

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

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

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9 MONDAY, MARCH 18, 2013

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

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5 **MR. ROBERT DASSOW**
6 **MR. RICHARD ARSENAULT**
7 **MS. ANNE ANDREWS**
8 **MR. JOHN THORNTON**
9 **MS. JENNIFER HOEKSTRA**
10 **MR. PAUL CORDELLA**

11 **(see docket for addresses)**

12 **For Defendant:**

13 **MR. JOHN D. WINTER**
14 **MR. JOHN LaDUE**
15 **MS. ERIN LINDER HANIG**
16 **MR. BLAINE DART**

17 **(see docket for addresses)**

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1 **THE COURT:** Good afternoon.

2 This is the March status conference in MDL2391.

3 Lead and liaison counsel and I spoke in chambers
4 beforehand to just iron out what we're doing here, and there
5 was a couple of agreements reached that I'll put on the
6 record at the close of today's conference.

7 First, I'm going to work off my sign-in sheet to say
8 who all's here, and if I don't call your name, please let me
9 know.

10 First for the Plaintiffs, Mr. Anapol.

11 **MR. ANAPOL:** Good afternoon.

12 **THE COURT:** Anne Andrews.

13 **MS. ANDREWS:** Good afternoon Your Honor.

14 **THE COURT:** Richard Arsenault.

15 **MR. AUSENAULT:** Good morning.

16 **THE COURT:** Robert Dassow.

17 **MR. DASSOW:** (Indicating.)

18 **THE COURT:** And then names we have to add to our
19 list.

20 John Thornton.

21 **MR. THORNTON:** Here, Your Honor.

22 **THE COURT:** Paul Cordella.

23 **MR. CORDELLA:** Good afternoon, Judge.

24 **THE COURT:** Good afternoon.

25 Jennifer Hoekstra.

1 **MS. HOEKSTRA:** Here, Your Honor.

2 **THE COURT:** And Blaine Dart.

3 **MR. DART:** Yes, sir.

4 **THE COURT:** Okay. And for the Defendants then, we
5 have John Winter.

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

7 **THE COURT:** Good afternoon.

8 John LaDue.

9 **MR. LADUE:** Judge.

10 **THE COURT:** And Erin Linder Hanig.

11 **MS. LINDER HANIG:** Judge.

12 **THE COURT:** I have your, if I can find it, again --
13 I had the agenda that you folks sent in, and I have promptly
14 attached it to something else.

15 So, Mr. Anapol, why don't I just turn to you, first,
16 and let you address where we stand.

17 **MR. ANAPOL:** Your Honor, on behalf of the
18 Plaintiffs, Richard Arsenault is here to argue about the ESI
19 predictive coding, which is the first item on the agenda.

20 I assume that's where Your Honor wants to go, start
21 with the ESI protocol?

22 **THE COURT:** Yes.

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

24 **THE COURT:** Good morning.

25 **MR. ARSENAULT:** Richard Arsenault.

1 Not so much here to argue, but just to give Your
2 Honor the framework of where we are, where we think we're
3 going, and what we're trying to do here, and this all
4 procedurally falls under the rubric of CMO Number 2, Exhibit
5 B, Page 15, Section 5A where to expedite discovery of
6 relevant electronic evidence and reduce costs -- so those
7 are the focuses, expedite discovery, reduce costs -- the
8 parties' computer experts will informally cooperate and
9 discuss procedures or protocols to facilitate
10 identification, retrieval, and production of computerized
11 information. This responsibility shall be continuing,
12 unless otherwise ordered by the Court.

13 We've been engaging in that process. We've had
14 somewhere between five and ten conference calls with our
15 vendor, which is ILS, on the call, and it seems that we've
16 reached an impasse. We offered to bring our experts here
17 today, and the tutorial that you would have gotten from them
18 would have been much greater than what you're going to get
19 from me right now, but I will do the best I can. I will
20 give Your Honor what I call the Reader's Digest version.
21 I'm assuming Your Honor knows what that this.

22 I was talking to some associates the other day and
23 said, "Would you give me the Reader's Digest version?"

24 And they said, you know, "What could that possibly
25 be?"

1 Four main points, Your Honor.

2 The Plaintiffs need to meaningfully participate in
3 how documents are collected and in what format they are
4 produced. It's got to be a collaborative process, Point
5 Number One.

6 Point Number Two, the Defendants pre-MDL production,
7 whatever they produced before this MDL, Your Honor's
8 court-appointed PSC had no input in any of that.

9 Number Three, predictive coding should be used, as
10 opposed to search terms, and this is where I'll give you the
11 brief tutorial, if you don't mind.

12 And then last, predictive coding requires a
13 collaborative effort to train the software.

14 So the two major concepts, Your Honor, as I
15 understand them here. For years, we've collected documents
16 using what's generally referred to as search terms.
17 Typically, what happens, the Defendants suggest terms, and
18 then the Plaintiffs suggest terms, and you try to reach some
19 agreement with regard to those terms. As you can imagine,
20 the Plaintiffs are in the embryonic stages of the case and
21 are at quite a disadvantage. They don't understand the
22 language.

