

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, APRIL 22, 2013

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

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17 DEBRA J. BONK
18 *Federal Certified Realtime and Registered Merit Reporter*
19 *United States District Court*
20 *204 South Main Street - Room 323*
21 *South Bend, Indiana 46601*
22 *debra_bonk@innd.uscourts.gov*
23 *574-246-8039*

24
25 *Proceedings reported in machine shorthand. Transcript*
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1 **APPEARANCES**

2 **For Plaintiffs:**

3 MR. THOMAS R. ANAPOL
4 MR. ROBERT DASSOW
5 MR. RICHARD ARSENAULT (telephonically)
6 MR. MARK LANIER (telephonically)

7 (see docket for addresses)

8 **For Defendant:**

9 MR. JOHN D. WINTER
10 MR. JOHN LaDUE
11 MS. ERIN LINDER HANIG

12 (see docket for addresses)

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1 **THE COURT:** This is Civil Cause 12MD2391, **In Re:**
2 **Biomet M2a Magnum Hip Implant Products Liability Litigation.**

3 Welcome to one of -- I'm glad you're here on one of
4 the days that spring has stopped in for a visit. There have
5 been few.

6 We have in court, for the Plaintiffs, Mr. Thomas
7 Anapol and Mr. Robert Dassow, and for the Defendants,
8 Mr. John LaDue, Ms. Erin Linder Hanig, and Mr. John Winter.

9 As I understand it, we have on the phone, at least,
10 Mark Lanier.

11 Are you there, sir?

12 **MR. LANIER:** Yes, I am, Your Honor.

13 **THE COURT:** And Mr. Richard Arsenault.

14 Are you there, sir?

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

16 Good morning.

17 **THE COURT:** Good morning.

18 I did speak with counsel, briefly, to see if there
19 was -- to talk about a few CM-ECF issues and to get a
20 general overview as to what we have coming in here.

21 Number one on the agenda that was submitted was the
22 ESI issue, and I apologized to them and will apologize to
23 everybody on the phone for getting a ruling out so close to
24 the case management conference, but my understanding is that
25 that at least sets the first of the road signs, and there

1 may be other issues that will come up, but at least we know
2 which direction we're heading, generally.

3 Is that fair from the Plaintiffs' standpoint?

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

5 **THE COURT:** And, Mr. Winter, is that your
6 understanding?

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

8 **THE COURT:** Okay. And that takes us to Agenda Point
9 2, 30(b)(6) depositions.

10 Mr. Dassow.

11 **MR. DASSOW:** Yes, Your Honor.

12 I think --

13 **THE COURT:** If you could get to the lecturn, we need
14 the microphone for the people -- why am I pointing to the
15 ceiling -- for the people who are on the phone.

16 **MR. DASSOW:** Your Honor, the only issue, I believe,
17 before the Court is, actually, the location of where these
18 depositions are going to take place. We, initially,
19 Plaintiffs, offered to go to New York or to Chicago or
20 Indianapolis. The folks from Biomet said "No" to New York
21 or Chicago but said we could do them in Warsaw or here in
22 South Bend. So the issue before you, Your Honor, is should
23 they be in Indy, should they be in Warsaw or South Bend.

24 And, Judge, the idea behind that the Plaintiffs want
25 them in Indianapolis is, really, three-fold: One, expense;

1 two, time; and, three, simply the travel-related issues all
2 surrounding taking these depositions.

3 Your Honor, we strongly believe that we would save
4 numerous nights of stays, overnight stays, in hotels. We
5 would save expenses, including meals, to say nothing of the
6 attorney time that would be involved if we had to go to
7 Warsaw and South Bend.

8 Most of the folks are from either -- for instance,
9 Mr. Lanier's office is Houston and New York. There are
10 direct flights. There are --

11 **THE COURT:** "Most of the folks." You mean the
12 attorneys who would be --

13 **MR. DASSOW:** The attorneys from our side.

14 And there are eight or nine direct flights from
15 Houston to Indianapolis, the same with New York. Mr. Anapol
16 and his office are from Philadelphia. Those are direct
17 flights to Indianapolis.

18 Even if it wouldn't be plausible to do it in a day,
19 it could happen in one day where the folks from Houston, New
20 York, any of the big cities that were doing the depositions
21 could literally fly in and take the deposition, if it was a
22 day deposition, and fly out that evening.

23 Let's say that that's not even possible, Your Honor.
24 If we're flying to Indianapolis, all of the folks, you're
25 talking about a one-night stay max because everybody can get

1 out that evening right after the deposition ends.

