

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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8  
9                   MONDAY, JULY 29, 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*  
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25                   *Proceedings reported in machine shorthand. Transcript*  
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2     **For Plaintiffs:**

3     MR. THOMAS R. ANAPOL  
4     MR. ROBERT DASSOW  
5     MR. RICHARD ARSENAULT  
6     MR. DANIEL BURKE  
7     MR. FREDERICK HOVDE  
8     MR. PAUL CORDELLA

9     (see docket for addresses)

10    **For Defendant:**

11    MR. JOHN D. WINTER  
12    MR. JOHN LaDUE

13    (see docket for addresses)

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1           **MR. DASSOW:** Good morning, Judge.

2           **THE COURT:** Hello.

3           I guess we're all just going to go along here adding  
4 people.

5           **MR. DASSOW:** Yeah, I think that's right, Judge.

6           **THE COURT:** Mr. Dassow, you're going to have to tell  
7 us when everyone is on because I won't know.

8           **MR. ANAPOL:** Once Mr. Winter is on, hopefully, we  
9 can get started.

10           **MR. DASSOW:** Judge, it's like September here. I  
11 mean, it's just amazing.

12           **THE COURT:** Yeah. I think I slept through August  
13 somehow.

14           **MR. DASSOW:** I had given the conference folks a list  
15 of who is going to be speaking, because this is the first  
16 time we've done a pure telephonic conference, so I'm not  
17 sure -- I just sent an e-mail to John LaDue and John Winter  
18 and everybody else to make sure that they tell them if  
19 they're speakers so that they understand that.

20           **THE COURT:** Okay. Maybe it's like hitting down a  
21 hill. We'll pick up people faster once we get going.

22           **UNIDENTIFIED SPEAKER:** And Mr. Winter has now  
23 joined.

24           **THE COURT:** Who joined us?

25           **MR. WINTER:** John Winter, Your Honor.

1           **THE COURT:** Oh, okay. Hello.

2           **MR. WINTER:** How are you?

3           **THE COURT:** Good.

4           And yourself?

5           **MR. WINTER:** I'm well.

6           **THE COURT:** We're waiting for people to join in  
7 here.

8           **MR. DASSOW:** John, this is Rob.

9           Is John LaDue or Erin going to join in?

10          **MR. WINTER:** Yes.

11          **MR. DASSOW:** Okay. Because we've got Tom and Rick  
12 and myself on right now and Judge, obviously.

13          **MR. ARSENAULT:** And Richard Arsenault is also on.

14          Good morning, Judge, and good morning, colleagues.

15          **THE COURT:** And who is this?

16          **MR. ARSENAULT:** Richard Arsenault, Your Honor.

17          **THE COURT:** Thank you.

18          Good morning.

19          **MR. ARSENAULT:** Good morning.

20          **MR. BURKE:** Daniel Burke's also on, Your Honor.

21          **THE COURT:** Well, we lost our momentum there.

22          **MR. DASSOW:** John, I just shot John and Erin another  
23 e-mail.

24          **MR. LaDUE:** Rob, we're on.

25          **MR. DASSOW:** Oh, okay. Good.

1           **MR. ANAPOL:** Oh. Well, Judge, we can get started  
2 then. I think we were just waiting for them, so it sounds  
3 like everybody is on the call.

4           **THE COURT:** Okay. Let me run through and have you  
5 state your appearances for the record then.

6           **MR. ANAPOL:** So, for the Plaintiffs, you have Tom  
7 Anapol.

8           **MR. DASSOW:** Rob Dassow and Rick Hovde.

9           **MR. ARSENAULT:** Richard Arsenault.

10          **MR. BURKE:** And Daniel Burke.

11          **MR. CORDELLA:** Paul Cordella, Lanier Law Firm.

12          **THE COURT:** I didn't hear the last one.

13          **MR. CORDELLA:** It's Paul Cordella, Judge, Lanier Law  
14 Firm in New York.

15          **THE COURT:** All right. Is that it for Plaintiffs?  
16 And for Defense?

