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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, MAY 18, 2015

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

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APPEARANCES

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For Plaintiffs:

MR. W. MARK LANIER
MR. THOMAS R. ANAPOL
MR. ROBERT DASSOW

(see docket for addresses)

For Defendant:

MR. JOHN D. WINTER
MS. ERIN LINDER HANIG
MR. JOHN LaDUE
MR. BLAINE DART

(see docket for addresses)

Also Present:

MS. BRENDA FULMER
MR. NAVAN WARD
MR. JUSTIN PRESNAL
MR. AHMED DIAS
MR. KYLE BACHUS
MR. GREGG BORRI
MR. JEFF LOWE
MS. LAUREN BRONSON

(see docket for addresses)

1 **THE COURT:** Good morning.

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

4 We are gathered for a status conference on the case.
5 We have several issues to go through, some contentious, others
6 not.

7 I do want to state, perhaps only for those who are
8 listening on the phone, that at all other prior status
9 conferences, we've conducted a pre-status conference in
10 chambers. That has basically been for my benefit so that I
11 know generally what we're looking at as I come into court. It
12 puts me in a little better position to be able to give people
13 rulings. We don't have arguments on the issues, just basically
14 a description of what the parties' positions are and why they
15 need a ruling.

16 We did not do that today because my chambers isn't
17 big enough to let everybody in here. And given some of the
18 issues that have been raised in letters to the Court, it seemed
19 best not to have some of the people there and not all, and it
20 also seemed best to have -- it seemed like those would have
21 been hard to discuss without argument, so I figured we'd just
22 wait until we get out here.

23 What that means, though, is that I don't know all of
24 the issues that are going to be raised today, so I may sound a
25 little bumpier. And if you've been listening to these

1 conferences before, counsel may have to drill a little deeper
2 to fill me in on what we're dealing with.

3 We do have a joint status conference agenda, and I
4 will follow along on that. The first item is the update on the
5 pending case statistics. This, I assume, is not one of those
6 contentious issues.

7 I do have a question, though. And I think Biomet
8 prepared this, so let me turn to Biomet. The bottom three
9 paragraphs, I'm not sure what the difference is between
10 remaining MDL cases that were filed after April 15th, 2014, or
11 did not otherwise qualify for Groups 1 or 2, and then the last
12 paragraph says: Number of remaining MDL cases filed after
13 April 15th, 2014. Which of those -- I guess I'm not sure how
14 they differ.

15 **MR. WINTER:** Very briefly, Your Honor.

16 At some point in October, we gave you a list of cases
17 that were not in Group 1 and Group 2 that were pending. There
18 were approximately 440 of those cases, and many of those cases
19 were in that group because the fact sheets were not completed
20 prior to the agreed-upon deadline or fact sheets hadn't been
21 submitted. So the two numbers that we have there, we broke out
22 for you, are the cases actually filed after April 15th, and
23 there were more than 87, but several have been dismissed or
24 settled, and then what was left basically of the 440, as of
25 October, working that number down by about 200. So of the 440

1 that were post-Group 1 and 2, as of October, that number has
2 come down by 200.

3 We just thought we would break that out for
4 Your Honor so you could see progress made in that group of
5 cases and the number of cases that have been filed, you know,
6 even through 2015.

7 **THE COURT:** So what remains today, out of the cases
8 that were filed after April 15th of last year or did not
9 otherwise qualify for Groups 1 and 2, is it the 231 or is it
10 the 87?

11 **MR. WINTER:** Actually, Your Honor, the easier way to
12 do it is there's a hundred Group 1 and Group 2 cases left.

13 **THE COURT:** Right.

14 **MR. WINTER:** And the balance is either a case filed
15 after April 15th or a post-Group 1/Group 2 case that has not
16 yet been resolved, so it's approximately 130 either filed after
17 April 15th or a non-Group 1/Group 2.

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

19 Did anybody else have anything to mention with
20 respect to the statistics?

21 **MR. ANAPOL:** Your Honor, Thomas Anapol for the
22 plaintiffs.

23 The only thing I would add is that there were a
24 significant number of non-revisions that may have been filed
25 prior to April 15th that then converted to revisions

1 thereafter, so that is comprised in the numbers that Mr. Winter
2 was talking about.

3 **THE COURT:** Okay. So they didn't appear to -- well,
4 I understand your position, don't need to restate it.

5 Okay. I think that takes us to the areas where
6 people have some issues to raise, and this has to do with
7 letters that the Court has received.

8 I discovered that we had some lack of communication
9 as to what was being placed on the docket as a whole and what
10 was coming in to individual cases, so let me summarize the
11 letters that I've received.

12 And, as I understand it, there are two attorneys that
13 wrote letters that are here to be heard, and I don't mean to
14 preempt their comments. I just want to include their letters
15 in what I summarize for the sake of those who might be dialed
16 in on the phone here. And what I'll do then, I'll invite -- I
17 think Mr. Borri and Mr. Lowe are here.

18 Do I understand that correctly?

19 I'll invite you folks to speak after I go through the
20 whole of the letters that I've gotten and then will invite the
21 steering committee and Biomet to comment after that.

22 The first letter we got was from Mr. Borri of the
23 Borri Law Offices of New York City. And, again, this is just
24 to summarize for anybody who didn't see it, since, I guess, it
25 wasn't open to everybody for a while. Although, it should have

1 been, because it addresses the whole system here.

2 As I understand it from the letter, Mr. Borri reports
3 that he has one case. It didn't settle. He said that the
4 plaintiffs' leadership informed him that Biomet challenged
5 every case in which the plaintiff sought enhancement;
6 relatively few mediations had occurred; and that the mediator
7 had not been able to move Biomet off the dime during the
8 mediations. And the first letter said that Biomet and the
9 plaintiffs' steering committee should provide information.

10 He then followed up with a second letter and a motion
11 to the same effect and requested that the plaintiffs' steering
12 committee and Biomet respond to, I think it was, six or seven
13 interrogatories.

14 The plaintiffs' steering committee responded with a
15 letter from Mr. Anapol who said that Mr. Borri misunderstood
16 the master settlement agreement and seeks information that
17 sweeps well beyond his single case.

18 Biomet also responded and reported that it had
19 engaged in pre-mediation talks with Mr. Borri. And when it
20 became clear that Biomet was going to stand firm, Mr. Borri
21 decided not to mediate.

22 And I look forward to hearing more from everybody
23 about that, but that's what I understand the gist of
24 Mr. Borri's letter to be.

25 Jeffrey Lowe, who is also here today, of the firm of

1 Carey, Danis & Lowe, in St. Louis, submitted a letter. As we
2 understand it, from looking at the docket, Mr. Lowe has settled
3 ten cases and has ten left. He echoed Mr. Borri's concerns and
4 joined in his requests.

5 Biomet responded to that in the same letter in which
6 they responded to Mr. Borri's letter and reported that because
7 of some undescribed, prior history with Mr. Lowe, Biomet
8 affirmatively reached out to Mr. Lowe, and Biomet reports that
9 Mr. Lowe didn't respond to its communications in a timely way.

10 And, again, I look forward to hearing more from
11 Mr. Lowe, and I'm just trying to summarize for those who are
12 not here, rather than to speak for Mr. Lowe or Biomet.

13 We then got a letter from Mr. John Dow of Dow Law
14 Group LLC in Concord, Massachusetts. I may have these a little
15 out of chronological order, but it's close. Mr. Dow has one
16 case. He echoed Mr. Borri and said that Biomet was late in
17 responding to his request for enhancement and mediation, that
18 he canceled the mediation. There was no settlement.

19 Scott Perlmutter -- I hope I'm pronouncing that right.
20 P-e-r-l-m-u-t-e-r -- of Cleveland, Ohio, wrote and indicates
21 that he had one case. When he sought enhancement, Biomet
22 challenged for the stated reason that the diagnosis on the
23 operative report was suspected -- emphasizing that word,
24 suspected -- metallosis. He echos Mr. Borri's comments. I
25 couldn't tell from the letter whether Mr. Perlmutter went ahead

1 and mediated, but there's no settlement, and he requested the
2 opportunity to submit something further in camera or talk in
3 chambers due to the confidentiality issues. I have not
4 responded to that request yet. I wanted to see what I found
5 out today.

6 Mr. Wendell Tong of Sullivan, Papain, Block, McGrath
7 & Cannavo PC, in New York City, reports that he had one case.
8 He had trouble getting a mediation date. He learned only just
9 before the mediation that Biomet was challenging. And in
10 pre-mediation discussions, he reports that Biomet said that the
11 plaintiff could do nothing at mediation that would move Biomet
12 off its offer, which Mr. Tong thought to be low. He decided
13 not to mediate, there was no settlement, and he joins in
14 Mr. Borri's request for information.

15 I think the next was Mr. David Riggs of the Riggs,
16 Abney firm, in Tulsa, who reports that he had one plaintiff.
17 He said it was hard getting a mediation date. He went to
18 Philadelphia for the mediation. He says that the mediator
19 eventually asked the Biomet attorney to step out of the room
20 and told Mr. Riggs that Biomet won't budge on these things,
21 that Biomet eventually went up over its original position, that
22 the plaintiff accepted it. Since there was a settlement, I'm
23 viewing Mr. Riggs' letter as informative only and not asking
24 for any relief.