23 Search terms basically look at massive documents and
24 try to find words, okay. So if we had, for example, a case
25 involving dogs, we'd be looking for the word "dog", "puppy",

1 "canine". That's search terms.

2 Now, fast forward. In more modern times now, we
3 have what's called predictive coding. It's concept
4 searching. It's artificial intelligence. So as opposed to
5 just mindlessly going through documents looking for
6 "canine", "puppy", "dog", if the hottest document in that
7 pile was "man's best friend," search terms wouldn't find
8 that. Concept searching would.

9 The way I also try to understand this or explain it
10 is spam filters. They learn over time what you, Your Honor,
11 don't want coming into your computer. Or this Pandora deal
12 with regard to music where you give thumbs up or thumbs
13 down, it learns the music you want at the end of the day.

14 The studies that I've seen suggest that when you do
15 search terms to look at documents -- and this is assuming
16 you have the most robust set of search terms -- you might
17 get up to twenty-four percent of the relevant documents.
18 Whereas, with predictive coding, you can get as much as
19 ninety percent of the relevant documents.

20 So our position is that we should be using
21 predictive coding and that it has to be a collaborative
22 process.

23 The other part to the predictive coding is you
24 train -- you train -- the software. Much like your spam
25 filter begins to learn what comes in, what doesn't come in,

1 you have to train that, so you have to show the software
2 that these are the relevant documents, these are an example
3 of relevant documents. It's called seeding. These are the
4 irrelevant documents. If you see something like this, we
5 don't want it. If you see something like this, we want it.

6 That's about as high as I can go on my pay grade
7 with regard to the process. Happy to answer questions, but
8 those are the points.

9 **THE COURT:** Obviously, one of the things that I have
10 to take into account are expense and burden.

11 Can you help me with that?

12 **MR. ARSENAULT:** The studies we've seen -- and there
13 was an article that just came out today in the New York Law
14 Journal -- they stand for the proposition that this is a
15 more efficient and less expensive process, and, just today,
16 the New York Journal had an article that goes into that.
17 The Journal also noted five different cases, including the
18 **Actos** MDL where I served as lead counsel, where this
19 predictive coding process is being used.

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

21 **MR. ARSENAULT:** Appreciate it.

22 **THE COURT:** Who speaks?

23 Mr. Winter.

24 **MR. WINTER:** Your Honor, we put together a little
25 bit of a PowerPoint for you because there's a little bit of

1 background that needs to be covered here, and what we're
2 here to tell Your Honor is we started a process which
3 involves search terms and predictive coding. We've been
4 saying for at least six months, "If you have other search
5 terms you want us to employ, give them to us. We'll do it."
6 We've engaged in a dialogue on how the predictive coding is
7 being done, and we've gotten nothing.

8 So let's start when we started to collect documents
9 in April of 2012, and we did a very broad search and
10 collected approximately twenty million documents. So if a
11 document is three pages or five pages, that's the breadth of
12 what we collected, because we went to a lot of shared places
13 at Biomet and said, "We need everything in orthopedics to
14 pull out the hips." We took everything in hips to pull out
15 the metal on metal.

16 So you had this big group of documents to which
17 search terms were applied, and you'll see search terms have
18 been used very consistently over the past twenty years. And
19 what it did, the search terms reduced the 19.5 million
20 documents to approximately four million documents. And then
21 when you take out duplication, which is a standard thing you
22 did, we ended up with 2.5 million documents. And then to
23 that group, search terms are applied, and this process takes
24 time. And as of last week, we had produced close to two
25 million pages of documents from that set of 2.5 million

1 documents.

2 And we had said at the last conference, Your Honor,
3 that we were going to be done with our document production
4 by July of this year, and that's when you said you thought
5 you wanted depositions starting in August, which made sense.

6 We're here to tell you, Judge, that if -- we'll go
7 through what the Plaintiffs want, but we will lose at least
8 nine months, if not a year, to go back to Square One. And
9 it's not like we're saying, "Just do it our way." We've
10 offered, along the way, ways for them to get involved in the
11 predictive coding process that we're in. But if we go back
12 to not use search terms and go back to that big pile of
13 19.5 million documents, it's going to take us a year.

14 So search terms were very good to help narrow it
15 down to something that looked like metal on metal, and we've
16 said -- we gave everyone the list of our search terms about
17 seven or eight months ago. We said, "Here are the
18 twenty-eight custodians that we collected from. Here is the
19 department and shared files we collected from," and, we
20 said, "Yeah, you might need to think about this for a
21 while."

22 But we've given lawyers on the Plaintiffs' Steering
23 Committee, lawyers in individual cases, you know, more than
24 a million pages of production so they could look at it and
25 say, "Why didn't you search for this? Why didn't you

1 collect from this custodian?"

