** Well, we had talked about it, and I
17 don't know that we -- John was going to -- Mr. Winter was
18 going to get back to me, and I'm not sure we actually had
19 that final dialogue.

20 **THE COURT:** Help me understand what the differences
21 are because I think I looked at that before I started
22 comparing these side by side.

23 **MR. ANAPOL:** As I recall, I think that the
24 defendant's proposed motion does not reference one way or
25 the other any ex parte communications. That's the primary

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1 focus. We just want to make sure that it's in the record.

2 **THE COURT:** Okay. So it's --

3 **MR. LANIER:** Paragraph V.

4 **MR. ANAPOL:** It's Paragraph -- yeah, Paragraph V.

5 **THE COURT:** Paragraph V of yours?

6 **MR. ANAPOL:** Roman Numeral V.

7 **THE COURT:** So I can't find the corresponding thing
8 in the defendant's because they don't have language there?

9 **MR. ANAPOL:** I don't think they do.

10 **THE COURT:** Okay. All right. I guess, let me ask
11 this on your Paragraph V. I understand the no ex parte
12 communications with the Court. Although, there may have to
13 be some communications with liaison counsel just for
14 scheduling, but, obviously, we would include everybody on
15 that. What is Paragraph II intended to do there?

16 **MR. ANAPOL:** I think Paragraph II has just been
17 consistent with many other case management orders that have
18 been prepared in other (inaudible) litigations just to make
19 sure that everything remains attorney/client privilege, to
20 the extent that it is, any conversations or dialogue with
21 the parties. I think it's kind of boilerplate language,
22 Your Honor.

23 **THE COURT:** Okay.

24 **MR. ANAPOL:** I don't know if you want to hear from
25 Mr. Winter or should we get into the next topic?

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1 **THE COURT:** That might be easiest. We've got time
2 to do it this way.

3 Mr. Winter, on the case management order, I guess,
4 insofar as it goes, so we can address the other issues. I
5 understand you want to have it all in one document.

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

7 **THE COURT:** And you can tell me why, but, first,
8 we'll deal with them separately here as we go through.

9 **MR. WINTER:** Sure.

10 I think, in terms of the ongoing record here, if we
11 have one order that incorporates a number of other parts of
12 the initial plan of this case, if something needs to be
13 amended prospectively, having worked off of this order, is
14 going to make it much easier for the parties to understand
15 where they are, for the Court to give clear directions to
16 the parties, and for this to proceed in an orderly fashion.
17 I mean, that's just how we see it.

18 If I can address just a couple of the points.

19 On severance, I think everyone agrees that
20 multi-plaintiff cases need to be severed. Where we depart
21 is that we think if a multi-plaintiff case is dismissed
22 without prejudice with a certain period of time to re-file,
23 which is normally the way it would be done, that you have to
24 pay the filing fee for each of those additional cases.

25 What their order says is, "That doesn't happen,"

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1 and, in fact, the multi-plaintiff case, as we understand
2 their proposal, wouldn't even be dismissed, and you would
3 have separate filings that, somehow, internally, there would
4 be some way of identifying the individual plaintiffs as
5 individual plaintiffs but still be part of the main case.
6 And our experience has always been that when a
7 multi-Plaintiff case is severed, it has to be re-filed, each
8 one individually, and the plaintiff pays the appropriate
9 filing fee, so that's the distinction between the two orders
10 on that point.

11 **THE COURT:** Okay.

12 **MR. WINTER:** With respect to the Paragraph V, I
13 think Ms. Linder will address that issue.

14 **MS. LINDER:** Your Honor, with respect to Paragraph
15 V, as you pointed out, Biomet does not include a similar
16 statement about ex parte communications in Biomet's proposed
17 CMO, and the reason is not that Biomet objects to a
18 prohibition on ex parte communications, but, rather, if you
19 look at the Court's Pretrial Order Number One, Paragraph 19
20 specifically delineates how the Court wishes to treat ex
21 parte communications, which is prohibiting them, so Biomet
22 feels it's unnecessary to include that section in Paragraph
23 V, again, in this case management order.

24 **THE COURT:** Does that paragraph, also, address the
25 topic of the second paragraph, dealing with communications

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1 among plaintiffs' counsel and between plaintiffs and
2 defendants or is that something beyond what I've already
3 done?

4 **MS. LINDER:** It does not. It's not in Paragraph 19.
5 I believe that it is in other paragraphs of the pretrial
6 order, I think, Paragraph 16, specifically.

7 And then also -- which I'm sure the parties were
8 going to get to in a second here -- there are also proposed
9 orders that deal with attorney/client privilege and work
10 product privilege and disclosure of that information, so we
11 believe that that -- the prohibitions on that information is
12 already covered in other submissions.

13 **THE COURT:** All right. Thank you.

14 All right. Mr. Anapol and Mr. Lanier, I guess we
15 move onto the fact sheets.

16 **MR. ANAPOL:** Mark, do you want to go?

17 **MR. LANIER:** It doesn't matter to me.

18 Your Honor, to clarify -- my hearing may have just
19 slipped -- did you say, "Anything further on this matter,"
20 or, "on fact sheets"?

21 **THE COURT:** Moving to the fact sheets.

22 **MR. LANIER:** Then, yes, I am up to bat.

23 Your Honor, plaintiff's fact sheets have an
24 interesting history in the MDL process, and I'm probably
25 telling you nothing you do not already know in much greater

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1 depth than I do, but I think it's useful for us to all be on
2 the same page.

3 Originally, in MDL proceedings, there was always a
4 question of whether or not there might be a class
5 certification that would come somewhere down the pike. This
6 was back in the days before it was clarified that you can't
7 really certify a personal injury class. And the plaintiff's
8 fact sheets were very useful in determining whether or not
9 there was typicality and commonality, and so they were very
10 thorough, and they were a staple of the MDL procedures.

11 In the process of history evolving, there came to be
12 another recognition that while fact sheets are not so useful
13 anymore on issues of class certification, fact sheets still
14 serve an important purpose if we're going to try and do
15 bellwether trials because it gives the Court an idea and it
16 gives the parties an idea of what the panoply of cases are
17 before the Court, how many go in this bucket, how many go in
18 that bucket, what would be the most profitable cases for you
19 to spend your time and effort trying as a bellwether.

20 Because this has been a morphing process, the
21 plaintiff's fact sheets have morphed, as well. What the
22 defendants have done in this case is they have basically
23 taken, it looks to me, like about ten different MDLs that
24 range from everything from orthopedic issues at issue in
25 this case, to birth control issues for the twenty-something

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1 feminine crowd of the world, to issues of neurotic drugs and
2 other things, and they have cobbled together and taken a
3 smorgasbord from all those different plaintiff's fact
4 sheets, rolled them all into one, so that if we're counting
5 subparts, we have something on the order of almost two
6 hundred questions that are supposed to be answered in a
7 binding interrogatory fashion within ninety days, a number
8 of these questions being things that, frankly, are
9 irrelevant for what we're dealing with in this case. For
10 example, in a geriatric predominant crowd of hip implants,
11 to be asking every school they went to since junior high
12 school seems to be a little bit outside the realm of
13 information that's going to be helpful in modeling or
14 sculpting some type of a bellwether process. Similar
15 questions that are on here just seem, to me, to be far
16 beyond the pale of what's useful in a case like this.

17 Does that mean that there cannot be some ingenious
18 way of devising some way to make it, if not relevant, at
19 least reasonably calculated to lead to relevant evidence?
20 Sure, but that's not what a plaintiff's fact sheet is about.
21 Even an interrogatory is not necessarily about that way,
22 which is why, absent your permission or our agreement,
23 thirty is the cap. It's certainly not 197.

24 So what we've got here is a situation where the
25 defendants want a plaintiff's fact sheet that we believe is

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1 far beyond the pale of what's reasonable. We suggested in
2 reply the plaintiff's fact sheet that was used in Judge
3 Kincaid's court in the Pinnacle Hip Litigation. It is a
4 plaintiff's fact sheet that supplies, for example -- you
5 know, the defendants are going to get medical
6 authorizations, and they're going to get a list of all of
7 the doctors, all of the hospitals, all of the pharmacy
8 records, all of the medical care providers. They can go get
9 those records. To make us, within a ninety-day stretch, not
10 only go get those records, but then make us go through and
11 fill in the blank, blank after blank after blank, on matters
12 that they're going to have the records to, anyway -- and the
13 original evidence is going to be in those records -- is an
14 example of things that could be culled down and were culled
15 down in our Pinnacle litigation.