25 Finally, over the weekend, I became aware that

1 Terrence Smith of Davis, Saprastein & Salomon, PC, in Teaneck,
2 New Jersey, wrote, as well, indicating -- he echoed Mr. Borri
3 in his letter and that he settled his case. And, again, since
4 the case is settled, I view Mr. Smith's letter as intended to
5 be informative, rather than seeking any relief.

6 Again, I am sorry if I misstated anybody's report.
7 When you try to summarize these in three or four minutes, it
8 becomes a challenge.

9 Mr. Borri, you had wanted to be heard, if you want to
10 come on up.

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

12 **THE COURT:** And, Mr. Lowe, I'll invite you next,
13 after Mr. Borri.

14 **MR. BORRI:** Your Honor, Gregg Borri, Gregg Borri Law
15 Offices, New York City, here in the **Chadwick** matter.

16 As indicated in my last letter, I filed a motion for
17 breach of -- seeking relief for breach of the settlement
18 agreement. The gist, as I said in my letter, is that what
19 happened was Biomet -- and I believe it will be -- I don't know
20 whether it will be disputed or not -- objected to every case,
21 at least, certainly, in Group 1, where an enhancement was
22 sought. I have that, really, in writing from the plaintiffs'
23 steering committee. And, effectively, they used the
24 enhancement --

25 **THE COURT:** I did want to ask you, from your original

1 letter, who, from the plaintiffs' steering committee, indicated
2 that to you?

3 **MR. BORRI:** Doug Kreis.

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

5 **MR. BORRI:** Doug Kreis, in an e-mail dated June 9,
6 2014.

7 I can quote it: As expected, Biomet challenged all
8 cases in which plaintiff sought an enhancement award. In
9 addition, they challenged a number of other cases for what they
10 believed to be for good cause.

11 I don't know about Group 2, but the **Chadwick** case is
12 a Group 1 case. Effectively, and the mediations, I think we're
13 seeing -- the information we're seeing come in, people had
14 similar experiences, as did I. Even going to the mediation
15 turned out to be largely fruitless.

16 But having filed the motion, I'm going to frame the
17 issue in terms of Ms. Chadwick, specifically. And what I
18 wanted to do -- Biomet has not had a chance to respond to the
19 motion yet. It hasn't called for it. So I thought, since I
20 made the trip out here, I would ask for answers to these
21 several interrogatories, which I had hoped would have been
22 provided, frankly, voluntarily, to the extent the plaintiffs'
23 committee has the information. I don't believe they have.
24 They may not have all the information, since it would be
25 proposed to Biomet. And once we flesh that out, we can argue

1 the motion.

2 But, effectively, Your Honor, I don't think, under
3 any circumstances or any stretch of the imagination, the fact
4 that a plaintiff seeks an enhanced award, has already been
5 categorized as a \$200,000 award under the agreement, the fact
6 that the plaintiff seeks an enhancement cannot be good cause
7 under that agreement, under any stretch of the imagination.
8 And to say it is and to act on that basis is, to me, a breach
9 of the expressed terms and the implied terms.

10 That agreement, just looking at its four corners --
11 and maybe I have the advantage of just looking at the four
12 corners since I wasn't involved in the negotiations, but it has
13 a process, and these cases are categorized, and then it's open
14 for enhancement or challenge, but the challenges are for good
15 cause. It's a term of art. And there are lists of the types
16 of good cause, and they refer to objective factors.

17 So I think it wasn't intended. There may be some
18 level of subjectivity in an individual case, Your Honor, in the
19 sense that people may differ in an individual case, but it's
20 just impossible -- it's impossible that, in every case, a
21 defendant would be allowed to ignore all objective evidence in
22 dealing with the terms. They have an obligation of good faith
23 and fair dealing.

24 And I think if they're objecting in my case and these
25 other cases, my case, specifically, they're objecting solely

1 because there's an enhancement or they don't have good
2 objective evidence. If they're after some other scheme to
3 drive down the total costs, that would be a breach of the
4 agreement, both the implied terms and the expressed terms.

5 To help me get what I need, I would simply like
6 Biomet to answer those interrogatories so I can see it and
7 evaluate the information that we get, and then I'll take the
8 motion up at Your Honor's convenience.

9 **THE COURT:** Okay. Thank you, Mr. Borri.

10 One thing I left out, as you're coming up, Mr. Lowe,
11 is that I extended the invitation to Mr. Borri to come speak
12 between his original letter and the motion to enforce, and so I
13 wasn't trying to circumvent Biomet's opportunity to respond,
14 but, obviously, I'm not in a position to rule on the motion
15 today.

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

17 **THE COURT:** I did want to clarify that.

18 Mr. Lowe.

19 **MR. LOWE:** Yeah, Your Honor.

20 We had some similar experiences, and we -- when we
21 saw Mr. Borri's letter, we joined in it.

22 And the clearest case I have is a case called **Muriel**
23 **Denno**, so I have -- it was a bilateral hip case categorized as
24 210,000 in the portal.

25 And I received an e-mail from Mr. Winter on

1 December 12th. It says: Agree. 210,000. Then we seek an
2 enhancement, and now, all of a sudden, it's a \$25,000 case. So
3 someone needs to look into this or there has to be some
4 process.

5 Also, we did not participate in the mediation because
6 we were assured by people that Biomet wasn't going to change
7 its position.

8 **THE COURT:** Help me understand. "Assured by people."
9 You phrased it as though you don't want to --

10 **MR. LOWE:** Well, I'd have to go back and look if I've
11 got it exactly. It might actually be from Mr. Winter. I can
12 go back and look at my e-mails.

13 Yeah, it actually is. It says -- Mr. Winter said:
14 You can formally mediate these cases in Philadelphia, if you
15 want, but you should know that Biomet's position regarding
16 their value is not going to materially change.

17 And that's his December 12, 2014, e-mail to me, so it
18 doesn't really make much sense to go to Philadelphia and
19 mediate cases if you're not going to be engaged in good faith
20 negotiation to try to settle the cases.

21 So, you know, I don't know how the Court wants to
22 handle all this, but I think somebody needs to look into this
23 in particular cases and let, you know, plaintiffs' attorneys,
24 who represent people, submit what they think is a breach of
25 the -- at least the implied covenant of good faith and fair

1 dealing or, not, the terms of the settlement.

2 **THE COURT:** Thank you, Mr. Lowe.

3 My assumption, from the people who are here, is that
4 the other folks wanted to -- the other folks, other than the
5 steering committee and Biomet's counsel, that everybody
6 else wanted to talk about the PSC, the second, rather than
7 these particular issues. If anybody else wanted to address
8 this issue, I'll be happy to hear from you now.

9 **(No response.)**

10 **THE COURT:** Okay. Mr. Anapol, I don't know if the
11 plaintiffs' steering committee wants to be heard, but I know
12 you responded to Mr. Borri originally, so let me give you the
13 floor next.

14 **MR. ANAPOL:** Yeah. I'll be short, Your Honor,
15 because most of these issues, I think, Biomet is going to have
16 to respond to, specifically.

17 What I wanted to share with the Court, as I did in my
18 letter, number one, I think that, from the perspective of
19 leadership, Biomet acted consistently across the board with
20 every firm, number one.

21 Number two, I think where Mr. Borri misunderstood the
22 terms of the settlement agreement: In fact, Biomet objected
23 and challenged every single case where a plaintiff sought an
24 enhancement. That was always part of the program.

25 The basis behind it is this: There were -- in other

1 hip litigations, in other settlements, there were confounding
2 factors that were addressed by way of a reduction in an award.
3 And so whether it's obesity, smoking history, or age, those
4 factors were ignored or dismissed for the purposes of a base
5 award in our litigation.

6 The fundamental understanding between the parties
7 when the deal was struck was that if people come and seek
8 enhancement in these cases, all bets are off. We're going to
9 go back and look more carefully and closely at the records to
10 determine whether Biomet has a good, clean defense. And so in
11 the context of that, they challenged across the board.

12 That information was relayed on national calls by
13 Mr. Lanier and I. We held several of them and notified
14 everybody in Group 1 and in Group 2 that you need to be very
15 mindful and careful in seeking enhancements because Biomet was
16 going to take a closer look at the records in those instances,
17 so everybody should have had open eyes with respect to seeking
18 enhancement for that very reason.

19 So other than that, you know, I think that the
20 mediation process did work for many, many firms. It didn't
21 work for everybody, obviously. We had pre-mediations in my
22 offices on behalf of hundreds and hundreds of claimants who
23 came and met prior to a mediation. That process worked. And,
24 you know, across the board, Your Honor can look at the numbers
25 as to how many cases resolved in the litigation. The vast

1 majority of the claimants in the litigation settled their cases
2 within the definitions of the master settlement agreement.

3 And so, beyond that, what the steering committee is
4 not prepared to do is to take a look individually at anybody's
5 specific case to determine whether or not that for-cause
6 challenge is reasonable, unreasonable, objective, or
7 subjective. That was always intended to be between the
8 claimant, their lawyer, and Biomet.