2 And we've said, multiple times, "We're more than
3 willing to do that."

4 So we have both a timing problem, Your Honor, and a
5 cost problem. We have spent approximately \$1 million -- and
6 that's not counting the review time for lawyers and other
7 people to look for privileged documents, because you still
8 have to do that -- just to get the production to where it
9 is, to collect the documents, to get it in the right format
10 so it's searchable, run the search terms, run the predictive
11 coding. It's going to cost us at least an extra \$3 million
12 to go back to Square One.

13 Now, how did this predictive coding work? Well, as
14 my good colleague explained to you, it's a computer,
15 artificial intelligence process, and someone sits down and
16 figures out, as they look at documents, what's relevant, and
17 the computer learns and then searches for those types of
18 documents.

19 We, both in writing and in meet and confers, said to
20 our good colleagues, "We will give you sets of documents
21 which have been determined to be nonresponsive" -- so
22 predictive coding has looked at it and said nonresponsive --
23 "we will give you sets of those, and you can randomly select
24 those things -- we all have very smart vendors on both
25 sides -- and you can review them. And if you review them

1 and you see documents that you think are responsive, we can
2 add that to what the predictive coding system is doing
3 already."

4 So we can make this interactive. We can have them
5 look at, you know, how many sets of nonresponsive documents
6 that they want to and satisfy themselves that it is
7 reasonably responsive, or if they want to add to it, it
8 becomes a partnership, and we can have it learn. It can go
9 back and look at the old stuff, and if there's more new
10 things to pull out, there will be more new things to pull
11 out.

12 But the notion that we have to stop and go back to
13 Square One and go look at these 19.5 million documents is
14 just not warranted, not permitted, we think, under the
15 rules, because it's got to be a reasonable thing and there's
16 got to be proportionality.

17 And I think what's important Judge is, when we were
18 here in February -- I know I was very late -- we were
19 talking about getting depositions started in August.

20 And as part of a meet and confer in January, our
21 good colleagues said, "We want more meta data in the
22 documents you're producing."

23 I think we had twenty-four, and they wanted us to
24 give thirty-seven fields of meta data.

25 We said, "Fine."

1 We went back to what we had already produced, had
2 the meta data added to it, produced that.

3 The next production we did last week had the new
4 meta data in it. We had this discussion in January.

5 Three days after we appear in front of you, we get
6 this letter with 184 document requests saying, "Sorry.
7 We're going back to Square One. We're doing everything
8 over."

9 Now, if you wanted us to do everything over, then
10 why'd you ask us the month before to just tweak the
11 production a bit to add these meta data fields?"

12 We didn't think it was really called for, but our
13 good colleagues wanted it, so we did it at our expense.

14 **THE COURT:** This going back to Square One, as you're
15 describing it, is that the gist of the disagreement between
16 you and the Plaintiffs or is there more to it than that?

17 **MR. WINTER:** Well, I think that's the fundamental
18 disagreement.

19 **THE COURT:** All right.

20 **MR. WINTER:** Then the other part would be, we said,
21 "Give us more search terms," and we haven't gotten them.
22 "You want more custodians, we'll look at it. You want to
23 look at documents that the computer said is nonresponsive to
24 see if you want to add that and reconfigure the algorithm
25 for the computer, we're happy to do that."

1 We've had no back and forth because what they say
2 is, "No search terms, and we start everything over," so
3 that, you know, becomes the real road block here.

4 And we've been very transparent. We do want to move
5 these cases along, Judge. When you said, "Do you want to
6 start depositions in August," you know, we're going to get
7 the document production done so that there's complete
8 production.

9 Obviously, someone can say, "I want another
10 custodian," and then we have to figure that part out as we
11 go along, but we'd be in a position to start doing
12 substantive depositions.

13 And, you know, we've spent a lot of money to get to
14 where we are, and to have us triple that cost -- forget the
15 lawyer time -- to do that is just not fair and reasonable.
16 And to the extent we're going to go back and re-do lots of
17 discovery, we're going to be asking you -- if that's what
18 they really want, then they should be paying for it.

19 Thank you, Judge.

20 **THE COURT:** Okay. Yes, Mr. Arsenault, please.

21 **MR. ARSENAULT:** Thank you.

22 I guess the fundamental issue at the end of the
23 day -- and I'm sorry that they've spent money. I'm sorry
24 that they've collected documents. We are going to have
25 affidavits here from two of the Plaintiffs' counsel, before

1 the MDL, that will stand for the proposition that they said,
2 "Look. Don't send us anything. We're going to have to
3 revisit all of this once we get to the MDL," so sorry
4 they've done that.

5 And then, at the end of day, I guess, I have to
6 question the motives associated with going with search terms
7 first versus predictive coding when we know that search
8 terms are going to give us twenty-five percent, at best, of
9 the relevant documents versus predictive coding.

10 They grabbed 19.5 million documents, moved it down
11 somehow -- I don't know -- to four million, then down to
12 2.5, so they've got -- out of their 19.5 million documents,
13 unilaterally moved that to 2.5. Then on that 2.5, instead
14 of using predictive coding, first, to try to get more
15 relevant documents, they used search terms. That leaves
16 seventy-five percent of the relevant documents unavailable
17 to the Plaintiffs at the end of the day. That's the
18 fundamental dispute.

