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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

THURSDAY, SEPTEMBER 3, 2015

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

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*Proceedings reported in machine shorthand. Transcript
produced by computer-aided transcription, Eclipse.*

1 APPEARANCES:

2 THOMAS ANAPOL, telephonically
3 ROBERT DASSOW, telephonically

4 FOR PLAINTIFFS:

5 NAVAN WARD
6 BRENDA FULMER
7 AHMED DIAB
8 JUSTIN PRESNAL
9 J. KYLE BACHUS
10 AMBER PANG PARRA
11 MAKESHA NOWELL
12 LAUREN BRONSON

13 FOR BIOMET:

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

18 (see docket for addresses.)
19
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25

1 **THE COURT:** Good afternoon.

2 This is Cause Number 12MD2391, also MDL2391,
3 **In Re: Biomet M2a Magnum Hip Implant Products Liability**
4 **Litigation**, and we are gathered for a status conference as we
5 transition from one plaintiffs' steering committee to the
6 other. We're sort of starting over, but it's even harder
7 because we're not starting over, so we're going to have to find
8 our way as we go through here.

9 Let me start by having everybody state their
10 appearance for the record. I think I have a list of who's
11 present, but it would be helpful if --

12 **MR. PRESNAL:** Justin Presnal on behalf of the
13 plaintiffs.

14 **THE COURT:** Mr. Presnal.

15 **MS. FULMER:** Rebecca Fulmer on behalf of plaintiffs.

16 **THE COURT:** Ms. Fulmer.

17 **MR. WARD:** Navan Ward on behalf of plaintiffs.

18 **THE COURT:** Mr. Ward.

19 **MR. DIAB:** Ahmed Diab on behalf of plaintiffs.

20 **THE COURT:** Mr. Diab.

21 Let's take the counsel who are here, and then we'll
22 pick up who's out there.

23 **MS. HANIG:** Erin Hanig on behalf of Biomet.

24 **THE COURT:** Ms. Hanig.

25 **MR. WINTER:** Good afternoon, Your Honor.

1 John Winter on behalf of Biomet.

2 **THE COURT:** Mr. Winter.

3 **MR. LaDUE:** John LaDue, Biomet.

4 **MR. DART:** Blaine Dart, Biomet.

5 **THE COURT:** And I think we have other people who have
6 signed in.

7 **MS. PANG PARRA:** Your Honor, Amber Pang Parra for
8 plaintiffs.

9 **THE COURT:** Let me find you here. There, okay.

10 **MS. BRONSON:** Your Honor, Lauren Bronson for the
11 plaintiffs.

12 **MR. BACHUS:** Kyle Bachus for plaintiffs.

13 **THE COURT:** There we are. Okay. Now I'm catching up
14 here.

15 **MR. WARD:** Jasper Ward on behalf of plaintiffs.

16 **MS. NOWELL:** Makesha Nowell on behalf of plaintiffs.

17 **THE COURT:** Here we go, okay.

18 And we also have on the line -- in addition to
19 anybody who has phoned in to listen, we also have on the line
20 immediate past lead counsel and liaison counsel, Thomas Anapol
21 and Rob Dassow, who, consistent with their statement at the
22 last conference, said that they would do what they could to
23 help with the transition. They are on the line in case their
24 input was needed.

25 We talked, briefly, at our pre-conference meeting,

1 which is, basically, just to give me a preview of what's coming
2 up so I don't look too surprised, and counsel, at that point,
3 thought that they would not need Mr. Dassow or Mr. Anapol
4 today.

5 Mr. Ward and Ms. Fulmer, is that accurate?

6 **MR. WARD:** Yes, that's accurate, Your Honor.

7 **THE COURT:** And, Mr. Winter, accurate from Biomet's
8 standpoint?

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

10 **THE COURT:** Mr. Anapol and Mr. Dassow, it's always a
11 pleasure to have you here, even if only by phone, but,
12 apparently, you can go do other things.

13 **MR. ANAPOL:** Thank you, Your Honor.

14 Tom Anapol.

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

16 Rob Dassow.

17 If you need anything, let us know.

18 **THE COURT:** Thanks, folks.