9 And so from that perspective, you know, those are my
10 thoughts on the issues that have been raised, and I would defer
11 to Mr. Winter on case-specific challenges.

12 **THE COURT:** Thank you, Mr. Anapol.

13 Mr. Winter.

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

15 Mr. Anapol is right, in terms of how this deal was
16 negotiated and how the master settlement agreement, as so
17 ordered by you, operates. People categorize, either agree or
18 disagree on categorization, and then there are enhancement
19 requests and contesting or challenges by Biomet.

20 We were very clear when we negotiated this that
21 Biomet would say, "You get a base award, and we won't discount
22 obesity, smoking, or age. But if you want more than the base
23 award, we are going to challenge that to take that into
24 account, and, in addition, we have a right to contest cases
25 where we think it's appropriate to contest, pursuant to, I

1 think it's, 3B of the master settlement," and that's what we
2 did. That's what we've done.

3 The reality, Judge, 94 percent of the Group 1 and
4 Group 2 cases have been settled. Now, there may be two people
5 who have sent in releases, probably gotten their money, and now
6 say, somehow, I strong-armed them into settling their case.

7 If those lawyers want to make a motion to vacate the
8 settlement because, somehow, I put them under duress, even with
9 the mediator, and caused them to resolve the case under some
10 power mystical that I have, we're good. They can file the
11 motions. We'll respond to them. I think that's the Riggs
12 lawyer, and then there's a Saprastein who wrote in. Okay. So
13 if that's what they want to do, that's what they want to do.

14 But to these other challenges, Your Honor, the cases
15 were challenged pursuant to the program. There were lawyers
16 who didn't understand that categorization agreement didn't mean
17 you actually have an amount, and you've already ruled on that.
18 You have a dispute as to whether or not a case can be settled.

19 And we've mediated. We've given you the statistics.
20 We've mediated cases. We've had cases where people come in,
21 and they say, "This is what I have," and the mediator has
22 worked back and forth. Many of the cases resolve.

23 That one case, the mediator said, "John, if you agree
24 to pay 50, I think this plaintiff's lawyer will agree."

25 "Okay, Mr. Rutter. We'll pay 50."

1 That's how this works.

2 These other gentlemen, most of them didn't even go to
3 the mediation or didn't like the number, and that's perfectly
4 okay. This settlement was never created to resolve a hundred
5 percent of the cases.

6 So for someone to say that Biomet acted in bad faith
7 because Biomet decided this case actually isn't worth what you
8 think it is, that's not bad faith. That's a position we're
9 allowed to take in any lawsuit. So the fact that someone is
10 unhappy that we're not paying them gobs of money is not bad
11 faith.

12 You know, I could say it's bad faith for Mr. Lowe to
13 have requested mediation on statute of limitation cases that,
14 quite frankly, Your Honor, stink, but I'm not saying that, but
15 I could turn that around. That is the reality of this
16 agreement. And you could have a statute of limitation case,
17 and you could say, "Biomet mediate it," and we did.

18 And there are more than 400 cases, Your Honor, where
19 someone got some type of enhanced award. Many of them,
20 Your Honor, were cases that should have been \$20,000, pursuant
21 to the precise terms of the settlement. Whether the person got
22 35,000, whether the person got 50,000, whether the person got
23 75,000, those are enhanced awards. There are cases that have
24 been mediated where someone got more than \$200,000.

25 So the whole process has worked. We have people who

1 just are unhappy with their particular case. And, Your Honor,
2 if we had 72 percent of the total cases resolved and 28 percent
3 where everyone was unhappy, then someone could raise a question
4 as to where, you know, the meeting of the minds are, has the
5 settlement, in fact, worked.

6 But, statistically, Your Honor, we all know that is
7 not true. We're at 94 percent, which, by any stretch of the
8 imagination, in an expedited basis, because we've done this in
9 under fifteen months, to resolve more than -- like we're at
10 1800-some odd cases being resolved, more than 500 dismissed.
11 To say that, somehow, Biomet acted in bad faith because three
12 people or four people are unhappy, that's not -- that can't be
13 true, Judge.

14 And to say, "I want discovery of the resolution of
15 all these cases," there's no basis for that, Your Honor, at
16 all.

17 I mean, the way the settlement works, the plaintiffs'
18 steering committee knows how much a case is resolved for
19 because they get a copy of the release. So cases get funded
20 based on clearing liens, releases being provided. When the
21 releases get to plaintiffs' steering committee, we confirm
22 that, yes, that's the right amount. So the process has been
23 monitored. It has moved forward, moved forward quite well.

24 The settlement agreement has terms you've already
25 ruled on, in terms of how the parties can interpret it. We've

1 consistently looked at these cases across law firms, across
2 individual cases, the same way, which is the only way that you
3 can do this on an expedited, efficient basis. The fact that we
4 have three or four disgruntled people, Your Honor, that doesn't
5 amount to anything.

6 And the reality, Judge, if we want, going forward
7 with discovery, we'll agree that anyone who's unhappy -- I'm
8 using that word, so they sent you a letter -- we will agree
9 they'll be a bellwether. We'll start discovery in their case
10 right away. We'll get them to the front. We'll get them to
11 trial early.

12 Thank you, Your Honor.

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

14 Thank you for the arguments. I understand the
15 positions better. I'm not in a position to rule. I think I've
16 got two different matters that I am going to have to rule on.
17 One is whether there should be some broad-based approach that
18 was originally suggested and that some of the other letters
19 echoed looking at the system broadly, and then one more focused
20 on the **Chadwick** case. Although, I understand the **Chadwick** case
21 seeks some of the same information. Obviously, I can't rule on
22 that one now because Biomet hasn't had a chance to respond, but
23 I'll try to get something out this week. You gave me a lot to
24 chew on. I'll try to get something out this week, and I know
25 it's got to move fast because we've got changes on the

1 plaintiffs' steering committee or changes of the plaintiffs'
2 steering committee. So at least on the part that I can rule on
3 now, I will. And then once the motion to enforce is ripe in
4 the **Chadwick** case, we'll set up a telephonic argument, if that
5 would work for all the parties.

6 **MR. BORRI:** Thank you, Your Honor.

7 **THE COURT:** So thank you, folks.

8 I think, probably, the next few items can probably be
9 addressed together. We have on the agenda: Motion Re: Escrow
10 Agreement, and that one I think I indicated I would defer until
11 May 26th; common benefit petition scheduling order;
12 administration of the master settlement agreement -- I'm not
13 quite sure whether there's an overlap of what we just dealt
14 with. And if it is, fine. Again, I don't know what we're
15 talking about today -- and then the termination of the current
16 plaintiffs' leadership.

17 So, Mr. Anapol, if I'm correct, we can address all of
18 those together.

19 **MR. ANAPOL:** Yes. Thank you, Judge.

20 If I may, can I just circle back?

21 I think there was one point in the prior argument
22 that neither me or Mr. Winter raised, and that's just that,
23 preliminarily, there was a confidentiality determination by
24 both sides that we thought that these settlements, outside of
25 the golden numbers, was to be confidential.

1 But moving on, you are correct, Your Honor, that both
2 the motion for the escrow agreement, which Your Honor's tabled
3 for two weeks, ties together with the common benefit petition.
4 Until we have that motion -- you know, until that order has
5 been entered, we can't really file our common benefit petition,
6 so we're kind of in a holding pattern for a week or two, but we
7 expect to file that within the next couple of weeks.

8 The administration of the master settlement
9 agreement, I think -- and Mr. Winter may want to speak to
10 this -- is nothing more than the Garretson firm has been our
11 administrator. I think they are prepared to move forward, once
12 there's a new steering committee in place, and to work with
13 those parties. And I'll defer to Mr. Winter if there's any
14 other issues with respect to that particular issue.

15 But then, you know, Your Honor has our motion to
16 terminate the existing steering committee, and that's where
17 we're at now.

18 **THE COURT:** Okay. Mr. Winter, anything to add on
19 those?

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

21 We've already gone on the record on the escrow motion
22 as having no opposition to it.

23 And on the administration of the settlement
24 agreement, it really is just to make sure that, at some point,
25 Garretson can continue in that role, which would be acceptable

1 to Biomet.

2 **THE COURT:** Okay. That takes us down to transition
3 from one steering committee to another.

4 And just to bring it all down to date in one place,
5 the bulk of the members of the current plaintiffs' steering
6 committee either have no cases remaining or are expected to
7 have no cases remaining within the next few weeks. And I don't
8 think anybody -- I know some judges have viewed plaintiffs'
9 steering committees as pretty much appointed for the term of
10 the district judge, and I think we've all agreed that that's
11 not the cleanest way to do it, but that we still have enough
12 cases that we need a plaintiffs' steering committee.

13 I invited applications for a new steering committee
14 and received none within that time. We have had a couple come
15 in, I think three come in, since then, and I think we
16 have Mr. Dias here to talk about the possibility of another
17 being filed on behalf of the firm that he and Mr. Fisk are
18 with.