19 Now, with regard to the meta data, you know, with
20 regard to electronically-stored information and these kinds
21 of documents, there are two basic issues, identifying what
22 you need, what's relevant and discoverable, and then, once
23 you do, the format, you know, so that's apples and oranges.
24 To the extent we've reached any agreement with regard to the
25 format and the meta data, that's going to be instructive

1 with regard to us ultimately identifying what's really
2 discoverable here, what's relevant.

3 Thank you.

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

5 **MR. WINTER:** Your Honor.

6 **THE COURT:** Mr. Winter.

7 **MR. WINTER:** So the record is clear here, predictive
8 coding was applied to all of those 2.5 million documents.
9 Search terms weren't used. Once it got to that level, it
10 was all done by predictive coding, and I think it's
11 instructive, Judge, if you look at --

12 **THE COURT:** Well, the search terms got you from the
13 19.5 down to the 2.5?

14 **MR. WINTER:** Correct.

15 **THE COURT:** And then predictive coding and search
16 terms after that?

17 **MR. WINTER:** No, just predictive coding.

18 **THE COURT:** Okay.

19 **MR. WINTER:** Just predictive coding to that 2.5, so
20 the search terms were only used to -- because the way we
21 collected, we have lots of documents on Biomet knees, on
22 Biomet shoulders, on Biomet elbows. All sorts of documents
23 were collected from regulatory and other functions that
24 applied across multiple product lines, so you had to use
25 search terms to knock out stuff that is not even a hip, and

1 then you had to use search terms so that you weren't talking
2 about ceramic hips. We were talking about metal-on-metal
3 hips and we're talking about Magnum's hips, so that's -- the
4 broad collection was to use search terms to get to a
5 universe that had metal on metal.

6 And I think it's instructive, Judge, when you look
7 at what we put in those slides, on how courts use search
8 terms, routinely, for lots of reasons, knowing their
9 limitations, but it's like, you know, the ship has sailed on
10 using search terms in discovery. It's a reasonable and
11 accepted way to do it.

12 And I think, if you look at what our good colleagues
13 said to the MDL Panel on why these cases should be
14 consolidated, for efficiency and that we don't re-do
15 discovery, that's precisely what they're asking you to do
16 here, which is precisely what the Panel, when it
17 consolidated all these cases, said shouldn't happen.

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

19 I do want to try to line this up with the ESI order.
20 I haven't memorized everything we did in the second Case
21 Management Order.

22 I will either get you a ruling this week or we'll
23 contact you and try and set up, perhaps by video or
24 something, a chance for me to hear from your IT experts so
25 that I can get that fuller understanding that Mr. Arsenault

1 talked about, and, again, I think we can do that by video,
2 rather than costing everybody a trip back to South Bend,
3 but, first, I want to see if I could do it based on the
4 ground we've already covered and what I've heard today.

5 I did find my agenda, and I've buried it again. I
6 have to get better at this. Here we are.

7 Plaintiffs' Fact Sheets. I think we agreed we were
8 going to talk about that afterwards.

9 Science information presentation.

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

11 If I may, if you may indulge me, we would like to be
12 heard, you know, again, in some capacity, on the ESI, if we
13 can, just to respond to some of the last comments that
14 Mr. Winter made, to talk about, if necessary, a possible
15 briefing schedule. So as much as Your Honor is ready to
16 kind of think about moving forward, whether it's off the
17 record in chambers or at some other point, we'd like to
18 respond, and we'd like to just address some more issues with
19 the ESI, if Your Honor will hear us.

20 **THE COURT:** Well, why don't we do -- I don't know
21 what your calendars look like. Could we do two weeks for
22 each side to put their positions in writing and identify
23 your disagreements, as you understand it, with the other
24 side?

25 So what would two weeks from today be? This is the

1 11th. No, this is the 18th. So we're into April, and I
2 can't do that math. April 1st?

3 **MR. DASSOW:** Yeah, April 1st, I believe.

4 **THE COURT:** So each side is allowed -- if you don't
5 want to do it, you don't have to do it -- allowed until
6 April 1st to submit, in writing, their positions with
7 respect to the parties' current disagreement concerning ESI
8 coding.

9 And, again, then I will either rule on what you gave
10 me or set something up in pretty short order. That's why I
11 would like to do it by video, so that we don't have to take
12 the time for people to make the arrangements, or I may be
13 able to go on what I'm given.

14 Science and information presentation.

15 **MR. ANAPOL:** Yes, Your Honor.

16 Unfortunately, we've got a bit of a dispute with
17 respect to the science and information presentation. I
18 guess it's protocol more than anything else. Both sides
19 think it's appropriate. We're prepared to move forward.
20 It's a question of what that protocol is and who's entitled
21 to present and what's going to be presented.

22 Our fear, again -- and it ties back into the
23 document production at some level -- is that we really don't
24 have the documents we think we need, Number One. We have
25 been through maybe a sixth of what's been produced already,

1 and there's a lot of holes in it, and I don't want to
2 belabor the ESI any more than I have to.