19 **MR. ANAOPOL:** Take care.

20 **MR. DASSOW:** Take care.

21 **THE COURT:** Okay. Turning to the status conference
22 agenda, we start with the common benefit petition and cases
23 that apply.

24 Mr. Ward.

25 **MR. WARD:** Again, thank you, Your Honor, and good

1 afternoon.

2 As we make this transition, Your Honor, to PSC number
3 2, one of the things that PSC number 2 -- at the inception, one
4 of their concerns was, possibly, going from a plaintiffs'
5 steering committee that was over twenty down to one under ten
6 and being able to finance and have the resources necessary to
7 move forward with litigation.

8 And to that end, in your CMO 3, when you appointed
9 plaintiffs' steering committee number 2, you invited
10 plaintiffs' steering committee number 2 to submit a common
11 benefit petition prior to September 1st of this year, which was
12 just a couple days ago. As a result, on August 27th,
13 Your Honor, PSC number 2, indeed, did what the Court wanted us
14 to do with regards to filing an interim petition for common
15 benefit for moving forward.

16 Now, the common benefit petition that we submitted
17 addresses concerns that PSC 2 had with regard to moving forward
18 and any type of budgetary issues that we may have had. These
19 terms were also very consistent with the current existing
20 common benefit order that was in place for plaintiffs' steering
21 committee number 1. And the petition is simply asking or
22 requesting the Court to set up this particular fund for the
23 cases that would apply for the particular fund, and it is
24 giving the percentages that were inconsistent to what was
25 already existing in the previous plaintiffs' steering committee

1 1 common benefit order and petition. So, Your Honor, it's our
2 position that, obviously, this was needed, the Court invited,
3 and this is what we've provided to you, which is, essentially,
4 the same as what is already in place.

5 **THE COURT:** All right. And the last couple of words
6 in the agenda item are "and cases that apply," and, as I
7 understand it, there may be some dispute over that, so let me
8 ask you to address that aspect of it.

9 **MR. WARD:** Sure, Your Honor.

10 In each of the MDLs I've ever been a part of, I'm
11 aware of, there is a common benefit order, common benefit set
12 up to where costs and fees are assessed to plaintiffs in the
13 particular litigation with regards to work that the plaintiff
14 leadership either does and/or costs that are associated with
15 moving forward with litigation, and, obviously, here is no
16 different. It's a transition. What was in place was a common
17 benefit order that was linked to the settlement, the master
18 settlement agreement. Cases that were filed, as per the
19 settlement agreement, stated cases filed before April, 2014,
20 along with plaintiff fact sheets that were also submitted
21 before June, I think it was, '14, 2014, cases known as group 1
22 and group 2 of the settlement, final settlement. And with
23 that, the cases that are a part of that settlement and the
24 cases that -- when I say "a part of that settlement," group 1
25 and group 2 -- as well as cases that, per the settlement terms,

1 were reimbursed \$6 million additional that was part of that
2 settlement that Biomet agreed to, those cases, obviously,
3 should not be reassessed.

4 As the process has gone on, cases have been funded in
5 various funding reports, 1 through, currently, 17.

6 As the transition has transpired and plaintiffs'
7 steering committee number 1 has moved on, and now plaintiffs'
8 steering committee number 2 has now come into a leadership role
9 capacity --

10 **THE COURT REPORTER:** I'm sorry, sir. I didn't hear
11 that. I'm having a really hard time hearing you.

12 **MR. WARD:** I apologize.

13 As the funding reports have gone, have moved
14 forward -- and the current one, to my understanding, is funding
15 report 17, which lists the cases that are part of the master
16 settlement agreement and the cases that should have been funded
17 under the master settlement agreement, it was our understanding
18 that funding report 17 would have encapsulated the great
19 majority, if not all, of the cases that should have been a part
20 of MSA, Biomet settlement agreement. However, because of
21 various reasons, there are some cases -- it was our
22 understanding that there are about 85 cases -- that will not
23 be -- were not on funding report 17.

