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

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

MONDAY, SEPTEMBER 23, 2013

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

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Proceedings reported in machine shorthand. Transcript
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2 For Plaintiffs:

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4 MR. ROBERT DASSOW
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7 MS. ANNE ANDREWS
8 MR. RICHARD ARSENAULT
9 MR. DANIEL BURKE
10 MR. FREDERICK HOVDE
11 MR. DOUGLASS KREIS
12 MR. DANIEL ROBINSON
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14 MR. JOHN THORNTON
15 MR. LARRY BOYD (telephonically)
16 MS. SHELLY HUTSON
17 MR. DOUGLAS KREIS
18 MR. TODD CAMPBELL

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12 (see docket for addresses)

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14 For Defendant:

15 MR. JOHN D. WINTER
16 MR. JOHN LaDUE
17 MS. ERIN LINDER HANIG
18 MR. BLAINE DART

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(see docket for addresses)

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1 **THE COURT:** You may be seated.

2 **(All comply.)**

3 **THE COURT:** Good morning and good morning to
4 everybody on the conference call.

5 We are gathered in 3:12MD2391, **In Re: Biomet**
6 **M2a-Magnum Hip Implant Products Liability Litigation.** We
7 are gathered for our periodic status conference.

8 I did meet with several counsel before coming in to
9 talk generally and we talked in general terms. Although,
10 some specifics were given just to explain the general
11 issues, and I can circle back and try to sum up.

12 It appears that there are some potential discovery
13 disputes that are not yet ripe for the Court's attention but
14 are bubbling up and still might be resolved through the
15 meet-and-confer process.

16 And I do want to commend counsel on all sides for
17 your work on the meet-and-confer process thus far. You've,
18 obviously, limited what I've had to decide in the case.

19 And, as a general matter, it appears that the
20 Plaintiffs believe that it might be helpful to have a
21 discovery master appointed to work with the attorneys for
22 both sides. The Defense does not believe that that is
23 necessary at this point. The Defense would like to see some
24 sort of scheduling order in place to work us toward
25 bellwether trials, and the Plaintiffs believe that the

1 discovery process has not reached a stage where that is
2 workable. And I guess those two general issues are in my
3 lap to see what we can do about that.

4 Let me turn -- we have a brief agenda, and let me
5 turn, first, to the Plaintiffs, if there's anything you want
6 to add to what I said about our general comments, our
7 general discussion, and anything you want to address that's
8 on the agenda.

9 **MR. ANAPOL:** Good morning, Your Honor.

10 No, I think you've covered generally the two primary
11 issues that are moving forward -- for the record, Tom Anapol
12 speaking -- I think you've covered the two perspectives, and
13 we're prepared to move forward with the agenda when Your
14 Honor is ready.

15 **THE COURT:** Mr. Winters, Mr. LaDue, anything to add
16 from the morning conference?

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

18 **THE COURT:** Okay. All right. Mr. Anapol, let me
19 invite you, or whoever wants to, to speak to the joint
20 conference agenda from the Plaintiffs' standpoint.

21 **MR. ANAPOL:** Sure.

22 On the update on filed cases, the primary issue,
23 Your Honor -- and we spoke about this in chambers as well --
24 are the non-revision cases. At last count, I think there's
25 over 650 filed complaints now.

1 Mr. Dassow, do you have the exact number? It's in
2 that range.

3 **THE COURT:** 694.

4 **MR. ANAPOL:** It's up to 694.

5 **THE COURT:** At least as of opening bell this
6 morning.

7 **MR. ANAPOL:** And as Your Honor well knows, cases are
8 being filed every day, every week, and this MDL continues to
9 grow.

10 One issue that has become apparent is the concept of
11 non-revision cases, and from the Plaintiffs' perspective,
12 there were a number of issues. One is some folks with
13 non-revisions actually do have injury and many of them have
14 elevated cobalt chromium levels. Many of them have
15 problems, evidence of metal wear, problems that, for
16 whatever reason, whether it be age or condition, can't have
17 a revision, and we think that that's one area of
18 non-revision cases that need to move forward as they are
19 with all the other revision cases.