3 We did meet and confer on the science day and try to
4 set up parameters. My sense from the Defendants is they
5 want to do it sooner rather than later. They're looking for
6 May. We're looking for the Fall.

7 And, again, even being more specific, one of our
8 biggest concerns, at this point, is our initial
9 understanding from Your Honor was to keep it pretty basic to
10 help Your Honor understand the parameters, the science with
11 respect to, I think, metal on metal, generally, the injuries
12 and so forth. The concern now is the Defendants are
13 suggesting they would like to bring an expert in to help
14 present what's presumably going to be modes of failure, and
15 I'm not sure what else specific to Biomet.

16 We're just not there, and so, at the end of the day,
17 I think we would either ask, if we have to move forward in
18 May, that it be very limited and that they don't have an
19 expert present. What we would prefer is to have some
20 documents in hand, to have experts look at those documents
21 and be able to have a more -- you know, if we have to go
22 down that road -- more substantive review of those records
23 and delay this science day to the Fall.

24 **THE COURT:** What do you anticipate as the
25 presentation if we don't have experts?

1 **MR. ANAPOL:** I think that would work better. I
2 think that we'd be prepared to go, I think, as early as May
3 without experts, and what we would be referencing,
4 specifically, would be metal on metal, generally; I think
5 the modes of failure within the more global view; more
6 specifically, what happens to claimants when they're injured
7 by these metal-on-metal hips.

8 **THE COURT:** So this would be more like what you
9 folks had in your what-is-this-all-about brief in the
10 beginning?

11 **MR. ANAPOL:** I think so. That would be our sense
12 more so.

13 But to get into the specific modes with respect to
14 Biomet and the differences between Biomet and some of the
15 other metal-on-metal products, we're at a huge disadvantage,
16 because we don't have experts, we don't have the documents
17 yet, we don't have the documents to give to the experts yet,
18 as far as we're concerned, so it's all part and parcel, and
19 we're more than happy to move forward in May, if it's
20 limited.

21 **THE COURT:** Okay. Mr. LaDue.

22 **MR. LADUE:** Judge, we had pretty close to agreement
23 on certain things.

24 I talked with Mr. Dassow about this, and he
25 suggested each side have an hour-and-a-half. We think each

1 side should have two hours just to make sure the Court has
2 plenty of time to ask questions. We agreed no witnesses, no
3 arguments.

4 Picking up on Your Honor's comments from our last
5 hearing, you said you didn't want us to make this into a
6 **Daubert** motion, you didn't want it to turn into summary
7 judgment arguments, and we agree with that, and we would be
8 focusing on the basic science supporting the parties'
9 contentions and just factual background information that
10 will assist the Court.

11 It's correct that we would like to have a surgeon,
12 an expert surgeon assist us. That person can answer
13 questions about the surgical procedures and talk about
14 post-surgical treatment. We think that's helpful.

15 **THE COURT:** Let me back, up because I just wrote
16 down what you said before, that you'd agreed to either
17 forty-five or sixty or -- I'm sorry. Not forty-five --
18 ninety or 120 minutes aside, but then I thought you said you
19 had agreed no experts, no argument.

20 **MR. LADUE:** I'm sorry. I said, "No witnesses, no
21 arguments."

22 **THE COURT:** No witnesses.

23 **MR. LADUE:** We didn't anticipate having the surgeon
24 take the witness stand and present testimony, just to assist
25 us with our presentation and be available to answer --

1 **THE COURT:** Sitting there at counsel table?

2 **MR. LADUE:** Yes.

3 **THE COURT:** But not to speak unless asked by --
4 unless I ask?

5 **MR. LADUE:** We would probably have them present just
6 a basic overview of the surgical procedures and then be
7 available to answer the Court's questions.

8 **THE COURT:** I see.

9 **MR. LADUE:** And then we still -- we still think that
10 May is a good target.

11 I'm not sure what additional document production
12 would do to change either parties' presentation on this just
13 sort of basic background information.

14 **THE COURT:** What you're thinking about with this
15 surgeon on surgical procedures, would he or she be comparing
16 procedures necessary for the Biomet product, as opposed to a
17 Zimmer product, or are you talking, generally, generically,
18 how one does it, or simply how one puts in the Biomet
19 product?

20 **MR. LADUE:** To explain how the Biomet product is
21 implanted and just sort of step by step through the process
22 and then post-surgical treatment for common complications.

23 **THE COURT:** Okay. So there would be no discussion
24 of anybody else's product?

25 **MR. LaDUE:** We hadn't intended on that, not at this

1 point.

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

3 Mr. Anapol, help me understand where the big area of
4 disagreement is. I understand the little one.

5 **MR. ANAPOL:** I just think we're at a disadvantage if
6 they have an expert present and we're not prepared to bring
7 an expert in in May, particularly as it relates to Biomet.

8 And our concern is that, by example, they start to
9 talk about failure modes as it relates to Biomet
10 specifically. I'm certain they're not going to come in here
11 and talk about the other products. The issue is metal on
12 metal, generally, and Biomet, specifically.