16 When I say, "It was Judge Kincaid's order," I should
17 underscore Judge Kincaid did not have to rule on it. It was
18 an agreement between J&J/DePuy and between us as the
19 plaintiffs, and I don't want to misstate that. It was not a
20 ruling from the Court, but it's one that was agreed to, and
21 we worked together on it as best as we could.

22 Now, I have had phone conference, at least one, with
23 Mr. Winter and some others where we've tried to work through
24 this plaintiff's fact sheet to save you from this hearing
25 and to allow us to come together with something united. We

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1 did meet early today on it. We're not in a position to
2 agree, and I don't know how we will do that short of either
3 you -- or if you want to assign us to a master or a
4 neutral -- working through some of these things. From our
5 perspective, it's far out of bounds of what a plaintiff's
6 fact sheet should be.

7 **THE COURT:** So when you indicated in your
8 supplement, your addendum, "Plaintiffs request additional
9 time to meet and confer on the PFS," you don't think that's
10 worthwhile just between the parties?

11 **MR. LANIER:** I was hoping that it would be. After
12 our phone conference last week and then after our meeting
13 today -- we all got here early today to try and work through
14 final issues, Judge Miller -- and everything that I brought
15 up, including the middle school records, was, "Well, we'll
16 just have to agree to disagree," so I don't know that it
17 goes anywhere absent you throwing us to a master. Or,
18 perhaps, if you give us some oral instructions of what you
19 expect, then, perhaps, a meet-and-confer would enable us to
20 better mold ourselves to you, but I think, right now,
21 they've got a kitchen-sink attitude, we've got a de minimus
22 attitude, and we need some guidance from the Court, at
23 least.

24 Thank you.

25 **THE COURT:** Thank you, sir.

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1 Ms. Linder.

2 **MS. LINDER:** Your Honor, there's two reasons why the
3 Court should approve Biomet's version of the proposed
4 plaintiff's fact sheet. Now, the first would be that all of
5 the requested questions in that fact sheet are reasonably
6 calculated to lead to the discovery of admissible evidence.

7 I have to disagree with the characterization of the
8 plaintiff's fact sheet proposed by Biomet as a smorgasbord
9 of questions about anything and everything under the sun.
10 To the contrary, all the questions in there are reasonable,
11 and they were all intended to gather information to help
12 Biomet prepare its defense.

13 Your Honor, the reason that these plaintiff's fact
14 sheets are helpful is that they streamline the discovery
15 process. All of the questions that are posed, including the
16 questions about education, medical history, prescriptions
17 that the plaintiffs have taken, all of those questions would
18 all be fair game at a deposition.

19 Now, being able to ask these questions in advance in
20 a fact sheet from each of the plaintiffs then allows Biomet
21 to prepare for each deposition, to prepare the discovery
22 process, so when depositions start taking place, the scope
23 is narrowed, and time isn't wasted on background questions
24 and essential information about revisions and
25 implementations that can be asked in advance.

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1 Now, the second reason that the Court should approve
2 Biomet's version of the PFS is because the plaintiffs aren't
3 making specific objections about the content of the
4 question. The objections the plaintiff is making here is
5 that there's just a sheer too many questions, just the
6 amount of the questions, but, as you know, Your Honor, the
7 Court has discretion, wide discretion, to order more than
8 twenty-five or thirty interrogatories, and Biomet feels
9 that's especially appropriate in a case like this where the
10 issues are complex and where we have a complex litigation,
11 whereas these types of questions are justified.

12 Now, Your Honor, if you look at -- if you compare
13 the two different plaintiff's fact sheets that are being
14 proposed here, Biomet's is more inclusive, and the kind of
15 questions that are being eliminated in the plaintiffs'
16 proposed version are questions that are very relevant to the
17 preparation of a defense.

18 For example, questions that are eliminated, for
19 example, are questions about medical expenses and whether or
20 not a plaintiff is claiming medical expenses that have
21 already been paid for by a third party, something important
22 to know in advance.

23 Another example would be whether or not a plaintiff
24 has suffered related medical conditions that could bear on
25 their claims. For example, does the plaintiff have

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1 arthritis, does the plaintiff have neuromuscular issues,
2 issues that are very relevant. And for these reasons, we
3 think that Biomet's more inclusive plaintiff fact sheet will
4 help streamline the process, and we ask that you adopt that
5 version.

6 I'd like to also point out that Biomet has accepted
7 the plaintiffs' proposed defendant's fact sheet without any
8 objections.

9 **THE COURT:** Let me ask this. I notice a difference
10 in terminology where Biomet wants the plaintiff's fact sheet
11 to be treated as answers to interrogatories. They talk
12 about discovery responses. I assume that, somewhere along
13 the way, somebody can take tell me what the difference would
14 be.

15 **MS. LINDER:** Well, I think that we both, actually,
16 agree on that, that the plaintiff's fact sheet would be
17 treated under the Federal Rules under a request under Rule
18 33.

19 **THE COURT:** All right. Okay. Thank you.

20 **MR. LANIER:** May I, Judge?

21 **THE COURT:** To close on it.

22 **MR. LANIER:** Okay, Your Honor. I have a difficult
23 time, and I'll apologize to you right now. I can see you
24 with my glasses on, but I can't read my notes, so I have to
25 take them off to read my notes, but then put them back on to

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1 see you.

2 **THE COURT:** Read your notes.

3 **MR. LANIER:** It's life in the fifties.

4 **THE COURT:** Read your notes.

5 **MR. LANIER:** Five responses.

6 First response to your interrogatory question and
7 the rule. Your Honor, our concern was that the
8 interrogatories are allowed to be amended, they're allowed
9 to be supplemented, and that wasn't clear from these sheets
10 originally, and we wanted to make it clear that if you're
11 asking people at the onset of litigation, at least give us
12 the benefit that you have in the land of interrogatories to
13 allow us to supplement and amend these answers later on as
14 more information becomes relevant. And if they've agreed to
15 that, then that's fantastic. That's one less thing to fuss
16 about.

17 Number two, on the defendant's fact sheets,
18 Ms. Linder is correct that we have agreed to that. We gave
19 them, basically, the six-page, less onerous fact sheet
20 that's been negotiated in the litigation that we have in
21 Pinnacle Hip Implants, and it's not an onerous fact sheet.
22 It's not a twenty-four pager like theirs is to us. It's a
23 six pager.

24 Response Number Three. This is in direct response
25 to her argument that, "This is reasonably calculated to lead

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1 to relevant evidence. These are all questions that would be
2 fair game in a deposition."

3 I can give an hardy amen to that. These are
4 questions, with the exception of two, that are fair game in
5 a deposition. There are two that, arguably, invade the
6 attorney/client privilege about "When did you first start
7 talking to lawyers" and things like that, but, by and large,
8 these are fair game for a deposition, but one of the issues
9 in an MDL is they don't go take -- the defendants do not go
10 take the deposition of all one hundred or one thousand
11 plaintiffs. The depositions that get taken are going to be
12 of those that are carved out into a special discovery group
13 for bellwether purposes.

14 The purpose of these plaintiff's fact sheets has
15 never been to supplant a deposition. It's not there to help
16 guide them in a deposition and guide deposition preparation.
17 All this is is to help them determine what the bellwether
18 group might be so that we can then say, "From the Court's
19 permission," or however the Court does it, "here's a pool of
20 ten cases. Now, go discover them 'til you're nauseated,"
21 and then we've got the benefit of doing it, and then they
22 can ask all the deposition questions they want. They can
23 ask all the interrogatory questions that you see fit to
24 allow them to. All of that takes place at that stage. This
25 is not a deposition on written questions, and it should not

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1 be treated as such.

2 Next argument. She said that, "We are not objecting
3 to any specific questions, and these are very complex issues
4 and so deserving of extra-long plaintiff's fact sheets."

5 Well, yes and no. I mean, I have not filed a
6 question-by-question objection. I think that would have
7 been a waste of your time to read. Perhaps, I'm wrong in
8 that regard, and maybe I should have done so, but I do think
9 that this is not a complex-issue case. This is a very
10 simple case. You've just got a whole lot of them, and
11 that's what we're trying to do is manage a whole lot of
12 pretty easy cases. There's nothing about this case that
13 rises to some great -- ultimately, this is a products
14 liability case, and it's not a complicated one.

15 The last point she made that I would address, Your
16 Honor, with your permission, is she said, "A lot of the
17 questions are extremely important that we had eliminated."
18 For example, "Were the medical expenses paid for by a third
19 party? What related medical conditions do you have? Did
20 you have arthritis," et cetera.