17          **MR. ANAPOL:** Judge, that's it for speaking  
18 Plaintiffs, at least. There may be many others on the call,  
19 but we've just asked a few of us that may or may not even  
20 comment, but that's all you need to --

21          **THE COURT:** Okay. And for the Defense?

22          **MR. WINTER:** You have John Winter and John LaDue,  
23 Your Honor.

24          **THE COURT:** All right. I have the joint status  
25 conference agenda that you proposed, and I'm willing to

1 listen here for a while because I don't know exactly where  
2 these lead, so let me turn it over to you folks to talk  
3 about them.

4 **MR. ANAPOL:** Sure, Judge. I guess Plaintiffs should  
5 go first.

6 So, on the discovery status, there are a couple of  
7 minor issues. In fact, I think the parties had another  
8 meet-and-confer as late as Friday, and we've ironed out  
9 many, many of those issues.

10 I've asked Dan Burke, who is heading a portion of  
11 that committee, to speak about it for the Plaintiffs. There  
12 are a few minor issues, and I think the parties are working  
13 many of them out.

14 Dan.

15 **MR. BURKE:** Good morning, Your Honor. This is Dan  
16 Burke.

17 We had a couple of issues in terms of -- one being  
18 search terms. And as you'll recall during the earlier  
19 motion practice, you recognized that the Defendants had  
20 agreed to allow us to provide certain search terms for  
21 purposes of gathering discovery documents in this matter,  
22 and we had proposed back in early May a list of three  
23 hundred search terms we had asked to be included.

24 And we've had a number of meet-and-confers from May  
25 up until now, and Mr. Anapol is correct that, as of Friday

1 afternoon at probably 3:00, we had agreement as to  
2 additional search terms to be used in the form of an anchor  
3 term, so the parties have worked together diligently over  
4 the past couple of months. I think we're in agreement on  
5 that issue.

6           There is one other issue that remains out there. We  
7 met and conferred on it, and we actually reached an impasse  
8 probably a month-and-a-half or so ago, which is with respect  
9 to documents that were used to train the system in  
10 the predictive coding that was used by the Defendants.

11           **THE COURT:** I'm sorry. I couldn't make out what you  
12 said, Mr. Burke.

13           **MR. BURKE:** I'm sorry, Your Honor.

14           We had asked probably ninety days or so ago, maybe a  
15 little shorter than that, for copies of documents or at  
16 least the Bates Numbers of the documents that were used by  
17 the Defendants to train their predictive coding system to  
18 allow us to better select documents that we could add to the  
19 system to help garner the relevant documents in the matter,  
20 and the Defendants have declined to allow us to know which  
21 documents they used to train the system, and what we'd like  
22 to do is ask Your Honor to -- to file a motion to request  
23 that we be allowed to see those documents.

24           **THE COURT:** Okay. Did you want to -- so, as I  
25 understand it, as far as the original three hundred terms,

1 you think you're working toward resolution, but you're going  
2 to need some help on the documents used to train?

3 **MR. BURKE:** That's correct, Your Honor.

4 We've actually reached agreement on the original  
5 three hundred search terms that we asked for. At this  
6 point, the only outstanding information that we're looking  
7 for is with respect to what documents were used to train the  
8 system.

9 **THE COURT:** Okay. And did you want to talk about  
10 the privilege log issue?

11 If you want to go ahead and run through them all,  
12 Mr. Burke, then I'll turn to Mr. Winter and Mr. LaDue.

13 **(Simultaneous, inaudible speaking.)**

14 **MR. ANAPOL:** I'm sorry, Dan.

15 **THE COURT:** I'm sorry. Who --

16 **MR. BURKE:** Yeah, I was just about to say I was  
17 going to turn that back to Tom to speak about the privilege  
18 log.

19 **MR. ANAPOL:** And, Your Honor, there's not much on  
20 the privilege log. In fact, I think the parties are still  
21 in a meet-and-confer status, and we wanted to just, I think,  
22 put this on the agenda so you knew we were working on it,  
23 but there's not -- I don't know that there -- we're at point  
24 where there is -- we need Court intervention, at this point,  
25 so we're still -- we're still in the meet-and-confer phase.