19 I then issued an order inviting those of the current
20 plaintiffs' leadership, who still have cases remaining, if they
21 wish to move to terminate their membership. We do have a
22 motion to terminate the steering committee itself, and I set
23 the deadline for those motions or requests for last Friday.
24 Even with electronic case filings, sometimes I find out about
25 things that happened a day or two earlier, but I am not aware

1 of any requests that were filed on that, other than the general
2 motion to terminate, but I do know that we have at least three
3 people who are not on the steering committee that I think are
4 here to address that. We have some other people who are on the
5 steering committee, and I don't know if they're here to address
6 that.

7 But let me start with those who I know are talking
8 about applying to the new committee. That would be Mr. Dias --
9 and I'm just going in the order in which you folks signed in --
10 Mr. Dias, Mr. Bachus, and Ms. Bronson.

11 So, Mr. Dias, did you wish to be heard?

12 **MR. DIAS:** Good morning, Your Honor.

13 **THE COURT:** Good morning.

14 **MR. DIAS:** I'm Ed Dias of the Gomez trial attorneys
15 from San Diego, California, Your Honor.

16 As you know, I feel like there's a bit of a hornet's
17 nest, and I'm kind of walking towards it, so I want to know
18 what exactly we're getting into. Obviously, both sides have
19 worked very hard on this agreement, so, respectfully,
20 Your Honor, we just want a little bit more clarity in terms of
21 the direction of where the current steering committee is going
22 to go, if, in fact, Your Honor is going to relieve them, and,
23 certainly, funding of the continued litigation is a concern of
24 ours.

25 I personally have about twelve cases. We may be

1 coming into a couple more. However, you know, before my firm
2 invests a substantial amount of time, money, and resources into
3 it, we just are seeking a little bit more clarity, which is why
4 I'm here today.

5 **THE COURT:** So you're not actually applying at this
6 point? It sounds like you're interested in applying, but
7 you're not quite ready to?

8 **MR. DIAS:** That's exactly it, Your Honor. I think
9 Your Honor's orders coming out in the next couple of weeks will
10 provide a little more clarity in that regard, so I hate to come
11 here kind of reticent, but, as you might imagine, the finances
12 and making sure that this works for us is important.

13 **THE COURT:** Let me ask you because it is one of the
14 issues that I've been trying to work through. It is unusual
15 not to have -- at least, at one point, we had none. Now we
16 have a few -- but it's unusual to have no applicants for a
17 plaintiffs' steering committee. On the other hand, things are
18 a lot different now than they were at the beginning of the
19 case.

20 How would you anticipate the steering committee being
21 funded? What would you recommend?

22 **MR. DIAS:** Your Honor, frankly, we would hope that
23 the current plaintiffs' steering committee leave back some
24 money. What that amount is is something that, obviously, we
25 would like to discuss, but that is a primary concern.

1 Also, what kind of scheduling order is going to be in
2 place, in terms of discovery, is another issue we'd have to get
3 a little more clarity on, as well.

4 **THE COURT:** Okay. Help me understand how I could
5 order -- because, as I understand it, under the settlement
6 agreement, Biomet funded the common fund for those cases that
7 would settle, and we're now into a step where we would be
8 proceeding with those who had not settled. Help me understand
9 the theory by which I get to Biomet paying for the common fund,
10 because this is Biomet money that you would ask them to leave
11 behind, paying for the common fund of cases that hadn't
12 settled. Help me understand how I get from Point A to Point B.

13 And, again, this is in all honesty, because I've been
14 trying to sort this out myself.

15 **MR. DIAS:** Sure, Your Honor, and, candidly, we're
16 kind of new to the fray, as well, so I would seek
17 recommendations from the current members of the PSC that are
18 going to stay and continue this forward, but we're open to
19 anything creative, Your Honor. That, really, is a question
20 that we have, as well.

21 **THE COURT:** Okay. Thank you, sir. Appreciate you
22 being here today.

23 **MR. DIAS:** Thank you, Your Honor.

24 **THE COURT:** Mr. Bachus.

25 **MR. BACHUS:** Good morning, Your Honor.

1 I'm Kyle Bachus from the law firm of Bachus and
2 Schanker in Denver, Colorado.

3 Our firm's name appeared on a list, pursuant to your
4 request, produced by Mr. Winters that indicated that we have a
5 volume of cases. Not a volume. I think we have eight cases.
6 But I think you requested five or more to be presented to you.

7 As a result of that -- and I think I can answer one
8 question as to why there's been a reticence. You know, this is
9 a very unique circumstance, and the circumstance is that very
10 little substantive work has been done on this case, and that's
11 just the reality.

12 And we talk about the expediency within which this
13 was resolved. The fact is that the group of people who have
14 been ordered to pay a common benefit cost, that money hasn't
15 been used. That's my guess. I mean, I'd be interested to see
16 what amount of that money has been used. I know there's a
17 reversion back to those participants.

18 But I think that the problem with like-minded people,
19 in terms of participating in this -- and, as you know, I have
20 filed an application to participate on the renewed steering
21 committee, but the concerns are the cost, money. You know, a
22 common benefit cost is supposed to benefit all of those
23 participants, not just a small sum. And, somehow, in this
24 litigation, there was an agreement put in place to say that
25 that common benefit was only going to benefit those that

1 resolved the case and not benefit those that continued, and
2 that, to me, is odd in and of itself. I mean, the common
3 benefit should go until the end of the case when the work of
4 this MDL is done. And at the conclusion of the MDL, that money
5 that's left should be reverted back, absolutely, but it should
6 be for the benefit of the common, not for the few or the many
7 or whatever it is. It's for all. And so I don't know what the
8 mechanism is when you look at the way this agreement was
9 crafted.

10 I think the problem, going back, all the way back to
11 the conversation that was presented at the beginning, this
12 morning, is that was this really a settlement agreement or was
13 this an invitation to negotiate, because it sure seems like,
14 when you talk about we can challenge, we can do this, you know,
15 this is a settlement agreement with parameters, but, really,
16 what it came down to, in our cases, too, this was nothing more
17 than an invitation to negotiate, an invitation to negotiate
18 actually with a maximum that you could recover and no minimum,
19 and you can go to a mediator.

20 And the sole determiner of whether these cases
21 settled or how much they settled for is sitting right at this
22 table over here, Mr. Winters. He was -- by virtue of this MSA,
23 he was given absolute authority to make a decision on every
24 case, whether it was going to settle or not settle.

25 And so what we're left with is a group of cases for

1 which there's no census that I'm aware of that could tell us,
2 those that are trying to come on board -- I think it is odd not
3 to have applicants. I'm trying to explain to you why there's a
4 problem with that. But for those who are coming on board, we
5 don't even know what's left. And so to have some idea of,
6 okay, here's what's left, here's why there was a dispute over
7 these, why Mr. Winters decided not to settle those cases, so
8 that we can look at it and say how are we going to fund going
9 forward.

10 And then we're going to certainly be with a truncated
11 crew, I mean, if you look at the size of what the PSC was and
12 now what it's going to be, assuming we can get some more people
13 to participate. I'm hoping that the Gomez law firm will
14 participate.

15 You know, the time frames that are going to be
16 necessary to conduct the same amount of discovery. When you
17 look, again, substantively, I think there were some 30(b)(6)
18 depositions that were done. I think that's it.

19 And we, obviously, also need to sit down and have a
20 meeting, assuming -- I'm being a bit presumptive. But if I'm
21 asked to participate, by virtue of the Court's previous order
22 and my application now, if I'm given that opportunity, we're
23 going to need to sit down and understand where they are with
24 the experts, where are they, what has been done on this side of
25 things, so that we can have some time frame to accomplish that

1 so we can come back before you and have a real scheduling
2 conference to figure out how to move forward.

3 Those are the issues that I wanted to bring before
4 the Court today, Your Honor, and I thank you for the time.

5 **THE COURT:** Well, I think, in fairness, as I
6 understand it, the settlement agreement came, I guess, early,
7 in the great scheme of things, as far as discovery.

8 As I recall --

9 **MR. BACHUS:** Yes, sir.

10 **THE COURT:** -- Biomet was of the opinion that all the
11 document production had been done. Of course, it's all
12 electronic. And the plaintiffs may have had a couple questions
13 about that. Some custodian -- maybe not all, but some
14 custodian -- depositions had been taken. I can't remember if
15 there had been 30(b)(6) deps. There had been some of those.
16 But there remains things to do there. I would anticipate we're
17 going to have issues. Mr. Winter mentioned the statute of
18 limitation issues. We haven't neared Daubert. And, probably,
19 before cases get remanded, I would imagine there will be at
20 least some summary judgment issues, so there's a lot out ahead.

21 And one of the good things about the expedited thing,
22 whether it had bad results, as well, is that the stay period
23 may have been short, where nothing was happening because of the
24 settlement agreement, but, obviously -- I'm looking forward --
25 I'm going to need the input of a new steering committee to

1 re-ignite the scheduling order, which is where we get
2 cart-and-horse issues with Mr. Dias wanting to know what the
3 scheduling order would be, and I need to know -- have the
4 plaintiffs' steering committee tell me. So I'm aware of a lot
5 of the issues you're raising. It's an awkward time to step in
6 and take the wheel. I'm looking for how to find people to take
7 the wheel.

8 **MR. BACHUS:** Yes, Your Honor.