21 We did eliminate those, and those were eliminated
22 because it's all in the medical records. We're giving them
23 an authorization. They will scour through those records,
24 just as we will. It seems a needless waste of time to tell
25 all the plaintiffs' lawyers to go spend the hours and hours

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1 reading through all of the records to make sure that we
2 adequately glean every complaint about every physical
3 symptom that every plaintiff ever had in the history of
4 their life and make sure that we detail them on these
5 interrogatory answers so that they are adequately put there.

6 I think if it were an interrogatory answer, we'd be
7 allowed to say, "Please see the medical records," and that
8 would be deemed sufficient, but the way these are set out,
9 it's not.

10 So, in short, Your Honor, obviously, we do whatever
11 the Court's preference is, but those are our thoughts and
12 what's driven us to a point of disagreement.

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

14 Let me -- I should have done this after we finished
15 the case management order issue, but let me give you my --
16 everything I'm giving you so far is tentative, because now
17 that I understand your positions a little bit better, there
18 are things I'm going to have to look up.

19 I think I need to check with the Administrative
20 Office of the U.S. Courts to find out whether I can waive
21 filing fees. I don't have a great deal of preference,
22 depending on what I'm allowed to do, but that's going to be
23 my first inquiry, to see if I can split a five plaintiff
24 case into five separate cases with one filing fee having
25 been paid. My guess is, with the AO having been trying to

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1 do everything it can for cost cutting in the last few years,
2 that I probably don't have the authority, but I may, and I'm
3 certainly willing to ask.

4 I also will go back and look more carefully at CMO
5 Number 1 to see -- I don't think there's much objectionable
6 in that Paragraph V that the plaintiffs request, but if I've
7 already said it, there's no reason to make this a longer
8 order.

9 Turning to the fact sheets, my initial -- what I'm
10 going to do is go back and look at the Manual For Complex
11 Litigation and a few other secondary sources to try to get a
12 feel, because I had a sense as to what the plaintiff's fact
13 sheet was supposed to accomplish, and, based on that, it
14 does seem to me that Biomet's proposed fact sheet is too
15 broad. If that turns out to be right, how much too broad,
16 obviously, is a different question, but it seems to,
17 basically, move into boilerplate interrogatories, and I
18 think that, over the last few years, the rule makers have
19 tried to move away from boilerplate interrogatories.

20 On the other hand, plaintiff's fact sheets are
21 normally done in just about any products liability case
22 that's in an MDL, and I want to go back and reground myself
23 as to the purposes and, perhaps, look at a couple of more
24 recent orders concerning plaintiff fact sheets, but my gut
25 reaction is that what Biomet is seeking, although it's

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1 perfectly discoverable somewhere down the road, is longer
2 than what the plaintiff fact sheet is designed to do, which
3 I understood was to get everybody started to figure out
4 which is what kind of case and, I suppose, in some
5 instances, to weed out cases. I think that's been the
6 effect in other MDLs.

7 So, again, I'm not giving anybody final rulings here
8 because I have to talk to the AO, I want to look at the
9 secondary authorities, and, perhaps, another plaintiff's
10 fact sheet in another MDL somewhere along the way, but
11 thought I would at least tell you what I'm thinking, if that
12 turns out to be helpful.

13 I think that takes us to the ESI issue. I don't
14 know who wants to address electronically stored information.

15 **MR. ANAPOL:** Your Honor, we have Richard Arsenault,
16 who is calling in, if Your Honor would permit. He's gotten
17 authority to talk from the phone.

18 **THE COURT:** Okay. Sure.

19 Do we have -- can he talk? Do we have the
20 microphone cut off? Mr. Arsenault is on the conference
21 call. I don't know if we've muted them.

22 **MS. KIRKWOOD:** We have not.

23 **THE COURT:** Okay. Mr. Arsenault, your voice hasn't
24 come across.

25 **MS. KIRKWOOD:** Mr. Arsenault?

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1 **THE COURT:** Are you there?

2 **MR. ARSENAULT:** Yes, Your Honor.

3 **THE COURT:** Okay. Go ahead.

4 **MR. ARSENAULT:** Good morning, Your Honor.

5 We have been, pursuant to instructions from
6 Mr. Winter, dealing with Genia Moscovich (phonetically
7 spelled), and we have provided her with information and
8 questions from our vendor. We have exchanged preliminary
9 information. We have given her a variety of questions that
10 we need so that we can talk about engaging in a dialogue
11 with regard to establishing an ESI protocol. Ms. Moscovich
12 (phonetically spelled) has sent us a proposed ESI protocol
13 that, apparently, has been the guide for the defendant in
14 some of the documents that have been produced thus far prior
15 to the MDL being organized. We anticipate receiving answers
16 to the questions we have posed shortly, and we are hopeful
17 that we'll be able to reach an agreement shortly with regard
18 to an ESI protocol.

19 **THE COURT:** Okay. When you say "shortly," what kind
20 of time frame are you looking at?

21 **MR. ARSENAULT:** Ms. Moscovich (phonetically spelled)
22 told us we were going to get answers to our questions early
23 this week, so I'm hopeful that, assuming we are relatively
24 on the same page, we can have some kind of order in place
25 next week.

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1 **THE COURT:** Okay. One question that I was going to
2 ask both sides. If there are any disputes or anything that
3 I don't understand in what you agree on, is there any
4 objection to my reviewing the parties' proposals with our IT
5 people, the Court's IT people, just so I can understand what
6 the terminology is?

7 **MR. ARSENAULT:** No objection by the plaintiffs, Your
8 Honor.

9 **THE COURT:** Okay. And I will lead with that
10 question for Mr. Winter.

11 **MR. WINTER:** No objections from the defendants, Your
12 Honor.

13 **THE COURT:** And you agree that it looks like we may
14 have an agreed order within about two weeks?

15 **MR. WINTER:** I would be optimistic that we will,
16 Your Honor.

17 **THE COURT:** Okay. Thank you. Well, then I don't
18 have to state anything tentative there.

19 Thank you, Mr. Arsenault.

20 Did you have another topic that you're going to be
21 on or is that the only one?

22 **MR. ARSENAULT:** I believe that's it, Your Honor, but
23 I'm on standby for the remainder of the call, and I
24 appreciate the Court allowing me to attend by phone.

25 **THE COURT:** No problem. Thank you.

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1 I think that takes us -- working on the agenda order
2 that you folks put together, that takes us to the order on
3 priveleged information, and I think you had indicated you
4 folks were still negotiating on internal redaction and
5 inadvertent production, and I don't know if you need more
6 time for that or if -- and whether -- I also note -- I'm
7 sorry. Let me put all my questions out there, and then you
8 can take them in whatever order you wish.

9 I noted, in Biomet's brief, they indicated that
10 Biomet had incorporated the majority of additions requested
11 by the plaintiffs to the privilege log protocol, so I don't
12 know if everybody's on the same page there or what else you
13 have to tell me.

14 **MR. ANAPOL:** Okay, Your Honor. Thank you for time
15 here.

16 So there are two issues that, I think, we haven't
17 resolved yet, and I think it's covered over two topics, both
18 the protective order and the privilege order, and that is
19 with respect to inadvertent production of documents, where
20 we presume it belongs in the privilege order, so I think
21 there's some duplication between the two. And the wording,
22 I think, we're close on, but whether we need it twice and
23 whether it belongs in just the privilege order is, I think,
24 where there's one issue.

25 The real issue, I think, the more relevant issue, is

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1 internal redaction, particularly as it relates to perceived
2 irrelevant documents, and the plaintiffs' perspective is
3 that that's what the protective order is actually there for.
4 If something is produced and it's irrelevant, let us see it,
5 and it doesn't become part of the case, and you're still
6 protected.

7 I think the big issue that defendants often are
8 concerned about is release of information, propriety
9 information, that, frankly, we're not really interested in.
10 And so in talking to Mr. Winter, he -- I don't want to speak
11 for him, again, but I think that we're close, and he doesn't
12 think there's going to be an issue here, but he's not yet
13 prepared, so I'll let him speak for himself, as to whether
14 there is in fact -- whether they're going to agree to the
15 language as we proposed it.

16 **THE COURT:** Let me ask this. I understand if
17 they're separate orders, you want to have something in there
18 about inadvertent production or both. If I do go with one
19 order, as Biomet suggested, are you addressing separate or
20 different ways of handling inadvertent disclosures of
21 privileged versus confidential information or is it just
22 that you want it clear that both are protected by a single
23 protocol?