24 Our petition asked for and requests that cases
25 settled and resolved in this litigation that have occurred

1 after funding report 17 should be a part of the new common
2 benefit plan. This new common benefit plan, we are not
3 suggesting -- it has come to our attention since we have filed
4 the petition that there's some plaintiffs in that group of 85
5 that, for various reasons, were not settled or not resolved
6 completely or funded completely prior to funding report 17, and
7 there's approximately 46 of those cases.

8 And the cases that apply, to go to your question,
9 would be those cases that should be under the master settlement
10 agreement, the 46 or so cases that should be part of group 1 or
11 group 2, and we don't intend in any way, shape, or form to
12 double assess them or to have them, those cases, apply to
13 whatever common benefit order we go with from here on out.

14 However, the cases that have settled after that time
15 frame, after that time frame and are resolved after that time
16 frame, those are the cases that we feel would apply to the
17 common benefit moving forward.

18 **THE COURT:** So there's about 39 cases --
19 understanding your figures may be off a couple, but about 39
20 cases that you contend the settlement took place after steering
21 committee 1 was gone, and --

22 **MR. WARD:** More specifically, settlements that took
23 place that are not technically eligible for the master
24 settlement agreement, meaning they weren't filed before April
25 of 2014, and they did not submit -- have plaintiff fact sheet,

1 materially sufficient plaintiff fact sheet, and defense fact
2 sheet, prior to June of 2014. Those are -- those are the cases
3 that are group 1 and group 2. And, again, we understand that,
4 for various reasons, some of those releases may have lagged
5 behind and, for whatever reason, didn't make it on this last
6 funding report, and that's fine. Again, those cases should not
7 be assessed, and we don't -- we don't -- we agree that those
8 cases should not be assessed, and that's where our petition
9 needs to be tweaked. And the cases that apply, we need to
10 adjust those, because as part of -- and this is not a common
11 occurrence where the defendants in the first settlement have
12 applied the \$6 million to the common benefit assessment. That,
13 you know, was a fairly unique and interesting and, quite
14 frankly, beneficial aspect of that settlement for those that
15 were a part of the settlement.

16 Well, with funding -- with PSC 1 closing out
17 business, the assessments and the cases that are applied to
18 that MSA and that \$6 million, it's now gone. The \$6 million,
19 as you -- the last few orders that you have given releasing the
20 plaintiff steering committee number 1, as well as the common
21 benefit issues, that issue is now gone, and now we stand at a
22 place where any and every other MDL -- where we don't have a
23 situation in this case where Biomet or the defendant has
24 offered additional sums of money to be reimbursed, we're at a
25 point where we normally would be by having an assessment for

1 cost and fees.

2 **THE COURT:** Let me ask you this, and I ask you this
3 not because it will even -- I'm sure it will matter, much less
4 be determinative. But, obviously, this is an unusual situation
5 that we find ourself in, as you say, and I'm going to have to
6 look some law up. I'm not going to be able to give you a
7 ruling today. But, in case it matters -- and I know this
8 steering committee has just been getting up and running and
9 had, basically, two, two-and-a-half months to do it -- was
10 there any benefit, trying to use the words in "common benefit
11 fund," that those 39 cases that settled and wouldn't have been
12 included, as you read it, under the master settlement
13 agreement, anything that they were benefited by that you and
14 your committee did, as opposed to the previous committee? And,
15 again, I don't know that it will matter, but I'm just --

16 **MR. WARD:** Sure. Sure, Your Honor.

17 Out of eight committee members, half of them were
18 part of PSC 1, the work that was done on their behalf for those
19 four. They're still on this, and so they also have put in work
20 in order to benefit for the ones who haven't settled.

21 **THE COURT:** Right.

22 **MR. WARD:** Over the last two, three months, in this
23 transition period, many calls and many issues that have arisen
24 from plaintiffs who are part of -- who are part of group 1,
25 group 2, as well as the ones outside of that, have certainly

1 addressed PSC number 2. And so with regards to many other
2 various things that have gone on over the last few months, as
3 we are preparing to move forward, certainly goes towards the
4 work and effort that those cases would apply to.

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

6 **MR. WARD:** Thank you.

7 **THE COURT:** Mr. Winter.