2 My suggestion would be that -- we are more than
3 happy to host them at Hovde, Dassow & Deets. We have an
4 extra conference room that the Defendants could solely use,
5 and we could also put a locked office, if they wanted one.
6 We're happy to do the depositions, obviously, anywhere in
7 Indianapolis, but it's the north side of Indianapolis.

8 Judge, if they were to be done in South Bend, it's
9 forty-plus miles, as Your Honor knows, from Warsaw to South
10 Bend. Let's say it's a hundred from Warsaw to Indianapolis.
11 You're talking about an extra hour of travel for the folks
12 who are in Warsaw to come do the deposition, but it is days
13 different for the folks that are taking the depositions.
14 It's just not practical to come to South Bend, as you know,
15 on a daily basis. It's different if we're coming for a CMC
16 that we know about six weeks ahead.

17 In the -- I'm just going to give you one of the
18 cases. There's a **NexGen** case involving Zimmer that the
19 Federal Judge in that case ruled, and, in fact, it's kind of
20 interesting the way the Judge said it.

21 I can't believe that we're not trying to make this
22 as practical as possible. There'll be common benefit time
23 and expenses. I don't want to see extra common benefit time
24 and expenses for the Plaintiffs coming across, you know,
25 every quarter or whenever we submit it, but there will be

1 hundreds of extra nights of hotels, hundreds of extra meals,
2 and -- I mean, I don't think I'm exaggerating -- thousands
3 of extra hours of travel time if we don't do Indianapolis,
4 so the Plaintiffs feel very strongly that we, you know, have
5 the depositions in Indianapolis.

6 And **NexGen**, I can provide to the Court -- excuse
7 me -- not only the transcript, but also the Case Management
8 Order where the Judge ordered that the depositions for the
9 Zimmer folks take place in Indianapolis.

10 So I know that that was fairly long-winded, but if
11 we're talking about seven-hour depositions, and if half the
12 time we can get in and out of the depositions by direct
13 flights, that makes a huge difference, Your Honor, huge
14 difference.

15 Thank you. I think that's all I have.

16 **THE COURT:** Thank you.

17 Mr. Winter.

18 **MR. WINTER:** Your Honor, just to give us a little
19 background here, earlier this month, we received six
20 30(b)(6) deposition notices, which is what we're talking
21 about here. Combined, the six notices have seventy-three
22 different topics they want covered.

23 What we did is, pretty quickly, worked with the
24 people at Biomet, and we have identified eight people who
25 are responsive, can provide responsive testimony to these

1 six notices and seventy-three topics. The dates that were
2 initially proposed, literally, were, I think, starting this
3 Friday and next week. What we did is we said, "We can
4 provide these eight people for these six topics, and," we
5 said -- we looked at people's schedules and said -- "we want
6 to start" -- I'm doing this from memory, Your Honor -- "the
7 week of May 20 with the first one and then about once a week
8 thereafter with two breaks, one for the Fourth of July week
9 and another week where we couldn't find the witness, and
10 we'll come up with a mutually-convenient date during that
11 week for the deposition so everyone can plan appropriately."

12 Then the question came up as to where these eight
13 depositions should be. And just so the record is clear,
14 Judge, we said, "South Bend or Fort Wayne." We never said,
15 "Warsaw."

16 And looking at travel, it is comparable for anyone
17 to get to South Bend as it is to Fort Wayne. We were, you
18 know, ambivalent that way. New York would be extremely
19 convenient for me, Judge, but I have learned a long time
20 ago, the convenience of the lawyers is, generally, not what
21 is driving these types of decisions. So our client is in a
22 spot almost equidistance from the two places, and we said
23 that's what we think it should be.

24 We can provide you, Judge, with orders in other MDLs
25 involving DePuy where exactly the same set-up was. You want

1 to go to South Bend. You want to go to Fort Wayne. Take
2 the DePuy witnesses, who also are located in Warsaw -- so we
3 thought that was fair.

4 Now, if we're going to talk about all the
5 depositions that are going to occur of Biomet employees
6 during the course of this whole MDL, I think that's a
7 subject far broader in terms of what would be fair in terms
8 of cost, expense. I'm not sure how dinners are going to be
9 cheaper doing it this other way. I'm not really sure how
10 travel changes appreciably for the lawyers. But we thought,
11 for these eight witnesses, that that was fair.