13 And where we are at a distinct disadvantage is
14 knowing the information that are in those documents,
15 knowing, you know, the differences between Biomet product
16 and another metal-on-metal hip, and we're just at a
17 disadvantage at this point without experts. And we think,
18 to be on a more level playing ground, if we're either -- if
19 they don't have an expert, I think we're more inclined to
20 not be as concerned with May.

21 **THE COURT:** Okay. Let me ask this, putting together
22 the two things that I've heard today.

23 Mr. Winters said that, if I go back to Square One
24 and predictive coding, that it would be many months, perhaps
25 as long as a year, perhaps not, before you would have

1 everything.

2 How does that fit in with what we're talking about
3 here, since you're indicating you need the documents to be
4 ready for science day?

5 **MR. ANAPOL:** This is the first I'm hearing that to
6 start this process over again would cost three times the
7 process that it already cost them, so I'm not quite sure how
8 that math adds up.

9 I can't imagine that it takes a year. I would think
10 that it would take months to work, but not a year. And by
11 the time -- if we are able to go down that road, what we are
12 entirely hopeful and think reality will be is that it will
13 speed up the process on the back end. So if the predictive
14 coding is accepted, and we are working collaboratively on
15 deciding which documents belong and which don't through the
16 predictive coding process, that that process may take two,
17 three, four months, and then the actual coding is immediate.

18 And, Mr. Arsenault, I don't know if there's anything
19 I'm missing on this, if you wanted to jump in.

20 If Your Honor will hear from him, it's really his
21 area more than mine, but that's my sense, that it will not
22 take a year. It would be much quicker than that, and, in
23 fact, it would speed up the process long-term.

24 **THE COURT:** But it would be a matter of months from
25 where we are?

1 **MR. ANAPOL:** I do believe, as I understand it, that
2 we'd have representatives from both sides together going
3 through specific custodian files to set up the predictive
4 coding. There may be issues, you know, with meet and
5 confers there where we disagree on what should go, what
6 shouldn't go, but that once that process is worked up, the
7 process on the back end is dramatically faster.

8 **THE COURT:** Okay. But your thought is somewhere in
9 the four-month range?

10 **MR. ANAPOL:** Mr. Arsenault is telling me two to
11 three months.

12 **THE COURT:** Okay. All right. I think maybe it
13 would be -- since there, obviously, is an impact of one on
14 the other, and I've just allowed two weeks to get briefs or
15 letter briefs in on the one, I'd better hold off on that.
16 Obviously, I want to know what we've got before we start
17 getting into discovery disputes, because that's my concern.
18 I think I need to know what you folks are talking about
19 before I can say what the witnesses have to talk about it.

20 So I will hold off on setting science day and
21 figuring out when it should be until I've given you the
22 ruling on the ESI, because there's going to be some impact.
23 Whether it's two months or a year or something in between,
24 there's going to be some impact, so I'm not going to resolve
25 that one today either.

1 How about remand motions. Maybe I can contribute
2 something there.

3 **MR. ANAPOL:** Yeah, remand motions. I don't think
4 there's any disagreement among the parties. We mentioned
5 this to Your Honor ahead of time. There are, I think, two
6 cases in which distributors may have been sued, and I need
7 to find out who the Plaintiffs' attorneys are, reach out to
8 them and find out what their wishes are, if they intend to
9 you know, fight or not the remand, and, you know, we haven't
10 really met and conferred, and I think we'll be able to get
11 that one resolved.

12 **THE COURT:** So would we do well for that to be a
13 five-week period to allow supplemental briefs for the
14 Plaintiffs moving to remand or to withdraw?

15 **MR. ANAPOL:** That sounds reasonable.

16 **THE COURT:** That would give you that two weeks we
17 talked about in chambers, okay.

18 And we did talk about multi-plaintiff cases to be
19 severed. And remind me because I didn't write this down.

20 Is that where you need to talk to the Plaintiffs'
21 attorneys first?

22 **MR. ANAPOL:** I think it's underway. We may have to
23 make sure that it's getting done. We're in full agreement
24 with the Defendants. The few complaints need to be severed.
25 Whether they have or haven't, I don't know, but we'll find

1 out who they are and assist the Defendants in having them
2 severed.

3 **THE COURT:** So if I use that on that five-week --
4 no, you're not looking forward to the --

5 **MR. WINTER:** I think, Judge, your prior order,
6 actually, set in place the timing of these, so I don't think
7 you need any further orders. You wanted the parties to
8 identify for you the cases that would be subject to the
9 order, which we have now done, so I think whatever the time
10 that you set in your order thereafter doesn't need to be
11 adjusted.

12 **MR. ANAPOL:** I think Mr. Winter's correct. I don't
13 have it in front of me. I don't want to, you know,
14 jeopardize some Plaintiffs that were unaware, for whatever
15 reason. The parties can work together, Your Honor. I don't
16 know that we need your involvement. We'll make sure it
17 happens.