1           **THE COURT:** Who wanted to talk about the  
2 interrogatories?

3           **MR. ANAPOL:** I don't really have an issue there.  
4 You know, we've given the Defendants a little bit more time.  
5 They had some objections to our interrogatories, and I think  
6 we're working on those issues, as well.

7           **THE COURT:** So still a meet-and-confer stage?

8           **MR. ANAPOL:** I think so.

9           **THE COURT:** Okay. And was Plaintiffs' fact sheets a  
10 Defendant's issue or a Plaintiffs' issue?

11           **MR. ANAPOL:** That's a Defendant's issue.

12           **THE COURT:** Okay. That's what I thought.

13           Mr. Winter, or, Mr. LaDue, if you want to talk about  
14 all the discovery matters, let me see your perspective here.

15           **MR. WINTER:** Well, thank you, Your Honor.

16           I think we definitely agree that in the  
17 interrogatories issues we're meeting and conferring, and,  
18 yes, we have reached agreement on the additional search  
19 terms.

20           With respect to the question, Judge, of the training  
21 set for the predictive coding, sometime ago, Judge, we told  
22 them that our first production, Volume 1, is, in fact, the  
23 training set. So we said, "Go look at Volume 1 that you got  
24 a long time ago," and that was the training set.

25           Now, you know, from our perspective, to do more than

1 that didn't seem to be unreasonable, and that issue, as we  
2 looked at it, has fallen off the table, but, apparently,  
3 it's back on the table. So if Your Honor wants briefing on  
4 that, we're happy to do so, and, you know, you can rule in  
5 September.

6 **THE COURT:** Okay. The other issues that they  
7 raised?

8 **MR. WINTER:** The privilege log issue, Judge, we're,  
9 again, in a meet-and-confer setting.

10 The Seventh Circuit recently came out with new  
11 guidelines on using categories in your privilege log, and  
12 the parties are conferring as to, hopefully, a set of  
13 categories we can mutually agree on which will streamline  
14 the privilege log, hopefully, going forward, but we're  
15 meeting and conferring on that.

16 I think we met, I think, seven times, Judge, on the  
17 search terms and then got to closure. Hopefully, we'll  
18 maybe get to closure on the privilege log a little sooner.

19 With respect to the fact sheet issue, Judge, this is  
20 something that we want to bring to your attention today.

21 If you will recall, one of your Case Management  
22 Orders required Plaintiffs' fact sheets to come in ninety  
23 days starting from, I believe, March 27th. There were  
24 approximately 260 fact sheets that were due ninety days from  
25 March 27th, which was June 25, and some people asked for

1 extensions, which we freely gave, the thirty days, but,  
2 literally, 141 of the 260, Judge, were not provided.

3 Another thirty days went by, and we hadn't received  
4 anything from these 141, I think, or 42, and we sent out the  
5 notices that the CMO allowed us to send out that says, "If  
6 we don't get them in the next time period, we are going to  
7 file motions."

8 So we're just letting you know, Judge, that for the  
9 September conference, you may have a significant number of  
10 motions to address because fact sheets were not provided.  
11 So this is not, you know, you didn't fill in three blanks on  
12 a fact sheet. It's you didn't provide anything.

13 And since then, Judge, there's another sixty fact  
14 sheets that became due on a rolling basis. And of those  
15 sixty, we only got thirty. And this week, we'll have  
16 another thirty where we have not received any information.

17 **THE COURT:** Okay. I'll keep my eyes open for that.

18 Mr. Anapol, did you want to comment on that? I  
19 understand nobody is asking for any relief, just letting me  
20 know here.

21 **MR. ANAPOL:** Yeah. Yeah, Judge.

22 And, in fact, Mr. Winter brought this to my  
23 attention on Thursday. We did meet-and-confer about the  
24 issue, and, frankly, I'm somewhat confused as to why we're  
25 bringing this to the Court's attention, at this point.