24 **MR. ANAPOL:** Yes, I think that's correct, Your
25 Honor. I think that we want it -- we're a little confused

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1 by the language that they've proposed. I'm still somewhat
2 unclear, and we had another dialogue earlier this morning.
3 We want to make clear that what is a protective issue is
4 referenced under the protective issue, what is a privileged
5 issue is referenced under the privilege issue, and so we're
6 using the identical language, and what it sounds like, or at
7 least my interpretation as I read the protective order, is
8 that we're referencing privileged inadvertent production, if
9 that makes sense.

10 **THE COURT:** I don't think I asked my question very
11 well, though. What you said makes sense. Let me back up
12 and try to ask it better.

13 Are you looking for a provision on handling
14 inadvertent disclosure of confidential versus privileged?
15 Would those provisions be different, depending on whether it
16 was privileged or confidential, and, if so, how would they
17 differ? If it's the same one, and you just want it clear
18 that both are covered, that's fine, too.

19 **MR. ANAPOL:** Well, I think that the defendants are
20 -- I'm somewhat -- I'm just confused on this, and maybe we
21 can hear from Mr. Winter, first. I'm somewhat confused by
22 the language, specifically. I understand it as it relates
23 to inadvertent production of what is otherwise privileged
24 documents. So if you want to give Mr. Winter an
25 opportunity, maybe that will clear it up.

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1 **MR. LANIER:** It's the same. It's the same.

2 **THE COURT:** It's the same.

3 Mr. Winter.

4 **MR. WINTER:** Your Honor, what we've proposed would
5 be to handle the production of inadvertent confidential
6 information and inadvertent privileged information the same
7 way, so that's why we think you put it in one place. I
8 don't think either side thinks the concept, i.e., we
9 discover that we made a mistake and inadvertently produced
10 something that should be marked "confidential," and we
11 produced it without that, or we produced something that we
12 believe is attorney/client privileged, and we want it
13 back -- both of those scenarios, we think, treat it the same
14 way. We proposed language to treat them the same way.

15 When we discussed the specific language, I think
16 there probably is agreement as to our obligation when we
17 find out that we made a mistake to timely notify plaintiffs.
18 And just the way the verbiage is set up, I think I explained
19 what our concern was there.

20 And there's some mechanical issues on physically
21 getting an electronic document back and then producing it,
22 again, as opposed to us notifying them and then a document
23 being deemed confidential without it having the proper
24 legend that the parties are agreeing to.

25 So we just think it should be in one place. I think

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1 we are in basic agreement as to the four corners of what
2 that provision should be, and, you know, I think we just
3 need to go back and forth on wording, and we just don't
4 think it makes sense to put it in two places.

5 **THE COURT:** Okay. Help me understand the internal
6 redaction issue.

7 **MR. WINTER:** Well, Judge, it would be -- in some
8 litigations, some clients will redact out of a document
9 something that relates to a product that has nothing to do
10 with the litigation, and you get into all sorts of issues
11 like, "What's that," and, as I explained, that's not been
12 the way we've handled the million documents that we've
13 already produced. And there are instances when we would
14 redact, be it attorney/client, and then it goes on the
15 appropriate log. There is some confidential information
16 relating to patients that, by federal law, we're required to
17 redact, some Social Security numbers.

18 After the discussion this morning, I just need to
19 look at the examples that we would be allowed to redact from
20 a document, make sure I have the three or four categories
21 that I think we have followed to date, and then I'm pretty
22 sure we can agree to no other internal redactions. I just
23 want to make sure that I've covered in the except-for part
24 of that paragraph the three or four areas, and, you know, I
25 think I can propose language in short order to take care of

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1 that.

2 **THE COURT:** So what you're shooting for then is some
3 language that would allow you to redact from an e-mail or a
4 communication something that would be -- some small part
5 that would be confidential or work product or
6 attorney/client privilege, but not other products, not
7 the --

8 **MR. WINTER:** Correct.

9 And I know, as we've been producing these documents,
10 we have not -- like if there's some other product in an
11 e-mail, we're not blanking that out. It's far too
12 cumbersome for us, and the reality is that it's covered by
13 the protective order, so, you know, what Mr. Anapol says
14 makes sense.

15 **THE COURT:** All right. Thank you, sir.

16 Mr. Anapol, anything you wish to add?

17 **MR. ANAPOL:** Yeah. I think we're very close. We're
18 kind of going around in a circle here. The only thing I
19 still am somewhat vague on -- and I'm going to defer to
20 Mark, if he can figure it out -- is the whole concept of the
21 duplication between the protective order and the privilege
22 order. You know, beyond that, I think we'll wait for
23 Mr. Winter on this final issue, what language he's looking
24 for with respect to internal redaction.

25 And with respect to the protective order, if I may

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1 move forward, we had two minor points, which we're prepared
2 to accept what the defendants have put in their protective
3 order on those two issues, so the only thing remaining,
4 really, between both the privilege and the protective order
5 is what language is appropriate with respect to inadvertent
6 production.

7 **THE COURT:** Okay. So do you folks think -- that two
8 weeks that Mr. Arsenault talked about, would that be about
9 the time in which you could get that done?

10 **MR. WINTER:** I believe so, Your Honor.

11 **MR. ANAPOL:** To clean up this language on that, as
12 well?

13 **THE COURT:** For both.

14 **MR. ANAPOL:** Sure.

15 **THE COURT:** Okay. Anything to add on the protective
16 order issue?

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

18 **THE COURT:** Okay. Well, what I will do -- and,
19 frankly, I'm not sure -- I've got a couple jury trials
20 starting tomorrow and full court days the first part of next
21 week, so I'm not sure I would be moving any faster than you
22 folks, if you can get it done in two weeks.

23 I would say, listening here -- let me back up to the
24 first issue that was raised, and that is whether we should
25 have individual orders on each of these things or one big

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1 one, and it seems to me that we might do best for clarity to
2 have one big order so if something is in one order and not
3 in another, it will not create any side issues. And also
4 for attorneys coming into the case going forward, they have
5 one less order they have to notice or maybe five less orders
6 they have to notice, so I think -- and I raise that now only
7 with the concern -- and I understand that you want it to
8 cover both inadvertent privilege and inadvertent
9 confidential, and I think that might be a question of
10 structuring it, the single order, to make it clear.

11 **MR. ANAPOL:** Yeah, Your Honor, I, actually, agree
12 with you, and I think it will happen, also, with the
13 electronic -- the ESI order.

14 Where I think that there's going to be a prolonged
15 issue -- and to the extent -- I'm not sure it belongs in
16 this preliminary CMO -- would be the fact sheet because I
17 think it's going to take more than two weeks to resolve
18 this.

19 **THE COURT:** Oh, yeah. I think I have to point in
20 some direction before anybody can resolve it in any way. As
21 Mr. Winter said, I've got to feel where along the spectrum
22 we're looking.

23 Then, I guess, that takes us to the especially
24 challenging explant and preservation order.

25 Mr. Anapol.

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1 **MR. ANAPOL:** And if we can get -- we have Pete
2 Flowers, who's on the Executive Committee, on the telephone,
3 and he's been granted permission to speak on the phone, as
4 well. He's going to address our differences.

5 **THE COURT:** Okay.

6 **MR. ANAPOL:** Before he gets on, what I can say, Your
7 Honor, I understand that Biomet has an FDA-mandated
8 protocol, and I think Mr. Flowers is going to talk about
9 other methods that may work, as well.

10 **THE COURT:** Okay. Do we have Mr. Flowers available?

11 **MS. KIRKWOOD:** Mr. Flowers?

12 **MR. FLOWERS:** Can you hear me yet?

13 **THE COURT:** Yep, you're on now.

14 Thank you, Mr. Flowers. I'll let you lead off for
15 the plaintiffs, sir.

16 **MR. FLOWERS:** Thank you, Your Honor.

17 Your Honor, I start off by just indicating that this
18 is supposed to be a preservation order with the purpose
19 being to preserve this key piece of evidence.

20 In these cases, it will abundantly be clear in the
21 specific cases that the two key pieces of evidence that
22 we'll have are the retrieved hip implants, meaning the
23 implants that are taken out of people, and the tissue that's
24 also taken out at the same time. So the whole purpose of
25 this order ought to be to preserve the status quo so both

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1 parties can proceed down expert paths and decide what's the
2 best way to analyze this data in order to present the case,
3 and I think this will be one of the most highly-contested
4 parts of this litigation, what is that proper method.

5 Biomet's order, essentially, attempts to identify
6 one and only one way to do that, and our order -- and what I
7 did was just simply red-lined their version and add in
8 certain parts. Our order is attempting to do what I
9 understand preservation orders -- the purpose of
10 preservation orders have always been, which is to keep the
11 status quo.