20 On the other hand, the Plaintiffs across the country
21 are concerned with statute of limitations and have been
22 filing non-revision cases, those cases in which there may
23 not be any evidence of metal wear, there may not be evidence
24 of cobalt chromium poisoning, and there is no apparent
25 manifestation of an injury at this time. The Plaintiffs'

1 perspective is that these are cases in waiting, that they're
2 going to turn into revisions potentially down the road.
3 They may. They may not. There are some that think that
4 there are injuries even with these folks that they just
5 don't even know they have injuries.

6 So without being more specific, the parties met with
7 Your Honor this morning, and our intention is to create
8 some type of a deferral process for these non-revision
9 cases. As I understand it, the parties are going to work
10 together before Your Honor enters any order on that issue.

11 **THE COURT:** Anything the Defense wants to add to
12 that?

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

14 I think we're going to, in the next thirty days,
15 hopefully, come up with a joint order to submit to you that
16 protects the concerns about statute of limitations, but I
17 think the agreement would be to dismiss those cases without
18 prejudice.

19 **THE COURT:** With specificity that statute of
20 limitations -- addressing the statute of limitations in the
21 event injury develops in the future --

22 **MR. WINTER:** Exactly.

23 **THE COURT:** -- or revision occurs?

24 **MR. WINTER:** Yes.

25 **MR. ANAPOL:** The only issue, Your Honor, that we're

1 concerned about with that, number one, is those cases that
2 have not yet been filed. One of the things that we
3 discussed in chambers was that if a complaint was filed
4 today and it was then dismissed, it would relate back to the
5 day of filing. Our concern moving forward would be
6 individuals that may have a non-revision that come to our
7 offices. We don't know. They certainly don't know. And so
8 I think that we really need to work on this language. We
9 prefer a deferred status, as opposed to a dismissal without
10 prejudice. We recognize both concepts can work, but we're
11 really concerned about the language and prospectively
12 concerned about individuals that may want to file and then
13 have to go ahead and have their complaint dismissed that
14 very day which, I think, is cumbersome.

15 **THE COURT:** Well, and, again, as I understand it,
16 that isn't ripe yet, but it's something the parties are
17 talking about and would affect at least a significant
18 minority of the cases out of those 694.

19 Fact sheet status. Who wants to --

20 **MR. ANAPOL:** I mean, from the Plaintiffs'
21 perspective, I think we're moving forward. I think that the
22 number that the Defendants have identified, we had an issue
23 with that first set of filed cases. I think that that
24 number is dramatically smaller now. There remain, I think,
25 a handful of deficiencies or unanswered, and I think the

1 next agenda item are pending motions. But from our
2 perspective, the Defense Fact Sheets, I think, are on their
3 way, consistent with the Case Management Order, and we see
4 no issue from the Plaintiffs' perspective.

5 **MR. DASSOW:** Your Honor -- Rob Dassow. Sorry --
6 what I've got here is that we've produced 374 Plaintiffs'
7 Fact Sheets already, so, actually --

8 **THE COURT:** Okay. And I think -- obviously, with
9 the cases coming in at a rate of about seventy a month, I
10 assume there's several for which no fact sheet is due yet.

11 **MR. DASSOW:** Your Honor, they're going to be coming
12 in on a rolling basis.

13 I think that the first snippet was going to be the
14 tough one because we had many, many that were due because of
15 the CMO that had everything kick in, and that was a lot of
16 work for us. We're setting up spread sheets and, you know,
17 getting data bases set up. It just takes time, but I think
18 we're pretty darn good now.

19 **THE COURT:** Let me ask this. I think Biomet had a
20 motion to dismiss X and then withdrew the motion with
21 respect to some of X so there's now a Y out there.