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

9 Common benefit definitely exists at some point in MDL
10 proceedings. It's an equitable principle that lawyers on a
11 steering committee who do work should be compensated in some
12 way from those lawyers who didn't do the work, just to be very
13 simplistic.

14 Every case that they want to tax -- because "tax" is
15 the word, because anyone, pursuant to the MSA, didn't pay a
16 penny in a common benefit. That was an integral part of that
17 settlement -- every one of the cases they want to tax was
18 settled, pursuant to the MSA framework. All the releases say
19 it's settled, pursuant to the MSA.

20 Like, two weeks ago, a lawyer sends me an e-mail.
21 "Mr. Winter, about nine months ago, you offered me \$25,000 on
22 this case. My client rejected it. My client called me up.
23 They now want to take it. Can we resolve this case?"

24 My response is, "Yes."

25 This PSC has done nothing -- and I'm not being

1 pejorative -- to facilitate or aid that settlement. The 39 or
2 46 cases that they're talking about all were done before.

3 And we had a case where it was an agreed-upon group 2
4 case, and, for some reason, the lawyer just didn't send in the
5 release. Three weeks ago, he says, "I'm really sorry. I
6 didn't send in the release. We had agreed to what the case
7 was. Can I send in the release now?"

8 We say, "Sure," but that has no benefit from this
9 group.

10 So we have no objection to some type of common
11 benefit order being entered at some point, but it has to be one
12 that says, "For work this PSC does, there will be" -- whatever
13 the percentage that you approve.

14 What they proposed violates the rights of everyone
15 else who settled, pursuant to the first settlement.

16 And I've had lawyers on the plaintiffs' side call me
17 up and say, "John, they want to tax an additional six percent
18 on this case that we settled before. Do I have to file
19 something with Judge Miller?"

20 So I have lawyers on the plaintiffs' side, some of
21 them who were on PSC number 1, who are very concerned about
22 this process.

23 So I can understand working on an order that creates
24 a line in the sand prospectively. But for these cases -- and
25 if we have to do it on a case-by-case basis to show you that,

1 in fact, this case was settled prior to a certain date, be it,
2 you know, June, October 1, September 5, whatever, we'll do
3 that, but that's what the common benefit and the equities say,
4 we submit, Your Honor.

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

6 Mr. Ward, final word on it or at least the final word
7 today.

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

9 You know, obviously, Biomet and Mr. Winter, they're
10 not in a position to, obviously, know what work has been done
11 on the plaintiffs' steering committee number 2 side, and that's
12 understandable, and so I don't think that they are able to
13 comment on what has been done from this time point.

14 But it's obvious, Your Honor, that there has to be a
15 dividing line, a dividing point of where does the settlements
16 that have occurred before stop and the settlements that have
17 occurred after will continue. That dividing line is, clearly,
18 made in the master settlement agreement. That dividing line
19 is, clearly, made when the former parties, the former PSC 1 and
20 Biomet, got together and said, "Group number 1 and group number
21 2 will consist of people eligible for this settlement that will
22 also be a part of the \$6 million recoupment and those cases
23 that were filed before April 1st, 2014, and filed a materially
24 sufficient plaintiff fact sheet before June the 14th, 2014."
25 That's that line.

1 In discussions with my own cases with Mr. Winter and
2 Biomet, cases that have occurred -- or filings were either
3 after and/or materially sufficient plaintiff fact sheets
4 weren't served at that particular time, those cases, in their
5 own words, don't apply to this settlement.

6 Now, it may very well be true because that's an easy
7 document and easy values, because we do understand that this
8 master settlement agreement does set out values of what these
9 cases are worth. It sets a standard as to what these cases are
10 worth. And so any case that settles from two weeks ago or two
11 years from now will, certainly, have the benefit of this
12 established value that the master settlement agreement has
13 given. But that dividing line is, clearly, already set in the
14 MSA. It's set by Biomet. It's set by the former PSC. And it
15 is April 1st for filing. It is June 14th for materially
16 sufficient fact sheets. They are the cases that are part of
17 group 1 and group 2.