9 I think that one of the concerns of counsel that I've
10 spoken with who were contemplating making application is -- and
11 I, obviously, wasn't involved. Leadership was involved in the
12 timetables in the original scheduling order. But when you look
13 at the amount of work -- and it is true. I know they've worked
14 very hard. I'm not trying to insinuate they haven't. I'm just
15 saying that the actual fact of the matter is that very little
16 has been done because of the timing that the settlement
17 negotiations consummated.

18 **THE COURT:** It might be fairer to say: A lot has
19 been done, but a small percentage.

20 **MR. BACHUS:** Yes, I think that's a much fairer
21 statement.

22 There's a lot left to be done, and I'm very
23 concerned about -- when I look at that scheduling order and
24 look at the volume of people that are going to be available to
25 do the work to get it accomplished in those same time frames,

1 if those are readopted, I think that's what has people running
2 for the hills.

3 Okay. Thank you, Your Honor.

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

5 Ms. Bronson, I know you are with Mr. Bachus' firm,
6 but you also submitted your own application.

7 Did you wish to speak?

8 **MR. BACHUS:** Yes, please.

9 Good morning, Your Honor.

10 I'm Lauren Bronson with the law firm of Bachus and
11 Schanker.

12 I just wanted to reiterate the concerns of Mr. Dias
13 and Mr. Bachus and just share in their concerns for the new
14 leadership.

15 Thank you.

16 **THE COURT:** All right. Thank you. I understand the
17 concerns.

18 We do have -- I think everybody who's not on the
19 steering committee, I think, has spoken now.

20 We do have some folks who are on the steering
21 committee -- I don't know -- I think Ms. Fulmer and Mr. Ward,
22 and there's one other who's --

23 **MS. FULMER:** Good morning, Your Honor.

24 Brenda Fulmer from West Palm Beach.

25 I was added to the steering committee about a month

1 before the settlement was announced, so I was not involved for
2 a long period of time.

3 I have some concerns, as well. And I've been doing
4 this type of work for 21 years. I've served on a number of
5 steering committees in the past. And we're kind of in a unique
6 circumstance here.

7 This MDL doesn't really follow the playbook any more.
8 I kind of look at this as being very similar to an MDL where
9 you've already had a number of bellwether trials. What's left
10 in the MDL, as best we can tell, are a lot of cases that did
11 not settle for case-specific reasons, so I'm very, very
12 concerned about using the traditional bellwether plan for
13 getting to the end of this MDL.

14 In my experience, it looks more like what we faced in
15 the hormone replacement litigation where there are lots of
16 large inventory settlements. And in that case, the judge
17 tended to focus more, towards the end, on remands and getting
18 case-specific discovery done and the cases ready so that they
19 could go back to their jurisdictions.

20 There are some things that we need. We attempted to
21 do --

22 **COURT REPORTER:** Ma'am, would you, please, slow down?

23 **MS. FULMER:** I'm sorry.

24 We attempted to do a census informally. But without
25 the support of the Court in requesting that, it was not as

1 effective as we had hoped, because we really needed to know
2 what was out there.

3 And I've heard that there are a lot of statute of
4 limitations cases, but I don't know how many of those actually
5 exist that haven't already been settled, and so it would be
6 very helpful if the Court could support us in requesting the
7 parties that remain to provide basic information. I obtained
8 everything that was available from current leadership, and it
9 was only part of what we needed. We have 130 new cases that
10 have been filed, and we really don't know a lot about those
11 particular claims.

12 One of the things that might be appropriate on a
13 going-forward basis is grouping the cases for discovery in a
14 way that makes sense, but you have to know the details of those
15 cases in order to do so. We don't know if there are common
16 doctors, if there are common issues in those cases, so there's
17 a lot of information that would be very, very helpful to us.

18 And the other thing we really need from the Court is
19 we need some guidance as to where we go from here and whether
20 the scheduling order that was entered previously is the only
21 road. I don't believe that it's appropriate, given the number
22 of cases, given the expense involved, and what we're likely to
23 gain from that discovery process. I think we need to take a
24 step back and retool that program so that we can actually get
25 to where we need to be with regard to the MDL.

1 **THE COURT:** What do you propose?

2 I understand you're interested in information, which,
3 of course, isn't usually available when we start a steering
4 committee. The steering committee gathers the information.

5 **MS. FULMER:** Right.

6 **THE COURT:** What do you propose?

7 **MS. FULMER:** I would ask the Court to issue a census
8 order -- basically, I can provide the Court with the
9 information that we requested informally -- and require that
10 parties, you know, respond by a certain date. That way, if
11 parties are just not going to be responsive, then you can issue
12 a show-cause order, and we'll have some -- you know, if there
13 are people that are really not going to participate in this
14 MDL, I want to know about them now, and I certainly don't want
15 to be responsible for working on their cases if they're not
16 going to be a part of the process, and so that would be very,
17 very helpful.

18 It's just basic information, but we need more
19 information about product ID, the surgeons, the date of the
20 index surgery, the date of the revision surgery, the defenses
21 that have been raised in those particular cases. I'd like to
22 see the medical records, the core medical records, so that we
23 can see is this is a case where there's a (inaudible) issue and
24 that's why it wasn't settled or is this a case --

25 **COURT REPORTER:** Ma'am, please.

1 **MS. FULMER:** -- where there's a dispute with regard
2 to the extent of the metallosis, because those cases need to be
3 dealt with very, very differently. If it's a dispute with
4 regard to how many medical records or how strong the metallosis
5 is documented in the medical records, there's not a lot to be
6 gained by having bellwether trials in those cases, and that
7 appears to be the bulk, at least from my experience, of the
8 Group 1 and the Group 2 cases that have not yet been resolved.

9 **THE COURT:** I think you may be right about the
10 bellwether cases, but I go back to the cart-and-the-horse thing
11 I mentioned with respect to what Mr. Dias was talking about.

12 How do I order the plaintiffs to turn over that
13 information to a prospective or potential plaintiffs' steering
14 committee? I guess I'm not clear on how I tell everybody, you
15 know, "What you might not have to disclose to the world, you
16 have to disclose to these people to see if they want to work
17 with you in this case."

18 **MS. FULMER:** Well, I believe, Judge, that a census
19 order is, actually, pretty commonplace. I've prepared censuses
20 in several MDLs in the last few months, so it's not an uncommon
21 request.

22 **THE COURT:** Which ones have you done?

23 **MS. FULMER:** The **Actos** census. I just filed that on
24 May 8th.

25 **THE COURT:** **Actos?**

1 **MS. FULMER:** **Actos**, the MDL that's based in
2 Louisiana.

3 We're working on a census report right now for state
4 court litigation for **Wright Medical**, as well as the MDL that's
5 based in Georgia. I mean, it's a pretty common situation.

6 You order a census for a lot of different reasons.
7 It could be for discovery purposes. Often, it's for settlement
8 purposes. But it's basic information. It's information that
9 -- it's the easiest way to pull together a lot of information
10 quickly, and so I don't think that there would be a problem
11 with that. We have some lawyers out there that, perhaps, are
12 not as in tune with what's going on in this case, and we need
13 the Court's help to get them on the same page with the PSC.

14 **THE COURT:** Okay.

15 **MS. FULMER:** Thank you.

16 **THE COURT:** Thank you, ma'am.

17 Mr. Ward.

18 **MR. WARD:** Good morning, Your Honor.

19 Actually, I'd like to echo just a few things that
20 Ms. Fulmer mentioned with regards to the census.

21 I think that's something, last time, when we met,
22 that was one of the issues that we brought up in chambers with
23 regards to the new PSC needing to know what's going on. And
24 because we have a situation here where you have two to three or
25 four existing PSC members -- and that's actually an issue I

1 want to ask about. I'm not exactly sure how many existing PSC
2 members that will still be on. You would be requesting that
3 they give information not to just random lawyers, but for
4 lawyers that are already in the system, lawyers that are
5 already part of the leadership team in order to be able to
6 better formulate the game plan going forward.

7 You've asked several of the previous speakers their
8 thoughts on some of the hesitation that attorneys have had
9 coming into it, and that is one of the many factors, again,
10 finding out what's going on. And the more ways that we're able
11 to get this information, I think we would have, definitely,
12 more supporting resources with other firms that are willing to
13 join.

14 And, again, this is something that we've intended on
15 and tried to get for the Court on the previous two occasions,
16 but just have not been able to get to that point with regards
17 to the response. Apparently, our authority is not as good as
18 authority of a court, such as yourself, in being able to get
19 this type of information. And so, I think, once we do, we
20 would be able to come up with a way to allow you to do what
21 your ultimate purpose is, get these cases in a position, in a
22 way, that these can be remanded back to their states,
23 because -- I think you've even mentioned it earlier today --
24 this is -- things are different than what it used to be --

25 **THE COURT:** Sure.

1 **MR. WARD:** -- with this particular set of cases that
2 are left. It's no longer two, 3,000. It's under 300 now. And
3 so, obviously, some of the things that the new PSC, going
4 forward, would need, to be able to not only seek a different
5 approach with regards to the scheduling order going forward,
6 but, also, with regards to whatever we were able to determine,
7 the cases left out there, would give us a good way to be able
8 to move forward with it, as well.