22 Are we going to hear further from the Plaintiffs on
23 that motion to dismiss?

24 **MR. DASSOW:** I don't know what that X is at this
25 point, and, obviously, the Defense counsel knows better than

1 I, but I know that a significant amount of motions to
2 dismiss have been withdrawn. I don't know the actual number
3 that's still outstanding.

4 **THE COURT:** With respect to whether it's a handful
5 or a couple dozen or whatever, should I be anticipating
6 further response from the Plaintiffs on that or have you
7 filed what you can file?

8 **MR. ANAPOL:** Your Honor, I'm aware of only one case
9 in which Plaintiffs' counsel reached out to the Defendant
10 and basically said, you know, "We're really close. The
11 Plaintiff was missing. Now we found her. We're in the
12 process of completing the fact sheet. We need a couple more
13 days," and I think -- I'll let Mr. Winters speak for
14 himself, but I think they have some issues with the delay.

15 And, John, Mary Jackson, 3:12CV00698, is the case
16 name.

17 **THE COURT:** Ms. Hanig.

18 **MS. HANIG:** Your Honor, where we're at right now,
19 Biomet went and filed motions to dismiss in all the cases in
20 which we did not receive a materially complete Plaintiff's
21 Fact Sheet by the deadline set by the CMO. In the meantime,
22 after filing that motion, we then received complete fact
23 sheets in a number of those cases, and that's why we moved
24 to withdraw in those particular cases, and I think you've
25 actually granted some of those motions to withdraw already.

1 **THE COURT:** Right.

2 **MS. HANIG:** Right now, where we stand as of close
3 of business Friday, we have fifteen cases where the motion
4 to dismiss is pending and we still don't have a materially
5 complete fact sheet. Per the CMO, Plaintiffs' response in
6 those cases is due this Wednesday, so if there's no response
7 or no Plaintiff Fact Sheet received by that thirty-day
8 deadline, then the CMO provides that you will dismiss with
9 prejudice.

10 **MR. WINTER:** Without prejudice.

11 **MS. HANIG:** Or without prejudice. Sorry.

12 And then in those cases -- sorry. Sorry.

13 **THE COURT:** There was a shudder over on this side of
14 the room.

15 **MR. DASSOW:** The entire side jumped up at the same
16 time.

17 **MS. HANIG:** There was a very key "out" that I left
18 out of that.

19 So in those cases that are dismissed then without
20 prejudice, we'll be prepared to submit proposed orders for
21 that ninety-day period. So if nothing has been refiled
22 within those ninety days, we'll give you a proposed order so
23 then they can be dismissed with prejudice at this point.

24 **THE COURT:** These fifteen were in the original
25 motion, but --

1 **MS. HANIG:** Yeah.

2 **THE COURT:** -- they're the ones that remain from the
3 original motion?

4 **MS. HANIG:** Right, so those are the ones that
5 remain.

6 And we're going to be filing those motions to
7 dismiss on a rolling basis then when we hit these deadlines.

8 So we've got fifteen with nothing received, and then
9 we have fourteen in which we have received something but
10 have yet to file the motion to withdraw because they're
11 coming in on a rolling bases, so we'll be filing another
12 motion with a set of fourteen to take off the table, but
13 that's where we're at right now.

14 **THE COURT:** Let me compare. The fourteen that
15 you're going to take off the table, are those from the
16 fifteen now pending?

17 **MS. HANIG:** No.

18 **THE COURT:** Okay.

19 **MS. HANIG:** So the fourteen are part of that -- you
20 know, of the three-hundred-and-some that we're starting to
21 receive, so there's fifteen, basically, that are deficient
22 and left pending right now.

23 **MR. ANAPOL:** And, Your Honor, I think the only
24 issues that pop to my mind right now are, to the extent that
25 some of these first fifteen cases that are about to be

1 dismissed are non-revisions and the party now seeks to have
2 it, ninety days from now, dismissed with prejudice, I would
3 hope that it would be subject to whatever ruling is entered
4 regarding the non-revisions in that regard.