12 On Page 8 of the red-lined version, you'll see Parts
13 A and B that were added in by us, which simply say, you
14 know, "There's more than one way to preserve, analyze, and
15 test explanted devices and tissue other than the way that
16 Biomet is presenting," so our order has been adjusted in
17 order to say, "Listen. This is not the stage of expert
18 discovery where we're identifying what the proper way to do
19 testing and analyzing of explants and tissue is. This is
20 the stage where each party is just attempting to preserve
21 the expert or information in order to allow each side to
22 test it."

23 And as an example and as a concern, a great concern
24 that we would have from the plaintiffs' side is, for
25 instance, on Page 5 of Exhibit A of Biomet's order, it talks

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1 about -- it's, actually, Section 9 -- it talks about
2 analysis of tissue and fluids, and then it specifically lays
3 out protocols that must be followed to analyze this tissue
4 and fluid, and one protocol that is laid out there is how
5 you score certain tissue, and it's called an ALVAL score.
6 That's A-L-V-A-L. That score has to do with how much metal
7 is identified in the tissue.

8 That score was created by an expert, and you'll see
9 her name on there. It's Campbell. That's with a P. That's
10 Pat Campbell. This particular expert is a well-known expert
11 in industry or for industry that has created this score that
12 we would not necessarily agree is the proper way to analyze
13 tissue.

14 That's just one example of many that I could point
15 out in their order that, essentially, attempts, at this
16 stage, to say, "Okay. We're making a determination of what
17 the proper way" -- "what the proper expert way is to analyze
18 these key pieces of evidence."

19 In my humble opinion, at this stage, the whole goal
20 ought to be to just preserve the explant and the tissue, let
21 the parties analyze it in the way they deem appropriate, and
22 then we'll deal with or you'll deal with the expert issues
23 down the road.

24 I understand that, at least from what I've been told
25 by Mr. Winter, Biomet has this mandated FDA protocol. If

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1 that's the case and that's necessary for them to follow, all
2 we're asking is that these additions be put in this
3 preservation order so it allows us, the plaintiffs, the
4 opportunity to potentially follow a different path, a path
5 that we'll need to justify to you down the road, but a path
6 that will be equally informative and equally reasonable in
7 terms of methodology, et cetera, and that issue is something
8 that we'll decide when we get to that stage of expert
9 discovery.

10 **THE COURT:** Let me ask this, and this is all new to
11 me, so if my question is a stupid one, I apologize in
12 advance. Do I understand what we're talking about here is
13 not simply preservation of the explanted tissue and device,
14 but, also, the analysis that will be done at or near the
15 time of explant so the information remains? Is that what
16 I'm looking at here?

17 **MR. FLOWERS:** Your Honor, that's what is in their
18 proposed order, exactly that, analysis and testing of the
19 explants and tissues. Frankly, that whole portion should
20 not even be an issue at this stage of the litigation. It
21 should just be the full preservation of the hip and the
22 tissue. It doesn't -- the testing doesn't need to occur,
23 for some reason, today or tomorrow when you explant the
24 device. The device and the tissue can be preserved in such
25 a way that, frankly, it could be analyzed and tested at any

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1 point in the future.

2 So you're right, you're catching onto the issue,
3 which is, is it really necessary to do this testing and
4 analysis immediately. No, it is not, and that's our great
5 concern. We don't want to be hamstrung to have to test it
6 in a certain way at this stage when all we really want to
7 do, both sides, is, essentially, preserve the device.

8 **THE COURT:** Let me ask this. If we break it down --
9 and I'm not sure we can, but, again, this is just unfolding
10 to me as I go here -- if we break it down between the
11 explant and preservation on the one hand and the analysis
12 and method of analysis on the other, do you have any
13 objection to what Biomet has proposed with respect to the
14 explant and preservation?

15 **MR. FLOWERS:** There's some very minor things that,
16 I'm sure, Mr. Winter and I could talk about that may need
17 slight adjustment just in terms of the preservation, but,
18 you're right, that may be the easy way to solve the problem.

19 **THE COURT:** So your objection then goes primarily to
20 the analysis and method of analysis?

21 **MR. FLOWERS:** Yes.

22 **THE COURT:** Okay. I think I have one other
23 question, but I'm trying to find it here.

24 Well, I guess I do have one question. Looking at
25 your red-line, it -- no, I think I misread it when I looked

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1 at it before and wrote down that question. I don't have
2 another question.

3 Thank you, Mr. Flowers. We may come back to you
4 here.

5 Mr. Winter?

6 **MR. FLOWERS:** Thank you.

7 **MR. WINTER:** Your Honor, we don't have an option as
8 to how a device comes back to us, how we store it, and then
9 how we analyze it.

10 **THE COURT:** The analysis is covered by the 522
11 order?

12 **MR. WINTER:** Yes.

13 **THE COURT:** Okay.

14 **MR. WINTER:** So we have to follow what we have
15 proposed, and everyone knows, last time we were here,
16 there's a 522 order, which makes us very different than all
17 the other cases that came up with the type of orders that
18 we're talking about now, because no one else had the 522
19 order.

20 So, from our perspective, even if there's three
21 words that Mr. Flowers would want to change, we would have
22 to say, "We're not comfortable doing that because we've got
23 a specific FDA requirement," and it goes down to how the
24 tissue gets sampled and the instructions that are given to
25 the surgeon or the pathologist, who is actually going to

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1 take whatever tissue he or she is going to take off an
2 explanted device.

3 And the reason that FDA requires the specific
4 language that it did, that's an FDA judgment, but they've
5 clearly told us they want it done a certain way, so when we
6 give them the data, they can analyze it the way FDA wants
7 to.

8 So, I said, "I'm pretty sure our hands are tied."

9 Now, if someone else doesn't want to have a device
10 analyzed that way, I would respectfully suggest to you that
11 we're going to get into an apples and oranges dispute in
12 this case sooner rather than later. And if we're going to
13 have a uniform order, FDA has told us what our half has to
14 be, and I don't see a lot of upside to putting off to a
15 later day how someone technically did something that
16 deviates from what FDA told us to do and whether that
17 technical difference is or is not meaningful. If we've got
18 large groups of cases to look at, it seems uniformity would
19 be the way we would want to approach this.

20 Now, if there's not going to be uniformity, we
21 already have a protocol that we have to follow, and,
22 obviously, we're going to do that. So if they're not going
23 to agree to follow that protocol, then I'm questioning why
24 we would need any type of order.

25 **THE COURT:** Let me ask this. Regardless of who

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1 explants it, you have to do a 522 report that the FDA has
2 mandated on every one of these devices that is explanted; is
3 that right?

4 **MR. WINTER:** They have given us a protocol to follow
5 for every explanted device that we get, yes, and then
6 there's data, and then we have to submit it.

7 **THE COURT:** Okay. Okay. Every one. That's what I
8 wanted to clarify, that this isn't a situation, like other
9 product liability cases, where one side might wind up with
10 something and do the testing, and then there's nothing left
11 for the other side to do. You have to do your analysis on
12 all of them?

13 **MR. WINTER:** Right. Whatever we get back, we have
14 to do it as we've set out in this protocol, both in terms of
15 how we get it, how we maintain it, and how we do the
16 analysis that's described.

17 **THE COURT:** So what's set forth here in Paragraph 9
18 and beyond in your proposed order is something you will be
19 doing regardless of what the plaintiff does?

20 **MR. WINTER:** Correct.

21 **THE COURT:** Then the next question, I guess, is why,
22 particularly if the plaintiffs disagree with -- I don't know
23 what part -- disagree with Pat Campbell -- and I would like
24 to say, "Doctor," "Mr." or, "Ms.," but I'm not able to do
25 that on my information on any of it.

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1 **MR. WINTER:** I'm pretty sure she's a woman, and
2 she's a physician, a doctor.

3 **THE COURT:** Okay.

4 -- if they disagree with her approach, how can I
5 bind them to not conduct their own analysis under a
6 different protocol?

7 If we make this the only way it is to be -- I'm not
8 asking questions well today. I'm sorry.

9 If we make -- let's call it the 522 protocol. If we
10 make the 522 protocol the only one that will be used, I
11 guess, where do I get the authority to tell plaintiffs they
12 can't use some other protocol, assuming that they can clear
13 **Daubert** with it, that would be in addition to yours?