12 Now, if it really is important to our colleagues for
13 one or two of these 30(b)(6) witnesses to be deposed in
14 Indianapolis because of extraordinary reasons, for travel of
15 the lawyer who has to take the deposition, we're more than
16 willing to talk about that, but if we're going to have a
17 process by which every deposition of a Biomet employee takes
18 place in Indianapolis, which was what I'm hearing, then I
19 think we have a much bigger issue to deal with. If we're
20 talking about for, you know, two out of these eight, three
21 out of these eight being in Indianapolis, once we pick the
22 dates, because we have a two-month period here to work with
23 starting the end of next month, we're happy to work with our
24 colleagues.

25 We've already told them, on the seventy-three

1 topics, we think some of them are too broad, and we need to
2 have a discussion about making sure we're all on the same
3 page there. We're going to serve our objections to those
4 notices well in advance.

5 We suggested a time to meet and confer so when we
6 start these depositions everyone, you know, is on the,
7 quote, unquote, same page. As part of that dialogue, you
8 know, if it turns out that someone has got a travel schedule
9 that getting to Indianapolis so they have to get there in
10 the morning is the only way they can do it, we'll work with
11 them. But if they want to have like a rule for this MDL
12 going forward every deposition in Indianapolis, we'd like to
13 submit some papers on that because lawyer convenience can't
14 be what drives this, Judge.

15 Thank you.

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

17 The right to close, Mr. Dassow.

18 **MR. DASSOW:** Very briefly. Very briefly, Your
19 Honor.

20 Your Honor, the seventy-three topics and the eight
21 folks is not what we're talking about. We're talking about
22 hundreds of thousands of dollars. We're talking about
23 thousands of hours of additional wasted time simply
24 traveling, when the folks at Biomet have to travel forty,
25 forty-five miles, anyway, instead of ninety miles, and all

1 of these direct flights -- in fact, I'm surprised counsel --
2 it saves counsel significant time, and there's ten flights
3 from Laguardia every day to Indianapolis. He, certainly,
4 can fly in right away, as opposed to Detroit to here,
5 Chicago to here, Indy to here. There's just nothing
6 convenient.

7 I think that if you would ask the folks in the **DePuy**
8 case -- and that's Judge Katz, who's up in the **DePuy ASR**,
9 who actually said, you know, "You've got to come here, as
10 opposed to Indianapolis," or they had to go to Warsaw or
11 Fort Wayne -- that they find that it's causing delays, and
12 you've got extra flights, you've got lost baggage, you've
13 got all these other things that can go wrong when you add
14 the connections, much less the hotels.

15 So I would just reiterate that, while we're willing
16 to work -- just like what counsel said. If there's some
17 reason that there's a witness that, you know, has problems
18 and that can't come down from Warsaw, we're happy to work
19 with that, but I think that the majority of the deps should
20 be in Indy, and we're willing to work with them, whatever is
21 the most convenient to come down from Warsaw, 69. I mean,
22 you know, it's a straight shot south to 69, and then you're
23 at my office, basically, on the north side.

24 So, Judge, I think it's important not to rack up
25 huge common benefit funds. It's not just a convenience.

1 It's what we have to submit to Your Honor, and it increases
2 the costs and expenses and time, you know, two-, three-fold,
3 at least, and I think you would see that when we would have
4 to start doing -- when we start doing our submissions.

5 **THE COURT:** Let me ask this. The agenda item said
6 30(b)(6) depositions, and that's what Mr. Winter was talking
7 about.

8 I gather you're talking about more than those eight?
9 You're talking about the ones to follow?

10 **MR. DASSOW:** Yeah.

11 I think, Your Honor -- I mean, I think that, while
12 it shouldn't be -- you know, not a hard-and-fast order, we
13 would request that not only the 30(b)(6)s, but as we go
14 forward with the custodians. And, you know, we were talking
15 on the way up here, lead counsel, you know. It may be
16 thirty, forty depositions total in the litigation. I mean,
17 don't hold me to that, Your Honor, because, you know, we
18 don't have the documents.

19 **THE COURT:** No, I understand.

20 But you are addressing depositions --

21 **MR. DASSOW:** I'm addressing those, yeah, and I think
22 that I'm, kind of, flipping on the other side, Your Honor.
23 If there's a custodian, that, you know, they say, "Hey,
24 we've got to do it up there," so be it or, you know, we'll
25 make it convenient, but I think the majority should take

1 place -- for the time and expense that it will save the
2 Court and all the folks in the litigation.

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

4 **MR. DASSOW:** Thank you.