1 I think that, A, we're not in violation of the CMO,  
2 number one. If Your Honor recalls, you know, we went back  
3 and forth on the substance and the length of this fact  
4 sheet, and at the end of the day, I think that the  
5 Defendant's version of it, a much longer fact sheet than we  
6 usually see in these MDLs, was approved. And, you know,  
7 within the language of the CMO, it's kind of built in that  
8 there is that thirty-day delay.

9 I think, in particular, what's important is -- and  
10 this happens in all MDLs, at least in the  
11 pharmaceutical/medical device world -- that first batch of  
12 fact sheets are always a little slower and a little longer  
13 to get out the door. People are looking at these for the  
14 first time. There's a heavier volume before it goes on a  
15 little more rolling basis.

16 The reality is -- and I understand that at least one  
17 of the Plaintiffs had produced twenty of these 140 missing  
18 fact sheets, I think, as late as Friday or Saturday -- that  
19 we are really at the 31st day of being overdue, and it's  
20 kind of built into the system.

21 I don't expect that you will see a large volume of  
22 motions to dismiss by September. I think that, in large  
23 part, many of these fact sheets will be submitted. And as  
24 we went forward, I just don't see it as an issue. So,  
25 again, I know he's not seeking relief. You know, we've had

1 a lot of other kind of back-and-forth discovery issues, and  
2 we look at this as just another routine issue that will go  
3 away in another thirty or sixty days once the litigation is  
4 up and running quicker.

5 **THE COURT:** Okay. I'll just look at it as a  
6 heads-up. And if everything gets wrapped up by September,  
7 great, and if not, I'll know it's coming.

8 Let me go ahead and do what needs to be done on the  
9 discovery status. What I would like -- I think I know what  
10 you folks are talking about when it comes to documents used  
11 to train coding systems. All I know about coding is what  
12 you folks told me at the last hearing. So what I think I  
13 would like is a very short memoranda, maybe five pages, just  
14 telling me what it is you want and why you need it and from  
15 the Defendant's standpoint why you think you already gave it  
16 to them and shouldn't give them anything more.

17 Would it be possible -- just so we keep it moving  
18 and I don't delay this, would it be possible to do those by  
19 next Monday, August 5th? If you need more time, let me  
20 know. I'm just trying to keep things moving as quickly as  
21 we can here.

22 **MR. ANAPOL:** I'll pass that back to either Richard  
23 Arsenault or Dan Burke to respond.

24 **MR. BURKE:** We could absolutely have that done by  
25 next Monday, Your Honor.

1           **THE COURT:** Okay. And from the Defense?

2           **MR. WINTER:** Yes, Your Honor, we can get you  
3 something on Monday.

4           **THE COURT:** Okay. And I'll just view them as  
5 simultaneous submissions and get you rulings as soon as I  
6 can. I just want to be sure I know exactly what you're  
7 talking about and what the impact is.

8           Okay. We have scheduling dispositive motions next.  
9 Who's speaking to that?

10           **MR. WINTER:** That's, actually, a Defendant issue,  
11 Your Honor, or something that we would like probably -- let  
12 me rephrase that -- something we would like to discuss in  
13 detail on September 23rd.

14           You know, we've gotten some fact sheets. We are  
15 getting some medical records. We see groups of cases that  
16 we think we would like to come up with a plan on some type  
17 of discovery with an eye toward some type of either  
18 bellwether summary judgment motion or omnibus summary  
19 judgment motion, given certain characteristics which we see  
20 are developing in groups of these cases. The obvious one,  
21 Your Honor, is where a Plaintiff has not had a revision and  
22 everything else looks fine, yet they have a lawsuit pending  
23 before you.

24           And just so the orders of magnitude, Judge, are put  
25 in perspective here, right now, thirty-two percent, as of

1 last week, of the cases that have been transferred to you  
2 are non-revision.

3 We have other groups of cases that we're looking at,  
4 and I told Mr. Anapol that we need to have dialogue between  
5 both sides before we, you know, argue our respective points,  
6 but we would like to be in a position to argue our  
7 respective points to you on September 23rd, both as to, you  
8 know, what could be grounds for dispositive motions and  
9 having a really robust discussion about how we're going to  
10 pick bellwethers.