14 I understand the problem if on one particular device
15 there's no 522 analysis and there's an analysis under some
16 different protocol, but if I understand you correctly,
17 there's always going to be your 522 analysis. If I approve
18 what you've submitted here, wouldn't I be forbidding the
19 plaintiff to do any other different analysis, if I say,
20 "This is how you have to do it," and put in the 522?

21 **MR. WINTER:** Well, I guess to answer your question,
22 Your Honor, if there's going to be uniformity, our position
23 is that we're bound to do it a certain way, so if there's
24 going to be uniformity, it has to be that way. If we're
25 going to deviate from uniformity in how we analyze an

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1 explanted device versus how the plaintiffs would analyze an
2 explanted device that doesn't come to us, then, you're
3 right, we can do it so that there's not uniformity.

4 **THE COURT:** Well, that's the last part, that doesn't
5 come to you.

6 Is it your understanding that protocols that the
7 plaintiffs might be using would destroy things so that you
8 could never do your 522 analysis?

9 **MR. WINTER:** Well, I think we'd have a -- I don't
10 know the short answer to that, Judge, but I am loath to say
11 it's not a problem --

12 **THE COURT:** Okay.

13 **MR. WINTER:** -- because someone will have done
14 something that doesn't precisely follow what we've been told
15 to do. And whether those deviations are material, whether
16 FDA would say to us, you know, "Sorry. You did this wrong,"
17 or, "We can't accept this," and whatever the consequences
18 are, I don't know.

19 Our point is we don't want to be in that position.
20 So if we're not going to have uniformity, then why are we
21 talking about an extended protocol?

22 We've got an obligation, they know it, about
23 something coming back to us. I mean, we're presuming, if
24 they have an explanted device, they're going to preserve it.
25 They're smart lawyers. They know, you know, how things

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1 work. They know how important that is. And, you know, if
2 it turns out it sat in someone's garage for nine months, so
3 be it.

4 **THE COURT:** Well, I'm talking about the analysis
5 part. I'm not talking about the explant and preservation
6 part.

7 I mean, we've now preserved the tissue, we've
8 preserved the device, and now it's time for the scientists
9 to look at it and tell us whether there's causation, that
10 sort of thing, all the usual scientific evidence we would
11 get in a products case.

12 Do you have a concern that if the plaintiffs do that
13 analysis first, there would be no way for Biomet to do its
14 522 analysis, both for your own sake in this litigation and,
15 also, for the FDA?

16 **MR. WINTER:** I think we have a real concern in that
17 regard, Your Honor, and I think what we would end up with
18 is, potentially, apples and oranges comparisons when experts
19 say, "I did this, pursuant to this protocol," when we did it
20 this way, so we're losing apples to apples for you.

21 **THE COURT:** Okay. Let me take the flip side of that
22 question.

23 When Biomet does the analysis set forth in your
24 proposed order, would there be any tissue left -- and I
25 assume there would be a device left, but would there be

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1 tissue left -- if the plaintiffs did want to have their own
2 independent analysis, with or without the same protocol, or
3 would they be bound by yours, if you get it first?

4 **MR. WINTER:** Well, we have specific instructions in
5 our protocol for how tissue gets sampled.

6 **THE COURT:** Uh-huh.

7 **MR. WINTER:** And I can't tell you, once our protocol
8 is followed, what would be left and/or what would be viable
9 of what's left for someone else to come in and then take a
10 different sample.

11 **THE COURT:** Okay. So you're not confident that if
12 they do it first, there will be tissue left for you to work
13 with, and you can't say that if you do it first, there would
14 be tissue left for the plaintiffs to work with?

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

16 **THE COURT:** Okay. Okay. I understand your position
17 better. Thank you.

18 Mr. Lanier, I see you standing. Okay. Go ahead.

19 **MR. LANIER:** Well, Your Honor, there's one thing I
20 want to make sure we're clear on the record. Mr. Flowers
21 can continue an argument on the tissue sample, because I do
22 think that there's room for tissue in both, but I want to
23 make sure that the Court is aware, especially the way things
24 have been worded, on how the 522 comes about.

25 The 522 is post-marking surveillance ordered by the

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1 FDA. When the FDA says, "We want post-marketing
2 surveillance from Biomet on their hip product," Biomet
3 writes the plan. Biomet submits the plan to the FDA. The
4 FDA will either approve Biomet's plan or the FDA will
5 negotiate a plan from that point forward, so this is not the
6 FDA has picked the Pat Campbell protocol out as the
7 appropriate one and has instructed them to follow it.

8 **THE COURT:** I've been assuming that this was
9 discussed between Biomet and the FDA and not the plaintiffs.

10 **MR. LANIER:** Then I will shut up and let Mr. Flowers
11 address whether or not I'm correct on the dual thing.

12 Pete.

13 **MR. FLOWERS:** Your Honor, Mr. Lanier, I believe that
14 was, took the words right out of my mouth. That is the way
15 that goes down. It's, actually, Biomet that proposes the
16 plan. We're, obviously, not a part of it. We have no idea
17 what the negotiation is.

18 But, more importantly, I think, at the end of the
19 day -- and I have the benefit or detriment of being deeply
20 involved in the DePuy Hip Litigation, and I'm getting ready
21 for trial in a month, and I've been through all these
22 issues, and I have experts, and we have experts that
23 disagree with the way the analysis was done on the tissue
24 from DePuy, and they disagree with ours, same with the
25 explanted device.

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1 The long and short of it, though, is the tissue
2 taken is not destroyed in any way. The tissue is there for
3 analysis from this point forward and is never destroyed.
4 The tissue they take is, simply, put on slides, and those
5 same slides are analyzed by everyone. They may disagree on
6 what they see, but they're analyzed by everyone.

7 The same issue goes with the actual retrieved hip
8 implant itself. Nothing happens to it. There's nothing
9 destructive. As a matter of fact, this order specifically
10 identifies that no destructive testing can occur. So at the
11 end of the day, if Biomet needs to do it a certain way to
12 report to the FDA, they're not going to be limited in doing
13 that at all. They'll be able to do that at any time they
14 want. It's just that we shouldn't be forced to be a part of
15 a plan that Biomet has created potentially or even the FDA
16 created which has to do with the proper way to analyze
17 things. Everyone should be able to present their own
18 position, and Biomet will not be inhibited in any way from
19 living up to their reporting requirements.

20 **THE COURT:** Okay. Thank you. I understand your
21 position.

22 I am not concerned really about -- not overly
23 concerned. Obviously, it would be great to get something
24 where all of the experts agreed, but I've been doing this
25 for a while, and I haven't seen many of those, so I'm not so

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1 concerned about the apples and oranges end of it. Normally,
2 if a case gets even this far, we have disagreeing experts or
3 experts who are likely to disagree based on how they
4 approach things, so I don't think that prohibits or really
5 weighs too heavily against making the 522 method one method
6 to use, but not the only method to use. My greater concern
7 is the ability of both sides to do their testing.
8 Mr. Flowers indicates that no tissue is destroyed in any
9 approach.

10 I guess, the Defense is at a disadvantage there
11 because the plaintiff, as I understand the plaintiffs'
12 submission so far, has just asked that the 522 approach not
13 be the only one, but they haven't identified what other
14 approaches might be used and I understand that because we're
15 still pretty early in the process here, but I think that
16 would make it very difficult for Mr. Winter to go back and
17 talk to his client and find out whether tissue would be
18 destroyed to their satisfaction -- find out to their
19 satisfaction whether tissue would be destroyed under any
20 other imaginable testing scenario.

21 So I think I would be pushing it a little too far at
22 this point to take the step that the plaintiffs ask me to
23 take and say that the plaintiffs recognize that Biomet has
24 to do it a certain way and the plaintiffs want to be free to
25 do it any other way until I can get some stronger answer

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1 than what Mr. Flowers is able to give me at this point as to
2 the tissue destruction. And I don't mean to suggest that
3 Mr. Flowers has given me bad information. I just don't
4 think he can be sure of what everybody's going to be using
5 at this point.

6 So what would be the best -- with that as my
7 difficulty here, let me ask both sides what the best
8 approach is here. I assume that we need to have something
9 in place to govern the explant and the preservation, and I
10 assume that so that Biomet is protected with respect to the
11 FDA, we have to be sure that they can conduct their 522
12 analysis. And I understand the proposal originates with
13 Biomet and may or may not have been challenged by the FDA.