5 **THE COURT:** Not knowing what the area of dispute
6 was, I haven't done any -- I haven't looked up the factors
7 to consider on location of depositions. I'll do that, I
8 want to say, this week. I'm going to be in -- I have to
9 leave for Washington tomorrow but should be able to get a
10 quick ruling out to you by Monday or Tuesday at the latest,
11 maybe by Friday, depending on how long it takes for me to
12 look at this stuff, but I think I understand your positions.

13 Pending motions we talked, briefly, about, and
14 my proposal to counsel was that we, at whatever is our next
15 case management conference somewhere in the way of six weeks
16 down the road, schedule oral argument, maybe twenty minutes
17 per side -- we didn't talk about that -- on the preemption
18 dismissal motions, which, I think, are **Caccia**, C-A-C-C-I-A,
19 13CV73, and **Chadwick**, 12CV614, and simply have the argument
20 to follow the case management conference, and I suggested
21 that when we gathered beforehand.

22 Now that everybody's had a little more chance to
23 digest it, does it sound okay for the Plaintiffs?

24 **MR. ANAPOL:** Your Honor, it is.

25 Again, let me just reiterate. I know that -- I

1 don't know how to pronounce it -- **Caccia**, I think it is -- I
2 know that there's going to be an opposition. I don't know
3 the status of **Chadwick**. There may or may not be, and
4 Mr. Winter and I continue to work with counsel there.

5 **THE COURT:** Or you can devote your entire argument
6 time to the Caccia one.

7 **MR. WINTER:** That's acceptable to Defendants, Your
8 Honor, and I'm almost certain **Chadwick** was fully submitted
9 before it was transferred here.

10 **THE COURT:** Okay. Yeah, we show that fully briefed.

11 And **Caccia**, the supplemental briefs are to be filed
12 by -- well, the reply brief is due next Monday, and I think
13 briefs are due today.

14 Okay. Next on the list was scheduling the science
15 day, unless I'm skipping over things.

16 Were there other things to discuss about the pending
17 motions?

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

19 And, if we can, Mark Lanier, on the phone, is going
20 to be discussing science day.

21 **THE COURT:** Okay. And was there anything on either
22 of the earlier agenda motions for the Defense? I suddenly
23 realized I'm blowing through these without inviting
24 comments.

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

1 I do think that one of the remand motions that was
2 pending before you, **Ziegler**, was withdrawn on Thursday or
3 Friday.

4 **THE COURT:** Right, yeah.

5 Okay. Let's turn to the science day issue,
6 Mr. Lanier.

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

8 Thank you very much for allowing me to appear by
9 telephone. I won't explain why it's helpful, but it's
10 extremely helpful, and I'm personally grateful.

11 Here is what I think everybody wants. Everybody
12 wants a useful and fruitful science day to inform the Court.
13 The difficulty, of course, is when can that be done. For it
14 to be a useful and fruitful science day, it needs to have
15 both sides prepared to present science to the Court. For
16 both sides to be prepared is a challenge for the Plaintiffs
17 much more so, I think, than the Defendants.

18 Clearly, the Defendants better have known the
19 science before they ever started selling the product.
20 They've certainly had years of experience with it. They've
21 got doctors on staff. They've got engineers on staff. They
22 had everything at the ready to do a science day for the FDA
23 just to get their product on the market.

24 We're, clearly, not in the same shoes that they are,
25 and so what we're trying to do is make sure we've got time

1 so that we can adequately represent our clients and the rest
2 of the Plaintiffs that are represented by us by virtue of us
3 being a steering committee.

4 So, toward that end, what does that mean? Well,
5 obviously, we'd like a chance to go through all of the
6 documents. The documents won't completely be presented
7 until midsummer, it looks like. It means that we will need
8 an opportunity to have a number of different implants and
9 tools provided to us from the Defendants so that we can have
10 our experts with hands-on tools and implements and the
11 actual implants to use and to study and to look at and to be
12 ready to present on. It means we need to retain a doctor,
13 at least.

14 You know, initially, our thought had been and the
15 Court's indication had been that this was not going to be a
16 **Daubert** hearing, and we still understand that to be true,
17 but the Defendants have said, "No, we don't want it to be a
18 **Daubert** hearing, but we do want to have a doctor available
19 to answer questions," and I guess that's maybe **Daubert**-like
20 or something. But if there's going to be a doctor there to
21 answer questions for the Plaintiffs -- I mean the
22 Defendants, then, obviously, the Plaintiffs aren't doing
23 their job if they don't have a doctor there ready to answer
24 questions, as well.