9 One thing in between that time, CMO 1, Paragraph 5,
10 if I'm not mistaken, required that defendants produce
11 plaintiff -- excuse me -- defense fact sheets. Defense fact
12 sheets would be another way for us to be able to get
13 information that we need for at least the people, the clients
14 or the plaintiffs who have not resolved their cases to be able
15 to get important information. I think that particular order
16 set forth 120 days, if I'm not mistaken, for defense fact
17 sheets to be produced after plaintiff fact sheets have been
18 produced.

19 That can go in combination with, again, any type of
20 census orders that Your Honor would be able to assist or that
21 we continue to try to get on our own, in order to, again, put
22 us in a better position to where those who are wanting to join
23 with their resources would be more apt to move forward.

24 And so I don't want to echo the remainder of what
25 many have already said. There's been a lot of orders that have

1 come out or at least orders, letters, or petitions.

2 In being able to identify the Plaintiff steering
3 committee, the new plaintiffs' steering committee, it's my
4 understanding that there's an order with existing plaintiffs'
5 members. Plaintiffs' steering committee members would be
6 allowed to -- ones that have cases will need to stay on and the
7 ones that don't have cases will need to go off.

8 You have, also, a list of attorneys or firms that
9 have the most cases, and those would be the ones that --

10 **THE COURT:** I think that's you.

11 **MR. WARD:** Yeah. I think you can check the box for
12 multiple of these categories here.

13 But a list of cases, of firms that have the most
14 cases, as well as people who have submitted applications, and
15 so whoever's on it and whatever it looks like and whatever
16 information that we have.

17 Clearly, with this number of cases, we, obviously,
18 will go forward and prosecute this case in order to, again, get
19 you what you need in order to ultimately remand these cases
20 back to state court or their local districts.

21 So I guess I'm trying to get an understanding, at
22 this point in time. Will you be taking -- how will you be
23 appointing or moving forward with actually placing the next
24 leadership?

25 **THE COURT:** I don't know. I'm looking for input on

1 that, and, you know, I will look into what was entered in the
2 **Actos** case, as far as the census order. But, again, I think we
3 have a lot of ordering issues to try to do. We've got a
4 plaintiffs' steering committee that wants to stop coming to
5 South Bend every month, and they want to be relieved, and I
6 think they have to be replaced about the same time they're
7 relieved. It doesn't seem to me to be a good system to have
8 300 cases floating out there with nobody allowed to do any
9 discovery, except a steering committee that doesn't exist, so
10 I think we need to move at some pace. But as far as how we go
11 about it, I'm very interested in hearing what people have to
12 say today.

13 So what are my plans? My plans are to listen and
14 then decide something. I wish I could give you better than
15 that. I do want to -- well, let me ask you one question before
16 I get to that, because I did want to ask everybody who's here
17 about this.

18 And I know Mr. Presnal is in an unusual situation of
19 not being on the steering committee, but wanting to be on the
20 steering committee before it dissolves, which might carry over
21 to his being on the next steering committee, and I'll hear from
22 him in a moment.

23 But let me ask this: Suppose I order a census --
24 and, again, I haven't given any thought to this until
25 Ms. Fulmer even mentioned the possibility -- but suppose I do,

1 and the word comes back, say, out of the 300 remaining cases,
2 200 of them are pretty vulnerable to a statute-of-limitations
3 challenge, to a pharmaceutical-devices challenge, whatever it
4 might be, that they don't look terribly strong to those of you
5 who are looking over the census and looking forward to --
6 because you said people are holding back, as far as applying,
7 because they don't know what's out there, and I understand
8 that.

9 What happens if that's what they find that's out
10 there? Where would that put us?

11 **MR. WARD:** Personally, I think people are more
12 worried or concerned with the unknown. Having a known gives
13 you the ability to develop a game plan and move forward. From
14 the little information that we've received with our own cases,
15 as well as the ones that we've been able to get in contact
16 with, it's our impression that they're very good cases that are
17 left over. Mr. Winter is wrong in the fact that there's two or
18 three people that don't think that this particular settlement
19 was applied appropriately.

20 **THE COURT:** No, I'm not assuming that there's 200 bad
21 cases out there or even that there's a hundred good cases. I
22 have no idea. And I understand that some information is better
23 than no information for the attorneys.

24 But suppose it comes back that the ratio of promising
25 to unpromising -- let me put it that way -- is such that it

1 doesn't look like a good financial decision for somebody to
2 actually apply to this new steering committee. What would
3 happen then from the docket standpoint, not from your
4 individual standpoint, as far as whether you want to be on the
5 steering committee?

6 **MR. WARD:** Well, again, from the information we've
7 gotten from the census so far, which is probably about half,
8 right around half, give or take --

9 **THE COURT:** You mean from contacting the plaintiffs'
10 attorneys?

11 **MR. WARD:** From contacting plaintiffs.

12 -- the cases just don't look like they are negative
13 cases or problematic cases, and so we are certainly hopeful
14 that the remainder of the ones that either are out there or --
15 you know, it's my understanding that, you know, several more
16 will be filed in the coming months. It is my understanding
17 that those, for the most part, percentage-wise, should,
18 hopefully, be just as strong as you would expect for any of
19 these particular litigations that are out there.

20 And, again, knowing at least what the issues are, we
21 can start developing a plan and who would be in charge of
22 whatever issues that are out there.

23 And in my experience, being a part of plaintiff
24 leadership -- I've been on several MDLs and been a part of
25 leadership for several different litigations -- there's

1 motivation for those who either don't have cases or motivation
2 for those who are getting into a situation such as this,
3 because you do have a common benefit package that will be
4 placed in some way, shape, or form at the end of the
5 litigation. That is the opportunity for it to make sense for
6 them, once they've had an opportunity, obviously, to work these
7 cases up, once they know what they need to do in order to work
8 these cases up, and that would provide motivation for them, a
9 game plan, as opposed to, again, not knowing what's out there.

10 **THE COURT:** Okay.

11 **MR. WARD:** I don't know if that answered your
12 question.

13 **THE COURT:** I think so.

14 I'm not sure it has a clear answer.

15 Let me run through what our numbers show as the
16 people -- and this leads into Mr. Presnal that I have to talk
17 to -- but what we show as attorneys currently on the steering
18 committee who have one or more cases. We've got Mr. Ward with
19 thirty; Ms. Fulmer with five; Lawrence Jones, from Louisville,
20 with two; Daniel Burke, from Port Washington, New York, with
21 one; Michelle Kranz, from Toledo, with one; and Ms. Relkin,
22 from Cherry Hill, New Jersey, with one. That's what I show.

23 Is that -- does that sound about right?

24 **MR. ANAPOL:** If I can address Mr. Burke, Ms. Kranz,
25 and Ms. Relkin, my understanding --

1 **THE COURT:** Well, let me hear from Mr. Presnal before
2 I do that.

3 **MR. ANAPOL:** Okay, sure.

4 **THE COURT:** Mr. Ward asked who still had cases, and
5 that was one of the things I wanted to ask, so I thought I'd do
6 that now.

7 But does that sound about right to the plaintiffs, as
8 far as who has cases?

9 **MR. WARD:** Again, from what information we have with
10 the census we've tried to obtain, it's difficult to ascertain
11 that at this point in time.

12 **THE COURT:** Okay.

13 **MR. WARD:** And, again, that's why --

14 **THE COURT:** Mr. Winter or Ms. Hanig or --

15 **MR. WINTER:** Your Honor, I think that's correct.

16 With respect to those last three plaintiffs --

17 **THE COURT:** Burke, Kranz, Relkin?

18 **MR. WINTER:** Yes.

19 -- I can represent to the Court, based on
20 conversations with those attorneys, there will be motions to be
21 relieved as counsel filed or different counsel being
22 substituted. In fact, I think one of those motions may have
23 been filed over the weekend or Friday. But those three
24 attorneys are disassociating themselves from those three cases
25 one way or another.

1 **THE COURT:** Okay. But some of them may be asking for
2 substitution on the steering committee?

3 **MR. WINTER:** Yes.

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

5 Mr. Presnal, let me invite you up, and let me say why
6 I thought that led into your position.

7 As I understand it, you want to replace Mr. Fisher,
8 who, in turn, had replaced Mr. Boyd because of health reasons,
9 and we don't have Mr. Fisher counsel of record in any of our
10 cases, so let me ask you to address that as part of your
11 remarks today.

12 **MR. PRESNAL:** Sure.

13 Your Honor, Justin Presnal with the Fisher, Boyd firm
14 in Houston.

15 We have been involved in hip litigation since the
16 creation of the Pinnacle MDL and since the creation of this
17 MDL.

18 Mr. Boyd was co-lead counsel with Mr. Lanier in the
19 Pinnacle litigation, during the course of that and this
20 litigation became medically incapacitated, and we asked for his
21 substitution by Mr. Fisher, who's the senior partner in our
22 firm, just to sort of hold the place. By that point, the
23 settlement already was well underway, and we really didn't know
24 what the future of that litigation was going to look like.

25 As it turns out, I sort of have one foot in each camp

1 here. I'm asking to be placed on the steering committee,
2 because as we went through the settlement process, I ended up
3 with a client who opted out of the settlement for what we
4 believe are valid reasons. And since that time, I have been
5 asked to take over the representation of some other cases
6 (inaudible) the issue with Ms. Relkin and some others that have
7 asked me to take over their cases.