5 And the only other issue, there is this one case,
6 and logistically I'm not sure if it's going to create more
7 paperwork or less. I recognize the Defendants need to push
8 this and not to grant unlimited extension, but, you know,
9 where we have missing plaintiffs that have been found, we
10 would seek some guidance from the Court to help clean that
11 process up so it's less cumbersome across the board.

12 **THE COURT:** All right. We have pending motions as
13 another agenda item. I don't know who wants to --
14 Mr. Winter.

15 **MR. WINTER:** Well, I think we actually covered the
16 pending motion.

17 **THE COURT:** I thought that was -- that was the only
18 motion I was aware of.

19 **MR. WINTER:** There's one motion to remand where we
20 responded and the Plaintiffs have asked for an extension on
21 their reply, which we agreed to. That's the only other
22 extant motion that we can think of, Your Honor.

23 And to just go back to the Plaintiff/Defendant Fact
24 Sheets, we think the process is working, and I think it has
25 informed both sides at this point as to what the inventory

1 of cases is starting to look like, and it's been a useful
2 process.

3 We have produced -- our Defendant Fact Sheets are,
4 you know, 120 days after completed Plaintiffs' Fact Sheet.
5 We're producing that. We're producing specific documents
6 with each of those Plaintiffs. I think we have a different
7 person to send information to. We're doing that, and I
8 think --

9 **THE COURT:** When you say "producing," understanding
10 there's that 120-day lapse, are you preparing them or are
11 you actually producing them to the other side at this point?

12 **MR. WINTER:** We're serving responses at the 120-day
13 point.

14 **THE COURT:** Okay.

15 **MR. WINTER:** A big number of our fact sheets are
16 going to come down the road because of that --

17 **THE COURT:** Right.

18 **MR. WINTER:** -- but we think the process is working
19 quite well.

20 **THE COURT:** Any pending motions that the Plaintiff
21 wanted to call to our attention?

22 So we've got the remand motion that we're waiting
23 for Plaintiffs' reply, and then we've got the motion to
24 dismiss on the fact sheets that comes ripe on Wednesday,
25 which may not include many cases. I don't know.

1 **MR. ANAPOL:** As far as I understand, neither of
2 these two cases are specific to the Steering Committee.
3 They're both case-specific issues. I think I gave the name
4 of the one that I'm aware of. Nobody else has reached out
5 to me as lead counsel to suggest they're having any issues.
6 The remand motion, I think, is a metal-on-poly -- I'm not
7 sure -- but it hasn't been brought to my attention.

8 **THE COURT:** Okay. All right. Anything else for the
9 Plaintiff today?

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

11 **THE COURT:** Anything for Defense today?

12 **MR. WINTER:** Your Honor, just to go back to that
13 statute-of-limitations discussion --

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

15 **MR. WINTER:** -- and what to do with those groups of
16 cases.

17 We made a proposal to our esteemed colleagues as to
18 a bellwether process for motions on those Plaintiffs,
19 recognizing we can't ask you to enter such an order now, but
20 we would very much want, by the next time we see you, to
21 have had as spirited a discussion as we can on the
22 bellwether statute-of-limitation motion practice that we
23 propose because, again, it is, you know, a considerable
24 minority of the inventory that we would like to address.

25 You know, there is a big obligation to us on these

1 Defendant Fact Sheets because we go not only to Biomet but
2 we go to the distributors and their sales reps, who are
3 third parties, to collect this information, and we're doing
4 that, but if we don't have to do it in a case because it is
5 time-barred, we would prefer not to incur that expense.

6 **THE COURT:** Let me just do some clarification for
7 those on the phone.