18 **THE COURT:** Well, I think you need my involvement to
19 order them severed, so I think I've got to do that and give
20 them all new cause numbers and that sort of thing.

21 **MR. ANAPOL:** Okay.

22 **THE COURT:** So we'll get on that.

23 Let me look at my notes to see if there was anything
24 else I wanted to add.

25 One thing we did talk about in chambers is that

1 there are some pending motions, some of them directed only
2 at parties other than Biomet and a full motion to dismiss.

3 Do we have those cause numbers now? Are they at
4 fingertip or do --

5 **MR. WINTER:** Yes, Your Honor. We handed a sheet to
6 both our colleagues and your staff.

7 **THE COURT:** Okay. So we will attach this as Exhibit
8 A to the memorial of today's conference and say that, in
9 these cases, the Plaintiffs are afforded -- what is five
10 weeks from now? Let's see. Two weeks was April 1st, so
11 that should be April 22nd -- afforded until April 22nd
12 within which to respond to the pending motions, and we'll
13 move from there and see who responds.

14 **MR. WINTER:** And on the motions to transfer that are
15 going to be on Exhibit A, Your Honor, we are going to
16 withdraw those motions without prejudice.

17 **THE COURT:** Okay. So in what we have as Cause
18 Number 12CV672, which came to us from the Northern District
19 of California -- I'm sorry. I missed the one at the top --
20 12CV586, which also came to us from the Northern District of
21 California, and 12CV724, which came to us from the District
22 of New Jersey -- did I miss any? Oh, I missed several. Let
23 me start over.

24 The motion to transfer is withdrawn in the following
25 one, two, three, four, five --

1 **MR. WINTER:** I believe it's five, Your Honor.

2 **THE COURT:** -- 12CV586, **Hales versus Biomet**
3 **Orthopedics;** 12CV617, **Wade versus Biomet;** 12CV619; **Hanson**
4 **versus Biomet;** 12CV672, **Chandler versus Biomet;** and 12CV724,
5 **Anker versus Biomet.** We'll just show those as withdrawn at
6 this point.

7 **MR. WINTER:** Yes, Your Honor. Thank you.

8 **THE COURT:** With respect to the others on this list
9 then, the motions to dismiss -- I guess this has the two
10 remand motions, also, where the Plaintiffs would be
11 responding or at least to let -- not responding, but to let
12 us know whether they wish to maintain them, and they shall
13 have until April 22nd within which to do that.

14 Anything in addition or anything we covered in
15 chambers that I didn't memorialize?

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

17 We're going to do the Fact Sheet --

18 **THE COURT:** Yeah.

19 **MR. ANAPOL:** That's all.

20 **THE COURT:** Anything for the Defendants?

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

22 **THE COURT:** Okay. We have a small conference room.
23 If too many of you want to participate, we will adjourn to
24 the jury assembly room.

25 **MR. ANAPOL:** Your Honor, do you want a date for the

1 next hearing?

2 **THE COURT:** Oh, yes. I'm sorry.

3 I would think -- May is a complete mess on my
4 calendar, so I think we would do well to go to -- the last
5 Monday in April would be April 29th.

6 Are you folks coming in on Sunday night? Is that
7 what you --

8 **MR. ANAPOL:** We are now, Your Honor, after last
9 month's fiasco.

10 **THE COURT:** Well, let me go ahead and give you 9:30
11 on the morning of the 29th, if that will work for you then.

12 **MR. ANAPOL:** Your Honor, it's actually a bit of a
13 problem for Mr. Dassow and me.

14 Does the week before or the week after work for you?

15 **THE COURT:** The week after does not work. That's
16 the Circuit Conference.

17 I can do the same thing on April 22nd, 9:30.

18 **MR. ANAPOL:** That's all right with me.

19 John, any problems?

20 **MR. WINTER:** Works for me, Your Honor.

21 Does it work for you, Mr. LaDue?

22 **MR. LaDUE:** Yes, sir.

23 **MS. LINDER HANIG:** Works.

24 **MR. ANAPOL:** So what time are we going to start?

25 **THE COURT:** 9:30.

1 **MR. DASSOW:** Correct.

2 **MS. LINDER HANIG:** Correct.

3 **THE COURT:** On Page 3, Section I, Questions 4 and 5
4 will be deleted.

5 On Section I, Questions 11(a) through (d) on Page 5,
6 Question 11(a) will become -- well, no.

7 **MS. LINDER HANIG:** That's correct.

8 **MR. DASSOW:** That's correct. It's going to be "yes"
9 or "no," yeah.

10 **THE COURT:** It will be "yes" or "no", and the rest
11 will be removed, correct?

12 **MS. LINDER HANIG:** Correct.

13 **MR. DASSOW:** Yes.

14 We might want to keep that "in part," don't you
15 think?

16 **MS. LINDER HANIG:** Yeah.

17 **THE COURT:** "Or a portion"?

18 **MR. DASSOW:** "Or in part," we can keep, Your Honor,
19 if it's -- 11(a) would be, "yes, no, or in part."