14 I think I lost track in the middle of that sentence
15 where I was going, obviously, a little too long a sentence.

16 I guess I have two thoughts. One is that we do need
17 to get something in place early, whether it's today or two
18 weeks from now or whatever, so that anybody who gets an
19 explant in the first half of 2013, it will be following
20 basically the same steps that Biomet needs to be followed,
21 and then, I guess, I'm open to suggestion as to how I can
22 take the next step, which is I would like to see the
23 plaintiffs be able to use their own experts and their own
24 experts' protocols, and we can deal with the reliability of
25 anybody's with **Daubert** on down the road, but I'm also

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1 concerned about the issue of tissue destruction that would
2 preclude the plaintiffs from doing an analysis if Biomet
3 acts first or Biomet doing an analysis if the plaintiffs go
4 first.

5 Mr. Flowers, are you able to suggest anything as to
6 how we should proceed given my concerns?

7 **MR. FLOWERS:** Sure, Your Honor.

8 What I would say, first of all, is that the analysis
9 of the tissue is simply -- and the Pat Campbell thing I
10 alluded to -- is simply viewing of the actual tissues under
11 the slides.

12 I think this is solved simply with a statement in
13 the order, which is already there, that says, "Absolutely no
14 destructive testing of tissue is to be done," and the tissue
15 will then just be removed at the time of surgery at whatever
16 hospital the explant occurred. It will be put on slides,
17 because that's what they do, and then those slides just sit
18 there. And if someone did want to do some sort of
19 destructive testing, I think the order already lays it out
20 that they need to go to court and ask you whether it's going
21 to be approved, so I think the problem is, essentially,
22 already solved in this, that no destruction of the tissue or
23 any destructive testing, for that matter, of the retrieved
24 hip implant is to be done by anyone without approval of the
25 Court.

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1 **THE COURT:** Mr. Winter, I don't know how far you've
2 delved into this with Biomet, but assuming Mr. Flowers is
3 correct that the Campbell system doesn't require destruction
4 of tissue, but, rather, observation -- I know that you can't
5 say that that's the case, but, if that is the case, would
6 there be any problem with an order that allows -- other than
7 the apples and oranges, and I appreciate your concern about
8 that -- with an order that says, "Anybody can test it the
9 way they think they can get admitted into court as long as
10 there's no tissue destruction"? Does that keep you
11 protected?

12 **MR. WINTER:** I don't think so, Judge.

13 **THE COURT:** Okay. Why not?

14 **MR. WINTER:** I think we've got an obligation -- and
15 just so the record's clear, when the FDA gave that 522
16 order, they gave the parameters for a protocol in writing.

17 **THE COURT:** No, I understand. Your hands are tied.
18 I understand that.

19 **MR. WINTER:** Right.

20 So we, today, analyze explanted devices that come to
21 us pursuant to that protocol, so I don't know how there can
22 be an order entered that says anything other than, "Biomet
23 proceeds according to that protocol," and let the testing
24 go, as we want to do, so we can comply with FDA time lines.

25 If it's suggested that we just get devices back

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1 after surgeons do whatever they're going to do on the tissue
2 or the pathologist and then the world stops without us
3 coming to you for an order allowing us to do whatever
4 additional testing we're obligated to do, I don't think my
5 client's going to be comfortable with that because we've got
6 clear obligations to do things in a reasonably timely
7 fashion with FDA, so that's why, you know, I don't see a
8 middle ground for us in terms of how we analyze devices that
9 are coming back to us.

10 **THE COURT:** Okay.

11 **MR. FLOWERS:** Your Honor, if I could just jump in,
12 and I apologize. I wish I was there so I could not be rude
13 in interrupting people.

14 **THE COURT:** We're always happy to invite people to
15 South Bend in January.

16 **MR. FLOWERS:** Exactly. I'm in Chicago. It's not
17 much different.

18 I would just say this. This seems like it's an easy
19 situation to resolve because the practical effect of this,
20 as I see it, is Mr. Smith has a revision surgery in Chicago
21 next week. The physicians in the hospital are given
22 specifically an order telling them that they need to
23 preserve the devices. Then, under this order, the
24 plaintiff, if the plaintiff was the one preserving it, is
25 required to tell the defendants, "Hey, we've got the device.

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1 We've ordered the device to be preserved and the tissue to
2 be preserved, and we have them."

3 And Biomet says, "Okay. We have these reporting
4 requirements to the FDA that we need to do within a
5 reasonable amount of time. Please give us the device and
6 the tissue."

7 So we, essentially, provide to them the device and
8 the tissue. They do their reporting. They send the device
9 and the tissue back.

10 I can tell you from reading their protocol, there is
11 no destructive testing in their protocol, the FDA protocol.

12 And we get the device back, and then we send it off
13 to our experts and have it tested.

14 I don't see, really, why that's such a big issue
15 from either perspective because it solves their problem and
16 their reporting requirements, and it allows us to go on and
17 test the devices as we see fit, non-destructively. And if
18 they want to come back later and rereview it, then they're
19 able to do that because all the evidence is simply
20 preserved.

21 **THE COURT:** Okay. Thank you, folks. Let me go
22 ahead and give you rough thoughts on this.

23 I think it would be an abuse of discretion to enter
24 an order that says that the plaintiff must follow Biomet's
25 protocols to the extent we're talking about experts

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1 developing opinions with respect to the device and the
2 affect that the device has on surrounding tissue. I think
3 that both sides are entitled to take their best shots under
4 Rule 702, and I think that as written -- and I understand
5 Biomet doesn't have much choice here, that the FDA has said,
6 "You can do it any way you want as long as it's this," and
7 so Biomet doesn't have much option, but I don't think I can
8 take away the plaintiffs' options.

9 I'm going to go down through what both sides have
10 submitted and see if I can put it together so that the order
11 would forbid any destruction of tissue or alteration of
12 tissue that would prevent other known methods of testing
13 without leave of Court so that both sides will be protected.
14 I understand Biomet needs to do these things to keep the FDA
15 at bay, but my hope is to be able to put together something
16 that would allow Biomet to do that and at the same time
17 allow the plaintiffs to use non-destructive methods of
18 analysis, so I will go down through that, what you tendered,
19 and see what I can do.

20 So thank you, Mr. Flowers. You're welcome to keep
21 listening, but I think we've gotten through what was on the
22 agenda with detail.

23 You had next had ECF filings. I don't know what you
24 had in mind there.

25 **MR. ANAPOL:** I raised it with Your Honor earlier in

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1 the CMO.

2 **THE COURT:** Okay.

3 **MR. ANAPOL:** Actually, just better explanation and
4 dialogue with those not familiar with the process, that
5 there's still some confusion as to what our role as lead
6 counsel is in educating non-PSC members who file to make
7 sure that there's a master docket and that they can file
8 those cases and track this case management order and others
9 beyond it from Your Honor as opposed to from lead counsel.
10 I think that was the big focus.

11 **THE COURT:** Okay.

12 **MR. ANAPOL:** I don't think the defendants care at
13 all on that.

14 **THE COURT:** So, largely, you're talking about a way
15 to communicate --

16 **MR. ANAPOL:** Yeah.

17 **THE COURT:** -- that otherwise would be the job of
18 liaison -- back in the pre-ECF days was the job of liaison
19 counsel?

20 **MR. DASSOW:** Right.

21 **THE COURT:** Okay. Understand that.

22 MDL deadlines. What do you have in mind? We need
23 some, but I want to see if you're on the same page as I am
24 as to what they should be.

25 **MR. WINTER:** I think we are, Your Honor. We need

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1 some. And while we can't come up with a proposal today, I
2 think in reasonably short order we need to meet and confer
3 and start proposing when people serve interrogatories, when
4 depositions start, when we're going to -- we're going to
5 have to come up with groups of cases to proceed with for a
6 lot of different discovery reasons, for dispositive motions,
7 as to groups of cases, for bellwethers, but I think maybe,
8 more importantly, we need to come up with a date for that
9 science day that Your Honor talked about.

10 So when do you want us to report back?

11 **THE COURT:** Well, I was going to propose -- I think
12 I indicated at the first conference that my hope was we'd
13 meet every four to six weeks. And, again, I've been
14 conscious since my time on the panel that we really put
15 things in a puddle of mud and not let it move when the MDL
16 process first begins, and I would like to get it out of
17 that. But if you folks can work out the timing of those
18 things, I would think another four or six weeks in the mud
19 is probably worth it.

20 Would that time frame work from the defense
21 standpoint?

22 **MR. WINTER:** Does that work for you?

23 **MR. LANIER:** Yeah.

24 I think, Your Honor, if we've got four to six weeks,
25 we'll certainly put together the laboring oar. We're not

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1 coming at this brand-new. The trails have been blazed. We
2 know what needs to be done in hip litigation and so we can
3 try and do that. If we cannot come up with an agreement
4 within four to six weeks, then we can certainly have you two
5 competing proposals for the next hearing.