8 **THE COURT:** Okay. So you anticipate getting in on
9 those?

10 **MR. PRESNAL:** Correct, and I have already in some of
11 them. We've appeared in some cases. Some motions have been
12 filed. Others will be filed.

13 But I'm asking, sort of in tandem with Mr. Anapol's
14 joint petition, to relieve Mr. Fisher from his obligations on
15 the steering committee. Since we do still have cases, mindful
16 of your order, I'm offering to step in and say, "I will serve
17 in his place," and then I'm also asking to continue to serve on
18 the steering committee when the new one is formulated.

19 **THE COURT:** Bless you.

20 **MR. PRESNAL:** So that's sort of why -- it's a little
21 bit of a -- it's a little bit of a weird situation, but that's
22 kind of where it comes down.

23 You should also know, relevant to the comments from
24 some of my colleagues here, that leading up to this case
25 management conference we have been doing work behind the

1 scenes. We have been trying to get together informally to see
2 who has cases, who would be interested in serving, who's
3 capable of serving and helping, and those types of things, so
4 we have been doing some groundwork laying in the background.

5 To echo some of the comments before, one of the
6 reasons why people are reluctant is funding is tricky when you
7 get to a case that's in this status. And when you -- I mean,
8 we all -- when we do this on the plaintiffs' side, we place a
9 bet when we get involved in the very beginning that there's
10 going to be cases that run the gamut from very good to not so
11 good, because that's typically the scenario, but you bet that
12 you're going to be able to get your money back and then some.
13 That's the only reason you do it.

14 Now, we have a leftover inventory of cases that still
15 run a gamut, but it's a much narrower gamut. We have ones that
16 have had case-specific causation issues raised by the
17 defendants as to why they don't believe that they should settle
18 under the agreement. We have others that are later cases that
19 don't qualify. So it's a little bit -- it's a little bit
20 difficult to just raise money the normal way that you would.
21 So we've been struggling with these issues, and I don't have
22 any answers for you, other than to tell you we are trying to
23 work on it.

24 I know one letter was filed with you suggesting that
25 it may be helpful for us to have a plaintiff-only discussion

1 with you about just those issues that relate to the formulation
2 of the committee, not anything having to do with the merits of
3 the case, so that we could, in private, discuss some of those
4 concerns with you. That's something that I know is sort of
5 before you, but not in a formal manner.

6 **THE COURT:** I don't think I've seen that yet, but
7 I've seen a lot, and I'm not sure I remember all of it.

8 **MR. PRESNAL:** I understand, and a lot flew in over
9 the course of last week.

10 You also mentioned earlier, when you were talking
11 with Mr. Ward about what I'll call the leftovers, what about
12 the leftovers.

13 I would suspect that there will be some percentage of
14 those or some number of those cases that can be adjudicated on
15 some type of summary judgment type basis. You mentioned
16 limitations. That's something that frequently can be
17 determined by summary judgment. But the vast majority, based
18 on what we have seen from our imperfect census so far, really
19 are case-specific causation questions that really don't lend
20 themselves to summary disposition.

21 So, you know, in light of where we are, I think it's
22 likely that we could have some winnowing of the cases through
23 motion practice, some MDL-type discovery that's done to prepare
24 trial packages for people, and then, likely, remands to their
25 originating court for trial, as the settlement agreement

1 contemplates.

2 So I took the opportunity -- you asked me to explain
3 my position -- and elaborated on some other things, so I
4 appreciate you indulging me.

5 Do you have any other questions about --

6 **THE COURT:** I do.

7 You indicated that you talked to about -- you've been
8 able to talk to attorneys, about 150 of the cases or so?

9 **MR. PRESNAL:** I think that's right.

10 **THE COURT:** I mean you as a collective here?

11 **MR. PRESNAL:** Correct.

12 **THE COURT:** So that's, roughly, half, give or take.

13 Have you had problems reaching the others? Have you
14 just not gotten to them yet? Are they declining to talk to
15 you, some or all?

16 **MR. PRESNAL:** What makes it difficult is -- well, for
17 one thing, the number of what's out there, settled versus
18 unsettled, is a constantly moving target. Cases were being
19 settled last week, leading into this.

20 The other thing that makes it a little complicated
21 is, if they're firms that we have worked with in the past and
22 we know, it's easy to get information from them. That's not
23 the hard part. The hard part is, from what I have seen in that
24 census list that we have, there are a large number of people on
25 there that may have one case or two cases, and they're people

1 that don't know, we've not spoken with, not had any interaction
2 with in this litigation. So just getting through to them, and
3 the logistics of making that many phone calls on a single case,
4 as opposed to "I need to ask you about these ten" just makes it
5 a time-consuming process.

6 I do echo what Ms. Fulmer said about the utility of a
7 census order to get us the information that we need. I think
8 it will be helpful for the Court, as well, to know, sort of,
9 what's left.

10 There are also --

11 **THE COURT:** So then, as I understand it, nobody has
12 said, "I'm not talking to you;" it's just a question of getting
13 --

14 **MR. PRESNAL:** No, sir, not at all.

15 **THE COURT:** -- them on the phone?

16 **MR. PRESNAL:** Correct. That's correct.

17 We've not -- at least as far as I know, we've not had
18 anybody who's just told us to go whatever.

19 But there are also out there a number of unfiled
20 cases. I have a number of them myself that are floating around
21 out there that have, you know, come up in recent months, after
22 the settlement agreement deadline was passed, and a number of
23 those haven't settled under the process there, so those are
24 pending. That may end up in this Court, may end up in other
25 courts, so we just don't know that yet, and there's no way to

1 really know that scenario across the country, other than, you
2 know, for some of the lawyers that have them.

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

4 **MR. PRESNAL:** Thank you very much.

5 **THE COURT:** Now, Mr. Anapol.

6 I'm sorry. Mr. Lanier.

7 **MR. LANIER:** I get this one, Your Honor.

8 Okay. Your Honor, Mark Lanier, for the plaintiffs'
9 steering committee.

10 And I've tried to keep up with the issues that have
11 been dealt with, and I've tried to do it in a way where I'm
12 also keeping up with your questions, and I think I've got it
13 down to about five categories that I'll hit real quick.

14 The first major concern of these potential new PSC
15 members seems to be scheduling, and certainly scheduling would
16 be a concern of any lawyer. It would be the concern that we
17 would have. I think, in a sense, that is putting the cart
18 before the horse, because my assurance to any of the potential
19 PSC members that have spoken with me is that you will be very
20 understanding with the schedule and will set up a fair, yet a
21 rigid schedule for people, expecting work to be done, but that
22 the committee needs to figure out what the schedule needs to
23 be. You cannot figure out the schedule and then put a
24 committee together. That can't be done.

25 Second category: What work's been done? Certainly,

1 a lot of work has been done. The work cannot be shared with a
2 potential PSC, necessarily, but it can with an actual PSC.

3 And I dare say that some of the critical work with
4 experts, for example, has been done with Mr. Presnal. And so
5 to the extent that Mr. Presnal is present in a future PSC,
6 perhaps even in a leadership position, he has been along with
7 me on a number of the visits with potential experts, as we have
8 plied through the expert issues, pertaining both from an
9 orthopedic perspective, as well as from an engineering
10 perspective, and so a good bit of that work has been done, and
11 he is aware of that work. It doesn't have to be shared with a
12 potential PSC, to the extent that he continues to work on a new
13 PSC.

14 Third issue: How to fund it? The money that has
15 already been assessed under the settlement agreement for
16 expenses has not only gone to the expenses of the plaintiffs'
17 work, but has also been gone -- has been earmarked for
18 Garretson and those lien resolution issues, as well, and it
19 will consume almost all of that money. By our best estimates,
20 there will be less than a hundred thousand left, and how much
21 less than that is unknown at this point, but we're getting that
22 data together for the Court and will provide it.

23 Next issue: Ms. Fulmer suggested a different
24 approach. She suggested getting a census order in place. I am
25 acutely aware of those census orders. I'm aware of them in a

1 number of litigations, including several that she's spoken of.
2 I can tell you that the census order itself does serve a really
3 good purpose, but the purpose that it serves is a purpose not
4 for the old PSC, if I can use that term non-pejoratively --

5 **THE COURT:** I like to think of it as PSC 1 and PSC 2.

6 **MR. LANIER:** I like that a lot better, especially
7 since I am older than Mr. Anapol.

8 PSC 1 doesn't get benefit from the census order.
9 PSC 2 would. PSC 2 has the difficult chore that every
10 plaintiffs' firm always has, but especially in an MDL: How do
11 you put together a viable economic model that allows you to
12 proceed? If the plaintiffs have a viable economic model, it
13 makes the case proceed much more easily from a plaintiff's
14 perspective. Without, it gives a great deal of leverage to
15 Mr. Winter and his client because there's no viable economic
16 model to proceed. So I think that a census order will at least
17 enable PSC 2 to know what cases are out there in terms of which
18 lawyers will be involved.