11 **THE COURT:** Pick bellwethers for summary -- you mean  
12 pick bellwethers for trial or for summary judgment? You  
13 mentioned something about bellwether summary judgments.

14 **MR. WINTER:** Both, Your Honor, bellwether summary  
15 judgments and then figure out how we're going to go forward  
16 picking bellwethers for trial.

17 **THE COURT:** Okay. Mr. Anapol.

18 **MR. ANAPOL:** Okay. So, Your Honor, I think,  
19 particularly with respect to bellwether case selection, I  
20 think -- and, really, both -- I think that these issues are  
21 somewhat premature, even for discussion right now.

22 The primary reason is the documents. We received  
23 that first batch. There are about four million documents,  
24 and I have some other folks on the line that can correct me  
25 if my numbers are somewhat off. I think that we are through

1 about half of them, and we have this -- you know, I think  
2 there were some additional documents produced as recently as  
3 Friday, and we have more coming.

4 We've just reached resolution on the search term  
5 issues, again, as late as Friday, and so until we have a  
6 better grasp of the documents and know what's there and  
7 what's not there and we get a little bit deeper into our  
8 discovery, we think that these issues are just a little  
9 premature. And I don't suggest that these get put off for a  
10 year or even six months, but I think that to start to talk  
11 about it at this stage is just a bit premature.

12 With respect to the dispositive motions, I think  
13 there may be kind of omnibus dispositive motions, you know,  
14 global motions for all cases and then there's some other  
15 levels of cases that I think we need to address, and there  
16 may be a two-pronged or multiple-staged attack at some of  
17 these, and I just think to have a collective, you know,  
18 overview of all of this at this juncture is just premature.  
19 So, certainly, we can start the meet-and-confer dialogue,  
20 unless Your Honor instructs us to be even more aggressive.  
21 The Plaintiffs, I think, think it's premature at this point.

22 **THE COURT:** Now, let me understand what you think is  
23 premature. You think it's premature, obviously, to be  
24 briefing and deciding the summary judgment motions.

25 Do you think it's too early to even talk about the

1 categories so that people can start thinking about the  
2 different types of summary judgment motion and which cases  
3 might fit where? You think it's too early for that, as  
4 well?

5 **MR. ANAPOL:** I'm certainly happy to begin the  
6 dialogue. You know, what I'm concerned about is that we  
7 come to some resolution by September, thinking that, you  
8 know -- until we have more information, I think that our  
9 hands are somewhat tied in knowing how much time we're going  
10 to need, you know, collectively to get through this and to  
11 be in a better position to know exactly what this case is  
12 and what we've got, so it's not that we're unwilling to  
13 meet-and-confer and to start the dialogue. I just think  
14 that a September -- you know, I think what Mr. Winter is  
15 seeking is some substantive advance on these issues by  
16 September, and I think it may be premature for that.

17 **THE COURT:** Okay. Mr. Winter, just let me be sure I  
18 understand your position.

19 I didn't understand you as wanting to have summary  
20 judgment argument on September 23rd but, rather, to be able  
21 to talk at that point about a scheduling order as to when  
22 motions would be filed and responded to and replies?

23 **MR. WINTER:** Yes, Your Honor, you have accurately  
24 described the Defendant's position.

25 **THE COURT:** Okay. Well, let's go ahead and plan for

1 September 23rd with that in mind, and if the Plaintiff -- if  
2 there are some -- perhaps there will be some categories the  
3 Plaintiff will be ready to talk about as far as a schedule  
4 and others not, but we need to start talking about it  
5 sometime so we get a feel as to when we're going to do it,  
6 so let's plan to talk about it, at least, at the  
7 September 23rd conference. And if we're able to schedule  
8 it, great. And if we need to wait until another conference,  
9 schedule some and defer others -- but we'll talk about it in  
10 September then, and I appreciate the heads-up.

11 **MR. ANAPOL:** That's fair, Your Honor.