8 One of the things that we kicked around -- and,
9 again, there's been no wording or agreement or anything of
10 that sort. One of the things that the Defense is interested
11 in -- when Mr. Winters says "bellwether," that would not be
12 a bellwether trial but rather bellwether motion on
13 statute-of-limitations grounds, and it would be the sort of
14 thing, at least as I understand what the parties are
15 contemplating, where I would issue a ruling and then, if
16 there are further motions along those lines, would simply
17 invite the movant to tell me -- or the responder, depending
18 on which way it would go -- what's different about this one
19 than the one I ruled on before.

20 That's what you're talking about, Mr. Winter?

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

22 **MR. ANAPOL:** Your Honor, from the Plaintiffs'
23 perspective, these are very much case-specific issues. We
24 have a direct file order which contemplates these cases
25 being sent back to -- remanded back to the proper

1 jurisdiction from where they came. We believe that these
2 issues are better addressed by that remand judge.

3 In my experience, no MDL judge has dealt with the
4 issue of statute of limitation on a case-specific issue this
5 early in litigation, and, frankly, from the Plaintiffs'
6 perspective, this is better suited for a remand judge case
7 specifically.

8 **THE COURT:** Okay. Well, I'll let you folks talk
9 about it and see what you think.

10 Were there any other issues that you wanted to talk
11 about today?

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

13 **THE COURT:** For Defense?

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

15 **THE COURT:** Okay. Let's pick a time for us to meet
16 again. If I run out six weeks, that takes us to Labor Day,
17 which doesn't seem like the best way to spend Labor Day. I
18 mean Veteran's Day.

19 How about November 18th? Would that work for you?
20 That's a Monday.

21 **MR. WINTER:** It works for Defendants, Your Honor.

22 Mr. LaDue?

23 **MR. LaDUE:** That's fine.

24 **THE COURT:** And, again, if you want, we can do this
25 by phone unless there are issues to deal with.

1 **MR. ANAPOL:** That's great, Your Honor.

2 So we'll plan for it to be a teleconference, and if
3 there's more significant issues, we'll come in person?

4 **THE COURT:** Yeah.

5 I can't remember if that's a home-game weekend, but
6 you should be able to get in while everybody else is getting
7 out.

8 **MR. ANAPOL:** It's right before Thanksgiving, but, I
9 mean, it seems fine to me.

10 **THE COURT:** Okay. Actually, Thanksgiving is the
11 following week this year.

12 **MR. ANAPOL:** Oh. I'm sorry. Yeah, yeah. That
13 works.

14 **THE COURT:** So I'll set it for telephonic, and I
15 guess that's about the time where the airlines change all
16 their flight schedules, so we probably ought to -- if we're
17 going to change it to in-person, we probably ought to do it
18 about three weeks earlier. So if nobody asks for anything
19 different, we'll do it by telephone, 9:00, on November 18th.
20 And if somebody thinks we do need an in-person, I'll see
21 some of you on November 18th.

22 I will try to get something out to you, whether a
23 ruling or at least a sense of the Court, on the matters of
24 setting -- trying to set up some at least tentative dates --
25 but, obviously, once we have dates, they may or may not be

1 tentative -- toward a bellwether process and the discovery
2 master issue, so I'll try to get those out. I'm going to be
3 out of town Wednesday through Friday, so if I don't get it
4 to you tomorrow, you don't have to watch your in-box for the
5 rest of the week, but I'll get it to you as quickly as I
6 can.

7 Thank you, folks.

8 **LAW CLERK SHEAD:** All rise.

9 (All comply.)

10 **THE COURT:** We talked about whether you folks wanted
11 to talk about mediation before we go into the bellwether
12 process. If you folks can, talk about that and let me know,
13 say, by the next conference, whether I should be appointing
14 somebody there, but, obviously, that's for you folks to talk
15 about. I just toss that out before we start into bellwether
16 activity. We won't be too far into the schedule then.

17 **MR. DASSOW:** Okay. Your Honor, thank you.

18 (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 9th DAY OF OCTOBER, 2013.

S/S DEBRA J. BONK

DEBRA J. BONK
FEDERAL CERTIFIED REALTIME REPORTER