6 **THE COURT:** All right. Let's see what we can find
7 for that. It's the 7th. One, two, three, four, five, six.
8 I start my jury trials on Tuesdays, so Monday works best for
9 me. I don't know. Hope it works best for you as a result
10 of that.

11 We've got an "X" through February 11th -- does
12 anybody know why -- Monday? Was that -- did we mark that
13 off?

14 **MRS. POTTS:** It's a holiday, Judge, isn't it?

15 **THE COURT:** The 18th is President's Day this year.
16 So did we mark off the 11th on the way to marking
17 off the 18th?

18 **MRS. POTTS:** I think it's just simply because IT is
19 installing video in the courtroom. I'll see if I can move
20 that.

21 **THE COURT:** Well, would February 11th work for you,
22 folks?

23 **MR. ANAPOL:** It would be problematic, I think, for
24 me. We have a conference, and I think Mark may be
25 attending, as well, that weekend, so that would be tough.

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1 **THE COURT:** All right. How about February 8th?
2 Does that --

3 **MR. ANAPOL:** Same conference, Judge.

4 **THE COURT:** I'm sorry?

5 **MR. ANAPOL:** It's the same conference.

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

7 **MR. ANAPOL:** It starts on the 7th or 8th, and it
8 ends, I think, the 12th or 13th.

9 **THE COURT:** Okay. How about the 22nd or the 25th of
10 February? We're starting to move further than I would like,
11 but I can't fit it in otherwise.

12 **MR. LANIER:** On the 22nd, Professor McGovern has me
13 teaching at his class at Duke Law School.

14 **THE COURT:** The 22nd?

15 **MR. LANIER:** If anybody's got stroke over him, it's
16 you --

17 **THE COURT:** I understand.

18 **MR. LANIER:** -- but he trumps me.
19 I'd sooner miss the seminar and be here the 11th.

20 **THE COURT:** Well, how about the 25th? Would that
21 work for people?

22 **MR. DASSOW:** Your Honor, I won't be able to do the
23 25th.

24 **THE COURT:** Could Mr. Hovde cover on that one?

25 **MR. DASSOW:** Yeah.

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1 **MR. WINTER:** I know I have a proceeding that week,
2 Judge.

3 **THE COURT:** The entire week?

4 **MR. WINTER:** Yeah, the entire week.

5 Does February 4th work?

6 **THE COURT:** Yeah. I just have to move a sentencing.

7 Would the 4th work for you, folks?

8 **MR. ANAPOL:** Is that enough time for us?

9 **MR. DASSOW:** It's like three weeks.

10 **MR. WINTER:** I agree with Mr. Lanier. We're not
11 forging into unchartered waters here.

12 **THE COURT:** That would be four weeks, if that date
13 would work.

14 **MR. LANIER:** I'm in.

15 **MR. ANAPOL:** The 4th is fine.

16 **MR. LANIER:** I love a good party in South Bend.

17 **THE COURT:** February is almost as fun as January.

18 **MR. LANIER:** I'm pretty pumped.

19 **THE COURT:** Okay. And I assume that 1:00 o'clock
20 start works fine for you because that way you can meet if
21 you --

22 **MR. WINTER:** That's perfect.

23 **THE COURT:** Let's do that.

24 Now, let me ask you folks to -- I guess I'm really
25 talking to plaintiffs' counsel here. I'm happy to keep

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1 doing the phone calls, if you set them up. My question is,
2 is it worth it? Is it worth the candle? I don't know how
3 many people are on the line right now. We'll find out
4 afterwards. I thought the first one was important. I
5 actually wanted to run a video on that. But is it helpful?

6 **MR. ANAPOL:** Your Honor, I don't know that we need
7 to have the entire PSC present often at all, if ever,
8 honestly. I think there were select members with different
9 issues that, with Your Honor's permission, we'd invite, as
10 we've had a couple we invited on the telephone today. And
11 whether we are all here on the 4th or we do that by phone or
12 however Your Honor wants to move forward, the core group is
13 here and a couple others that we'll either invite or have
14 participate on phone, but at least to keep the PSC involved,
15 to the extent they can hear what's going on at the hearings,
16 the conferences are great. If it's not --

17 **THE COURT:** You would prefer they continue?

18 **MR. ANAPOL:** I have no problem with having the call
19 available.

20 **THE COURT:** Okay. And I have one last thing that is
21 kind of unique, I think. Although, as you said, these paths
22 have been cleared, to some extent, already.

23 Two of our constituent cases, our Cause Number
24 3:12CV867 is entitled **Beverly Gugino**, perhaps --
25 G-U-G-I-N-O -- **versus Biomet Orthopedics, Biomet, and**

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1 **Biomet, LLC**, and Cause Number 3:12CV702 -- oh, both of these
2 were originally filed in the Western District of Texas -- is
3 entitled **Beverly Gugino and Rodney Gugino versus Biomet,**
4 **Inc., and Biomet Orthopedics, LLC.** It looks to me as though
5 we have the same lady, and maybe she had two hips done, but
6 if I could ask the plaintiffs to look into it.

7 Do you know about it?

8 **MR. WINTER:** Not that we're playing plaintiff
9 trivia, Your Honor, but I am reasonably confident that that
10 particular case was -- the first one was dismissed without
11 prejudice for failure to comply with an order to show cause
12 on some jurisdictional issue and then refiled.

13 There also are, I believe, two cases, Your Honor,
14 where, in fact, we do have multiple filings by what we think
15 is the same plaintiff.

16 What I was going to propose is I would send a note
17 to Mr. Anapol saying, "These are the three cases or four
18 cases where it seems there's something duplicative," and let
19 him investigate.

20 **THE COURT:** Okay.

21 **MR. ANAPOL:** Fine with me.

22 **THE COURT:** Okay.

23 **MR. WINTER:** There are two cases I am aware of, Your
24 Honor, that, to us, look like duplicate filings by the same
25 people.

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1 **THE COURT:** Those things happen. We don't show a
2 dismissal on Ms. Gugino, but, again, when we get the docket
3 sheet, they may be running a little bit behind in docketing,
4 so that can happen.

5 **MR. WINTER:** One last housekeeping thing, Your
6 Honor, from our perspective?

7 **THE COURT:** Sure.

8 **MR. WINTER:** I think we have conferred and have
9 determined there was not going to be a master complaint by
10 the plaintiffs.

11 **THE COURT:** Okay.

12 **MR. WINTER:** Your last order gave us until, I think,
13 next Friday to file answers.

14 **THE COURT:** Uh-huh.

15 **MR. WINTER:** We've discussed if we could get an
16 extra two weeks on that. We'll catch up with the cases that
17 have been transferred here where we haven't yet filed the
18 answers, and we'll then get everyone current.

19 **THE COURT:** All right. We're working on -- this
20 two-week extension is working for a lot of things.

21 What I will do then on those matters that we talked
22 about early -- and I've set aside my agenda here, so I can't
23 tell you what they were -- the severance of parties and the
24 filing fee, the plaintiff's fact sheet, ESI, you folks think
25 you'll come to an agreement? My notes weren't all that

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1 clear. You folks indicate you think you'll be able to come
2 to an agreement with respect to the privilege and proposed
3 protective order or do you think --

4 **MR. ANAPOL:** I think we're basically there with the
5 exception of one or two points you've raised earlier, the
6 internal redaction and the specific language with respect to
7 inadvertent production.

8 **THE COURT:** Okay. And you indicated, the redaction,
9 you thought you would be able to narrow down?

10 **MR. WINTER:** Yes, Your Honor.

11 **THE COURT:** Okay. On those that I indicated I would
12 offer some guidance after looking things up, I will do that.
13 I may tender language to you, if I'm able to get on it
14 pretty quickly. I think I can do something faster than you
15 folks can because you've got a lot of other things.

16 With respect to the explant preservation order, I
17 will see what I can put together. I would like to tender
18 you language on that, again, for anybody's suggestions for
19 improvement. And I think the other things we talked about,
20 I'm going to allow two weeks to see if agreement can be
21 reached, allow two extra weeks for the answers, and continue
22 with the conference calls, and I'll see you all on the 4th
23 of February.

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

25 **MR. WINTER:** Thank you, Your Honor.

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MRS. POTTS: All rise.

(Proceedings concluded.)

CERTIFICATE

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

DATED THIS 17th DAY OF JANUARY, 2013.

S/S DEBRA J. BONK

DEBRA J. BONK
FEDERAL CERTIFIED REALTIME REPORTER