12 **THE COURT:** Were the administrative issues ours or  
13 yours?

14 **MR. ANAPOL:** Maybe I can address them, Judge.

15 I think there were two duplicate cases. They should  
16 have been resolved by this morning. I saw one come across  
17 my e-mail. I'm not a hundred percent sure the other did,  
18 but they should both be gone by now, and that was more Your  
19 Honor's issue, I believe.

20 **THE COURT:** Yeah. I did not check to see. I don't  
21 remember seeing the second one come through, but we'll  
22 include it in the memorandum of this order, if there's still  
23 one out there.

24 **MR. ANAPOL:** There may be, and we'll make sure we  
25 get that taken care of, Judge.

1           **THE COURT:** Okay. And the status of the  
2 Plaintiffs' form complaint?

3           **MR. ANAPOL:** Yeah, Your Honor. You had requested at  
4 the last Case Management Conference that we try and put  
5 together a form complaint to add to, you know, I guess, a  
6 CMO or just on the Website for people to access, and,  
7 honestly, Your Honor, we struggled with that a little bit.  
8 We started to do it.

9           And the concern that we have is we're dealing with  
10 claimants from all over the country, and we're dealing with  
11 different (inaudible) allegations. Different states have  
12 different requirements with respect to product liability  
13 law, negligence law, loss of consortium, on and on and on,  
14 damages, and so we just -- I guess, as lead counsel, I felt  
15 somewhat uncomfortable posting something that would apply in  
16 my state or in some other states and then having folks rely  
17 on that, and so we just have not done it, and it was  
18 something you had requested, and we're just -- without a  
19 short form complaint, which we did not want to do, we're  
20 struggling to put up a form.

21           And I think there are, you know, a handful of form  
22 complaints that are floating around and people are sharing,  
23 but I think that the responsibility still becomes that of  
24 the individual lawyer to make sure that it properly, you  
25 know, identifies causes of action in their home state, and

1 so we've just struggled to do that.

2           **THE COURT:** Okay. We'll take it off the table for  
3 now and see how we do, and we may have to put it back on.  
4 Maybe I'll take a hand at trying to at least put a skeletal  
5 thing together or maybe we can get something on the Website  
6 saying, "Draft your own complaint, but these are the things  
7 that we'll have to fix if you do it, if you include them."

8           I guess I owe you the **Caccia** ruling, and I had hoped  
9 to have it done by now. Frankly, I didn't get as much done  
10 on my vacation. It turned out to be a better vacation than  
11 I expected so I didn't get as much done on it then. I  
12 hope to -- well, I don't hope to. I will -- have a ruling  
13 out to you sometime next week on the **Caccia** motion.

14           That was the only thing I had to add to my  
15 conversation.

16           So what I've got is that I've got a heads-up on  
17 possible issues concerning privilege log issues and  
18 objections to interrogatories, the possibility of motions  
19 being filed with respect to the fact sheets, that we will  
20 talk about dispositive motions and selection of bellwether  
21 trials at the next conference, that the Plaintiffs think  
22 they have addressed the dismissal of duplicate cases but  
23 will doublecheck, that I'm taking the form complaint issue  
24 off the table at least for the moment, and that you folks  
25 will file briefs not more than five pages by August 5th

1 addressing the documents used to train the coding system.

2 Did I leave anything out or do you have anything to  
3 add?

4 Mr. Anapol, or, Mr. Dassow?

5 **MR. ANAPOL:** I do not.

6 **MR. DASSOW:** No, sir.

7 **THE COURT:** And, Mr. Winter, or, Mr. LaDue?

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

9 **THE COURT:** Okay. Thanks, again, for your good work  
10 together and trying to keep this as smooth as possible, and  
11 I will try to give you prompter rulings than I have on the  
12 **Caccia** case but will try to keep up what I've done on the  
13 others, so we'll get a ruling out soon.

14 **MR. ANAPOL:** Thank you, Judge. We'll see you in  
15 September.

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

17 **THE COURT:** All right. Bye.

18 **(Proceedings concluded.)**

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