20 **THE COURT:** So 11(a) will be --

21 **MS. LINDER HANIG:** Right, as is.

22 **THE COURT:** With (b), (c), and (d) out?

23 **MR. DASSOW:** Correct.

24 **THE COURT:** There was no objection by the Defendant,
25 as I understand it, to the removal, on Page 7, Category III,

1 Question 9, the second part?

2 **MS. LINDER HANIG:** Correct.

3 **THE COURT:** So that will be out.

4 Now, to Page 10, Question 20, toward the bottom, the
5 question would be modified to, "Have you ever been out of
6 work for more than thirty consecutive days?"

7 And then what was 21, modified to 20 here would
8 be --

9 **MS. LINDER HANIG:** I think that's actually in, Your
10 Honor.

11 **MR. DASSOW:** In. That's in.

12 Twenty-one is --

13 **MS. LINDER HANIG:** Is out, Plaintiffs' red line.

14 **THE COURT:** Oh, that's right, yeah.

15 Twenty-two is out --

16 **MS. LINDER HANIG:** But, before we get any further,
17 Judge, I think we skipped Page 8 and 9. Twelve, 13, 14, and
18 18, the "five years" should be "three years."

19 **THE COURT:** Twelve, 13, 14, and 18, the period that
20 is to be covered is three years, instead of "one" or "five."

21 Thank you.

22 **MR. DASSOW:** Yeah.

23 Twenty-four, Your Honor --

24 **MS. LINDER HANIG:** Page 11, Question 24.

25 **MR. DASSOW:** -- is out.

1 **THE COURT:** The original 25, then modified to 24?

2 **MR. DASSOW:** Correct.

3 **THE COURT:** And the question about third-party
4 funding and losing control will be out.

5 Twenty-six.

6 **MS. LINDER HANIG:** The Defendants don't object to
7 that question being stricken.

8 **MR. DASSOW:** Yeah, that was taken out. That was
9 stricken.

10 **THE COURT:** So that will be out, okay.

11 **MR. DASSOW:** Twenty-eight stays in, and 29 comes
12 out.

13 **THE COURT:** Right, 28 in, 29 out. That's on
14 Page 12.

15 **MS. LINDER HANIG:** Correct.

16 **THE COURT:** I think that takes us down to the bottom
17 of Page 15.

18 **MR. DASSOW:** Correct.

19 **MS. LINDER HANIG:** Correct.

20 **THE COURT:** The line at 4 will be changed to
21 "alcohol and allergies," and Part B will be deleted, and
22 "food and medication" will be returned to that chart.

23 **MR. DASSOW:** Correct.

24 **THE COURT:** Ms. Hanig, I'm going to have to ask you
25 to help me on Page 17 where we have a variety of other

1 things that ask them whether they've experienced or been
2 diagnosed. The chart will be expanded to include answers as
3 to --

4 **MS. LINDER HANIG:** Symptoms, date of onset, date of
5 diagnosis, and name of physician.

6 **THE COURT:** Let's see. Then on Page 22,
7 Question 1(d)(iii) about currently suffering from any
8 injuries, that will be deleted as duplicative of the chart?

9 **MR. DASSOW:** The chart, uh-huh.

10 **THE COURT:** And then the expansion of that onto the
11 next page, date of onset, date of diagnosis, and name of
12 physician, those will be deleted, as well.

13 And then of the two questions that were lost as the
14 Plaintiffs moved from an earlier document to this one, the
15 question about past residences will be included. The
16 question about past institutions of education will be
17 deleted.

18 **MS. LINDER HANIG:** Correct.

19 **THE COURT:** Does that cover everything?

20 **MR. DASSOW:** And then the last one was just the
21 language, whoever had the language, for Request Number One.

22 **THE COURT:** Oh, that's right.

23 **MR. DASSOW:** Yeah.

24 **THE COURT:** On Page 26, Request Number One will be
25 rewritten to read, substantially, as follows: "With respect

1 to any injury, illness, and/or disease identified in
2 response to this Plaintiff Fact Sheet, all medical records
3 in your possession from any physician, hospital, or
4 health-care provider."

5 **MR. DASSOW:** Okay.

6 **THE COURT:** Okay?

7 **MR. DASSOW:** Yeah.

8 **THE COURT:** And, as I understand it then, Biomet is
9 going to recast the word processing and forward it then to
10 Mr. Dassow --

11 **MS. LINDER HANIG:** Correct.

12 **MR. DASSOW:** Right. Sure.

13 **THE COURT:** -- for review?

14 **MR. DASSOW:** And then we'll submit it jointly.

15 **THE COURT:** Assuming it survives both of those, I
16 will sign it.

17 Thank you, folks.

18 **MS. LINDER HANIG:** Thank you, Your Honor.

19 **MR. DASSOW:** Thank you, Your Honor.

20 **(Proceedings concluded.)**

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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 25TH DAY OF MARCH, 2013.

S/S DEBRA J. BONK

DEBRA J. BONK
FEDERAL CERTIFIED REALTIME REPORTER