25 So when you wash through all of this, assuming that

1 the documents are produced timely, assuming that the
2 Defendant doesn't fuss and supplies us with sample implants
3 and sample tools used for that process, then if we put on
4 the burners, there's no reason during the summer we can't
5 not only go through the necessary documents, get those
6 tools, but get an expert on line or a doctor on line to at
7 least be available to answer questions and hold accountable
8 the question/answers provided by the Defense doctor.

9 If we set an hour aside or whatever you want to
10 provide for each side and set this sometime in the Fall --
11 September, to us, seems the most reasonable time period --
12 we think, with good effort, we could be ready by then, so I
13 think that's the real debate. The Plaintiffs -- the
14 Defendants have suggested May, and we don't see any way that
15 we could even remotely be ready in a month to do this. We
16 don't even have all the documents, much less have a doctor
17 on line, much less have samples of the actual devices
18 themselves and the tools used to implant them, so that's the
19 position for the Plaintiffs.

20 And I apologize that I am by phone, but I'm most
21 appreciative.

22 **THE COURT:** I've got a couple of questions
23 Mr. Lanier.

24 First of all, I can't remember what it was called,
25 but the first submission you folks made to me, when I was

1 simply looking for somebody to tell me what the case was
2 about, seemed pretty extensive about what the Plaintiff says
3 goes wrong with these things and what injuries they cause
4 and how it goes wrong, and I guess I'm trying to figure out,
5 if you had that information, what is it that you could --
6 because it was pretty fact-specific concerning what you were
7 contending, which I appreciated, but, I guess, I'm not sure
8 what it is that holds you back from being able to take just
9 a few steps from that for science day.

10 **MR. LANIER:** Excellent question, Your Honor.

11 What we did when we presented that to you is we gave
12 you the data that we, as lawyers, were able to conjecture
13 from two different things. Obviously, we have involvement
14 in other metal-on-metal hip implant litigation.
15 Mr. Arsenault and myself are on the executive committee --
16 I'm a co-leader in the **DePuy/Pinnacle Implant Litigation**,
17 also on the PFC in Judge Katz' court in the **DePuy ASR**
18 **Litigation** -- so we and Mr. Anapol and others have a good
19 general working understanding of the general problems that
20 exist with metal-on-metal hips, and so we're able to take
21 that knowledge, able to combine it with what a treating
22 physician here or there may have told a lawyer here or there
23 or what we may be able to have gleaned from some of our
24 other experts who have compared -- for example, in **Pinnacle**,
25 an expert who may have compared the Pinnacle to the Biomet,

1 because you're always looking for a safer alternative design
2 or you're doing something like that, so we were able to
3 glean enough information to be able to cobble together what
4 we presented to you and presented in good faith.

5 It's also, secondly, a draw from the research and
6 investigation we did before we filed the case because we
7 didn't cavalierly just decide, "Hey, let's go after another
8 hip implant manufacturer. We did the due diligence that's
9 required before we filed such a suit.

10 The problem is, if the science day is no more than a
11 recitation of what we've already provided you, or even if
12 it's just a step or two away from that, then, sure, we could
13 probably stand up -- heavens, I could stand up and snow you
14 for an hour with good data right now. And I say, "Snow,"
15 with tongue in cheek. It would be very legitimate, very
16 genuine, but it's nothing more than what we've done with a
17 little buff, polish, and shine.

18 If there's something to be educational beyond that,
19 you know, specifically, here's how these implants are put
20 in -- which is one of the things Mr. Winter argued in the
21 last hearing he wanted a doctor there to explain -- with all
22 due respect, I don't think I could explain that to you right
23 now. I think I would need a doctor to do it. It
24 immediately injects questions of things like -- and this is
25 more direct on point -- how do you position the cup, the

1 acetabular cup, so that the ball and joint have the least
2 amount of impingement and the least amount of wear and
3 surface friction.

4 Well, it's possible that the Defendants are going to
5 say the cup should be positioned somewhere between forty and
6 forty-five degrees inclination or they may say between
7 thirty and fifty degrees. They may say that this makes a
8 difference in how the surgeon does it, whether the surgeon
9 uses Tool A, Tool B, Tool C. Is there an alignment guide
10 that's used for the surgery? In the process, is this the
11 surgeon's fault when you have bad wear because the ball is
12 improperly aligned with the cup or the cup's in at the wrong
13 degree?