19 If you look at Mr. Presnal's comment about
20 petitioning or polling the lawyers that are left in the cases
21 that are left, the difficulty of reaching out to, say, half of
22 those is resolved with a census order. You put a census order
23 in place, those lawyers will be reaching out to the PSC 2,
24 saying, "What do I need to do," and that's very typical.

25 I think a census order is also useful to the Court,

1 and I think it's useful to Biomet, because, in a sense, it's a
2 plaintiffs' fact sheet light. It gives certain core
3 information that would then allow Biomet to seek the
4 plaintiffs' fact sheets, but it gives that information to the
5 Court.

6 Last issue: Input on how the Court might put
7 together PSC 2. You know, it's a perplexing problem, in a way,
8 but, in a way, it's not. I think that the Court's approach is
9 very similar to that of PSC 1, and, that is, who wants on and
10 who's got the cases. If enough people want on, you don't have
11 to go to Factor Number 2.

12 Mr. Presnal -- I don't want to nominate someone to
13 take Mr. Anapol's place, but I'd nominate Mr. Presnal to take
14 Mr. Anapol's place or Ms. Fulmer or Mr. Ward. Any of those
15 folks would do a fantastic job leading the litigation.

16 But I think, to the extent that the Court first looks
17 at the volunteers, that's a great way to go. To the extent
18 that there do not seem to be adequate volunteers, I think it's
19 absolutely appropriate for the Court to say, "Wait a minute.
20 You've got the cases on my docket that you are arguing are
21 worth enough money to consume my time, my staff's time, the
22 defendant's time, and yet you're not willing to prosecute those
23 cases?"

24 There's a problem with that, and I'm sure you don't
25 need me to say that, so I think the Court's got the right to

1 appoint beyond the volunteers, should the Court deem so.

2 And I will pledge, on behalf of Mr. Anapol,
3 Mr. Dassow, and everyone else, absolutely, to share with PSC 2
4 everything that's been done by PSC 1, all of the information,
5 all of the data, all of the experts we've talked to.
6 Everything that we've possibly got, we will sit down and
7 divulge fully once PSC 2 is put together.

8 Thank you, Your Honor.

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

10 Mr. Anapol, I know you wanted to speak before. I
11 don't know if Mr. Lanier --

12 **MR. ANAPOL:** No, it's been covered. Thank you, Your
13 Honor.

14 **THE COURT:** Okay. For Biomet, Mr. Winter.

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

16 Based on what Mr. Lanier just said, I don't think it
17 will be an issue. But with respect to the \$6 million, Your
18 Honor, we believe that that money can only go to the current
19 PSC. That was the deal that was negotiated. It was created,
20 in part, for multiple different reasons, to make this work, so
21 Biomet believes the order requires that \$6 million to only go
22 to the PSC. If there's only \$50,000 left over, we're really
23 not fighting about anything. But that's our position, so we're
24 clear on that.

25 As to who the PSC is going forward, that's not our

1 issue.

2 **THE COURT:** Right.

3 **MR. WINTER:** But having sat here, Your Honor, some
4 observations.

5 There already are completed fact sheets, materially
6 complete fact sheets, for more than 90 percent of the pending
7 230 cases.

8 And the reason I'm hedging is because there's a group
9 of cases that have been filed --

10 **THE COURT:** Right.

11 **MR. WINTER:** -- early, earlier this year, so the time
12 to file them isn't due.

13 So my colleagues have had all the information that
14 they need. There's medical records attached to these fact
15 sheets; there's what types of device; when it's used; and,
16 importantly, because we're going to go back in time,
17 Your Honor, do they still have the explant, because part of --
18 when we started this, if you don't have the explanted device,
19 as the plaintiff, there's a huge hole, from our perspective, in
20 their case.

21 So my colleagues talk about very specific factual
22 issues. We think there are many issues in the remaining
23 litigation that lend themselves to global-type rulings from
24 you. So my colleagues do have the information now to look,
25 what the remaining inventory is like.

1 I will note for Your Honor, we've gone from 280, at
2 the last case management conference, to 230.

3 **THE COURT:** Right.

4 **MR. WINTER:** And I can't swear to you, Judge, that
5 the next time we're back, it won't be a little bit even lower,
6 because there were offers made in almost all of those cases,
7 and someone calls up and says, "Okay. I'll take the money."
8 So, we're going to -- you know, we'll resolve those cases, I
9 mean, but we're not going out to solicit anyone any more.

10 But on this census order, I think we should be
11 talking about some type of lone pine order, which, actually,
12 will serve the needs of both sides, like put up or shut up, I
13 mean, to be very crass, Your Honor. I mean, I think -- I
14 hadn't thought of that until my colleagues started raising the
15 census order, which, you know, may have merit on one level, but
16 I think let's find out what, in fact, is left.

17 And we can work on, you know, what the order looks
18 like. We're more than happy to do so. And there is going to
19 be a little bit, period of time here, Your Honor, as we figure
20 out what to do. And we've always said the new PSC needs a
21 period of time to analyze and review what's been produced.

22 You'll decide what that is. But in that period of
23 time, whether it's 60 days or 90 days, order can be issued, and
24 then we'll see like what, in fact, is left. I think that may
25 be the most efficient way to proceed, Your Honor.

1 Thank you.

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

3 **MR. ANAPOL:** Judge, I just have one point of
4 clarification.

5 Mr. Winter, I'm not sure if you know or not. The
6 cases that were filed after April 14, was there not a stay in
7 place? Should fact sheets have been submitted on just that
8 batch of cases? I'm unclear.

9 **MR. WINTER:** No.

10 Actually, Your Honor, cases filed after April 15th
11 did not fall into you don't need to file a fact sheet, so we
12 have a large number of fact sheets from cases filed after April
13 15th. In fact, there's probably 10 or 15 motions that were
14 filed that, ultimately, led to those being cured, so it's only
15 cases filed in March --

16 **MR. ANAPOL:** Right.

17 **MR. WINTER:** -- or February or in April of 2015 where
18 we don't have fact sheets, and that's by operation of time.

19 **MR. ANAPOL:** So for purposes of, you know, the PSC 1,
20 we have collected fact sheets up through April 14th. I think
21 that that information has been shared, and our existing
22 steering committee has looked at them, I think.

23 **MS. FULMER:** No.

24 **THE COURT:** But, I gather, from what you say, there
25 wouldn't be a problem making it available?

1 **MR. ANAPOL:** No. To the extent that they've been
2 properly submitted to our steering committee, they are
3 available to PSC 2. It's those 90 cases we haven't seen at
4 all, 87 to 90 cases. Whatever information has come in
5 post-settlement, we have none of it.

6 **MR. WINTER:** And, Your Honor, I think that the last
7 time we were here, Biomet said that, to the extent the PSC does
8 not have, you know, a material or complete fact sheet from one
9 of these cases, just send us an e-mail, and we'll send it over.

10 **THE COURT:** And then once the steering committee gets
11 it --

12 **MR. ANAPOL:** We can do that.

13 **THE COURT:** -- all members, including those who would
14 still have cases, can look?

15 **MR. ANAPOL:** (Nods head.)

16 **THE COURT:** Okay. Well, that might at least help.
17 Well, before we wrap up, I see there's "other
18 business" as the last agenda item.

19 Did anybody have any other business?

20 **MR. ANAPOL:** Nothing from the plaintiffs.

21 **MR. WINTER:** None from Biomet, Your Honor.

22 **THE COURT:** Well, thank you for your comments today.
23 We've got a lot of issues. I know what I'm going to be doing
24 the rest of the week.

25 For everybody, both outgoing -- first of all, to the

1 steering committee members who won't be with us, thank you.
2 You've done -- obviously, a large number of cases have been
3 resolved -- whether it should have been more, a large number
4 have been resolved -- and I want to thank you for all the work
5 that you have done.

6 I don't want to have a situation where there is no
7 steering committee, so until we've got a new steering
8 committee, I'm going to have to keep you in place, even if,
9 formally, you're not going to be doing a lot while we're in the
10 holding pattern.

11 I am very sensitive that the new steering committee
12 is going to have to get up to speed. Whether it was enough or
13 not, there were a lot of electronic documents made available to
14 the first plaintiffs' steering committee, and I don't know how
15 many of the people who would be on the new steering committee
16 have had a chance to review those.

17 On the other hand, we've got some people whose cases
18 were filed in 2012, and we do need to keep the ball moving as
19 best we can so that this doesn't become one of those black-hole
20 MDLs that cases get filed in 2012, an MDL is created, and off
21 they go, never to return.

22 So we've got a lot of different issues going back and
23 forth, but I thank you for your presentations. I've got a much
24 better feel for where we are. Obviously, whatever I do is not
25 going to be a customary thing, because this isn't a customary

1 position, but I'll let you know as soon as I can.

2 And when the motion to enforce becomes ripe, we'll
3 set up a telephonic hearing on that.

4 So thanks to all of you.

5 **LAW CLERK:** All rise.

6 **(All comply; proceedings concluded.)**

7 *******

8 **CERTIFICATE**

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

12 **DATED THIS 20TH DAY OF MAY, 2015.**

13 **S/S DEBRA J. BONK**

14 **DEBRA J. BONK**
15 **FEDERAL CERTIFIED REALTIME REPORTER**

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