14 All of those types of things I can't answer, I can't
15 even come close to answering, I can't respond to until I see
16 the documentation and I know what testing was done to
17 determine what the proper cup position was. Were there
18 complaints made about hips that failed, and, as a result of
19 those complaints and the investigation, they modified or
20 they changed the cup positioning? Did they modify the tools
21 because people were having trouble with the kind of tools
22 being used at getting the right inclination for the cup or
23 for the ball itself? And all of that, those types of
24 details, are the types of data that, while we gave you a
25 thorough insight, we don't have the basis for answering

1 that. We can't until we get access to the documents and
2 have a real surgeon really work through those documents, a
3 surgeon who has some working knowledge of the Biomet,
4 specifically, and, at that point in time, we're able to
5 respond and give those types of answers.

6 I do think, based on what we've seen in the other
7 hip implant litigation, those are very serious defenses and
8 very serious issues that have been raised by the defendants.
9 In both hip implant litigations that I'm familiar with,
10 **Pinnacle** and **ASR**, the defendants are arguing the surgeon did
11 not put these in at the right angle. Surgeons are arguing
12 that the tools are not the proper tools. We've seen
13 reflections that when these have been sold in Japan, the
14 Japanese won't even use the tools made in the United States
15 because they don't think those tools are adequate to place
16 the implants in the right position.

17 I don't know if those documents exist, I don't know
18 where they are, I don't know what the equivalent situation
19 of that is, but that's the kind of stuff that requires us to
20 get documents, that requires us to get the implants, the
21 tools used to implant them, get all of that to a doctor so
22 that we've got a doctor able to respond properly at a
23 science day and do something more than just simply tell you,
24 "Hey, metal-on-metal doesn't work in a car if it's not
25 lubricated, and it doesn't work in a body if it's not

1 lubricated. You're going to have an ion-shaving problem
2 that the body will react to negatively that will produce
3 pseudo tumors and other biological responses because the
4 macrophages just can't handle it in the body." I can do
5 that, but I can't do what they want done, if that makes any
6 sense.

7 And I'm sorry I'm on the phone and rambling.

8 **THE COURT:** Thank you, Mr. Lanier.

9 Who speaks for the Defense on this?

10 Mr. LaDue.

11 **MR. LaDUE:** Thanks, Your Honor.

12 Mr. Lanier is correct. Biomet did hope to schedule
13 science day in May. We still think it can be done early, if
14 not May, then sometime in the first half of June, and that's
15 based on our understanding that the Court wanted an overview
16 of the parties' contentions, as you described earlier,
17 Judge, sort of one step further beyond what we described to
18 you in the initial submissions, and we don't expect that
19 this was intended, in the first place, to be a debate back
20 and forth about, you know, what should be the proper way to
21 implant the device. We'll give you our contention and the
22 Plaintiffs can give you theirs, and then, as we move through
23 the litigation, we'll begin to have the kind of debate and
24 argument on the merits, I guess, that Mr. Lanier was just
25 describing.

1 We didn't think that was the intent of the science
2 day, and we believe that each side -- if each side is
3 allotted two hours of time, we think that that would allow
4 an hour-and-a-half or so for each side to make a
5 presentation and allow the Court, you know, time for
6 questions and answers during that presentation. We would
7 start in the morning. We could be done, you know, right
8 around lunchtime. And, again, we still believe this is
9 something that can be scheduled and helpful to the Court
10 now, if not May, then in early June.

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

12 Somewhere, I guess, out there is a continuum that
13 none of us have ever seen that has science day at one end
14 and **Daubert** hearing at the other, and it sounds as though we
15 may be sliding toward the **Daubert** hearing, and that's not
16 what I want.

17 And I understand how it's happening. I think that
18 once the mention was made about having a scientist here on
19 one side, the other side wanted to be prepared with
20 something that would have a scientist on the other side.

21 I am not looking for responses to each other. I'm
22 not looking for, "Well, here's what's wrong with the other
23 guy." I'm just looking for what you folks contend is the
24 science I need to know to rule on deposition issues and
25 discovery issues. I know I'm going to learn a lot more

1 about everybody's position when we get to the **Daubert** stage,
2 but what I'm looking for is something to get me up and
3 running in case, in these 30(b)(6) depositions that I
4 understand will be starting about a month from now, heaven
5 forfend, somebody might object to a question during one of
6 them, that I might have a backdrop against which to put
7 this.

8 So while I understand the spirit behind the
9 Plaintiffs' request for more time to prepare, I think I need
10 to know the basics upfront, and that's really all I'm
11 looking for. And, frankly, if somebody goes much beyond the
12 basics, my eyes will probably glaze over, since this,
13 obviously, isn't anything I studied to be the audience for
14 this hearing, so I'm going to see what we can find.

15 May is an absolute mess on my calendar, between
16 conferences and that sort of thing. I think later in June
17 would be better on my calendar, simply, because I have what
18 could be a very significant -- well, I have two of them,
19 actually, at the beginning of June, one three weeks and one
20 eight days. I think the three-week trial is going to move
21 today -- we have a hearing on that this afternoon -- but the
22 eight-day trial is hotly contested. It's criminal. And
23 from what I can tell from just what's been going on with the
24 matter of pretrial release, that's going to be fought tooth
25 and nail, so let me look for something later in the month.

1 How would you look for June 21st? We would have to
2 hold our hearing in Judge DeGuilio's courtroom because he's
3 got a Naturalization in this one.

4 I see winces.

5 That doesn't work?

6 **MR. ANAPOL:** It's a tough day for me, Your Honor.

7 **THE COURT:** Okay.

8 **MR. ANAPOL:** That's a tough day for me.

9 **THE COURT:** How about the 28th of June?

10 **MR. ANAPOL:** Between the two, I'll take the 21st,
11 but I want to hear from Mr. -- if I may, Your Honor, just
12 one point, substantively, if Your Honor would address.

13 I think that Mr. Lanier is of the assumption -- and
14 I don't know if it's been ruled upon or not -- that there
15 is, in fact, going to be or not going to be experts.

16 So, Your Honor, are you inclined to allow both sides
17 to have a doctor or neither?

18 **THE COURT:** I don't want a question-and-answer type
19 of thing. If you want to have somebody come in with charts
20 and pictures and little models of the human body and show me
21 what you're talking about, that's fine, but I don't want
22 this to be an evidentiary kind of thing with questions and
23 answers and Cross Examination. That's not what I'm looking
24 for. If you want to just do an attorney with PowerPoints or
25 a slide show or whatever, that's fine. If you want to bring

1 in somebody who is a physician or somebody who manufactures
2 these things, I'm willing to hear from anybody, but I don't
3 want it to be an adversarial thing where people are
4 questioned or even doing a Direct Examination.

5 **MR. ANAPOL:** Well, between those two dates, I'm
6 going to defer to Mr. Lanier, who, I think, is going to be
7 presenting, but the 28th is absolutely impossible for me.
8 The 21st, if I have to, between the two, if they're my only
9 options.

10 **THE COURT:** Okay.

11 **MR. LANIER:** Your Honor, Mark Lanier, on the phone.

12 The only difficulty that I've got on the 21st and
13 the 28th, during the month of June, I teach a law school
14 class in Lubbock, Texas, Texas Tech University, on
15 Saturdays. It's a class that starts at 8:30 in the morning,
16 so I've just got to make sure I can get to Lubbock by 8:30
17 in the morning to teach the class. I've already got
18 students enrolled. It's a commitment I've got.

19 **THE COURT:** I'm pretty sure you can't get from South
20 Bend to Lubbock on Friday afternoon to Saturday morning.

21 How about the 17th of June? That's a Monday.

22 **MR. LANIER:** The 17th June, I'll absolutely change
23 what I've got that day. It's very flexible. I can change
24 it.

25 **THE COURT:** Okay. I see nods at Defense table.

1 **MR. WINTER:** Yes, the 17th will work for Defendants,
2 Judge.

3 **THE COURT:** Okay. All right. We'll set it for 9:30
4 that morning.

5 I'll allow two hours a side, but, like any jury, I'm
6 perfectly happy if people don't use their full time. So if
7 the Plaintiff wants to go for an hour, that's fine. And if
8 the --

9 **MR. ANAPOL:** Your Honor, it may make sense -- it's
10 close enough -- if we could do the CMC in that argument. Is
11 that all too much for you in one day? It would work from
12 our perspective, I think.

13 **THE COURT:** No, I would think that would work fine.
14 Would that be agreeable to --

15 **MR. WINTER:** I'm sorry. I misheard.

16 **THE COURT:** After science day, have the case
17 management conference and then the argument on the motions
18 to dismiss, as long as we've got everybody here.

19 **MR. WINTER:** Oh, sure. That's great, Your Honor.

20 **THE COURT:** Okay. So I'll just -- and we'll block
21 out the morning and early afternoon, just in case we are
22 still going.

23 Okay. And what's next on our agenda, stipulation on
24 applicability of answers? Oh, I see.

25 **MR. WINTER:** I think that was our item, Judge.

1 **THE COURT:** Okay.

2 **MR. WINTER:** That in a severed case that is refiled,
3 we actually already have an answer on file for the
4 multi-plaintiff case, as it was filed, and we were hoping
5 that we would stipulate that the answer previously filed
6 would apply to the refiled case and not have us have to file
7 another answer.

8 **THE COURT:** So if Mrs. A gets severed out and then
9 does re-file pursuant to the Case Management Order, you're
10 asking that the answer filed in the case from which she was
11 severed apply to her new case?

12 **MR. WINTER:** Correct.

13 **MR. ANAPOL:** I don't represent the bundled
14 plaintiffs, but I certainly would not object to it as lead
15 counsel or if it was me who had filed that, so I would be
16 surprised if there's an objection.

17 **THE COURT:** Okay. I'll go ahead and include that in
18 the order today, and if somebody wants to move to reconsider
19 because they represent the bundled plaintiffs and seem to
20 think something is wrong with that, then I'll, certainly,
21 entertain it, but, until that happens, we'll just deem that
22 applicable.

23 I think the only other thing you folks have is the
24 update on CM-ECF issues, and I know we talked about some of
25 those in chambers.

1 Is there anything left from the Plaintiffs'
2 standpoint to talk about there?

3 **MR. ANAPOL:** No.

4 I mean, I'll announce, for those on the phone call,
5 I think that we were told by the Clerk this morning that
6 there's no need to file continuing pro hac vice
7 applications. Once you've been approved in one case, you no
8 longer need to file in subsequent cases.

9 I have nothing else from the Plaintiffs' side.

10 **THE COURT:** That's, certainly, fine with me. I'm
11 using up our stamp very fast.

12 **MR. WINTER:** Nothing else from Defendants, Your
13 Honor.

14 **THE COURT:** Okay. Was there anything left?

15 **MR. ANAPOL:** If you could just indulge me one more
16 moment, I want to be clear on specifically what is or isn't
17 permitted with respect to doctors, experts on Science Day.

18 Could you just give us one more indication?

19 **THE COURT:** Anything but question and answer. I
20 just -- I don't want to do a question and answer,
21 lawyer/witness type thing. If you want to have somebody
22 lecture me, that's fine. If the lawyers want to explain it,
23 that's fine. Obviously, visual aids are welcome. But I
24 don't want to get into Cross Examination, and, because of
25 that, I don't want to even get into Direct Examination.

1 **MR. ANAPOL:** That's great. Thank you.

2 **THE COURT:** Whoever is going to talk, talks.

3 Mr. Dassow.

4 **MR. DASSOW:** Your Honor, I just did one of these
5 recently. Well, not recently, years ago.

6 I want to be clear for the Plaintiffs, honestly,
7 Your Honor, because we're talking about having to put this
8 together.

9 The Defendants are going to be able to go back, talk
10 to their folks. They've got fifty docs ready to go that
11 know everything there is to know about this device.

12 When you say, "Anything," I think it's difficult --

13 **THE COURT:** Let me try to clarify.

14 **MR. DASSOW:** Yeah, because it's very difficult for
15 us.

16 **THE COURT:** I'm not going to be using these to
17 decide **Daubert** issues or summary judgment motions or
18 anything. I'm just looking for something that will give me
19 a background so that if somebody says, "This isn't relevant
20 to this case," I at least have some sense what might be
21 relevant. This is not to try to out persuade the other
22 side, because I'm going to forget all that. I'm just going
23 to try to remember what the case is about so I can deal with
24 the discovery issues and at least walk into the **Daubert**
25 hearing understanding what I need to be listening to when we

1 get to that point.

2 **MR. DASSOW:** Yeah.

3 And I just want to underscore that I feel like we're
4 going into the varsity game and we've got eighth graders.

5 **THE COURT:** All freshman, yeah. I understand. I
6 understand.

7 Again, this isn't -- nobody is going to win a case
8 on this one. This is just for me to understand. Otherwise,
9 I'd insist that everybody bring in experts. But if an
10 attorney wants to stand up with eight-by-ten glossies,
11 that's fine, just as long as I walk out of here having a
12 little bit better understanding about what the scientific
13 issues are, not how they're to be resolved, okay.

14 **MR. DASSOW:** Great.

15 **THE COURT:** Anything for either side?

16 **MR. WINTER:** No, Your Honor. Thank you very much.

17 **THE COURT:** Okay. Thanks, folks.

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

19 **MRS. POTTS:** All rise.

20 **(All comply;**

21 **Proceedings adjourned.)**

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