18 The list of 85 cases they gave, we were easily able
19 to delineate them because they have a third column that says
20 group 1, group 2, and then there are blanks for the others.
21 Those blanks would suggest that they are not part of,
22 eligibility-wise, the first settlement. Those are the cases
23 that should apply to the common benefit order moving forward.

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

25 I don't want to bog anybody down with these things,

1 but I'm going to have to look up some law. Frankly, I looked
2 up a lot of law on common benefit funds for a presentation last
3 week and don't remember reading anything about anything like
4 this, but I also need some help on the facts.

5 If I could ask the plaintiff -- and I'll let you
6 folks set your own timetable here. If I could ask the
7 plaintiff to give me a list of the cases and the dates with
8 respect to those cases that the plaintiffs think take it out of
9 the original common benefit fund and put it in the new one and
10 then give Biomet a certain amount of time just to respond as to
11 why they believe it's already covered by the master settlement
12 agreement, that will help me a lot to figure out what I'm doing
13 here, because, frankly, this may be the first case we have
14 anything like this for.

15 Did you want to --

16 **MR. WINTER:** Your Honor, I think there are
17 plaintiffs' lawyers who may want to be heard.

18 **THE COURT:** Oh, I know. I agree. I'm going to allow
19 time for comment before I rule, after that, because I
20 understand that this impacts -- as well as the current steering
21 committee, it impacts the attorneys whose cases are identified
22 as potentially covered by the second common benefit petition.

23 How long do you think it would take? And I don't
24 know who on the plaintiffs' steering committee would be doing
25 it, but can anybody give me what would be a good ballpark time

1 for it to be due?

2 **MR. WARD:** Your Honor, we could have that within the
3 next week.

4 **THE COURT:** Okay. Well, let me give you two weeks,
5 because, again, I don't want to crunch anybody here. So
6 September 17th for the plaintiffs' list of cases and the dates
7 that they believe are pertinent. And I'm not looking for
8 briefing, just the facts.

9 For Biomet?

10 **MR. WINTER:** Is October 1 two weeks after that,
11 Your Honor?

12 **THE COURT:** Yes.

13 **MR. WINTER:** (Nods head).

14 **THE COURT:** Okay. And then we'll spread those,
15 generally, on the Court website, and I will allow another two
16 weeks for any interested counsel from this docket to file a
17 reply. And then if anybody wants to respond to that, let me
18 know. But it's, obviously, an issue. Everybody's interest has
19 to be taken care of.

20 Agenda item number 2, pending cases. Start with the
21 plaintiff, again.

22 And I do have a question, if I can find it here. Let
23 me ask it before you get started, and you can answer it in the
24 course of your presentation, but I doubt that it fits in your
25 presentation.

1 On the list that I have, which was attached to your
2 August 27th proposed statement concerning the case management
3 plan, there's a list of cases as Exhibit A. And I understand
4 you got that from Biomet, so maybe my question should go to
5 Biomet. But on some of these where it lists plaintiffs'
6 counsel, there are asterisks. Sometimes it's an asterisk by a
7 pro se. Sometimes it's an asterisk by a law firm.

8 And, if you know, could you tell me what the asterisk
9 means? And if not, I will ask Biomet when I get to them.

10 **MR. WARD:** Well, Your Honor, I was intending on
11 saying this agenda item, during the parties' meet-and-confer,
12 was brought up by the plaintiffs for the very reason that
13 Your Honor is asking, as we feel that it would benefit everyone
14 to know what the different jurisdictions are. As a result of
15 that, the defendants were kind enough to provide us this list
16 of 249 cases. We do understand that there's been a few cases
17 that have come in. There's been a few cases that have been
18 dismissed since then. So this is, roughly, the case list that
19 is available.

20 There are some cases that I do see here that have the
21 asterisk by. There are some cases here that I see, at the end
22 of this, I mentioned, where it shows 2, 1. If I'm not
23 mistaken, those are suggesting group 1, group 2 cases. And
24 then there's ones, there are cases here, that have a blank,
25 which would suggest that they were after that time frame. And

1 so the ones that I see -- so I, too, our side, too, would like
2 to know some of the various things, because I see where it has
3 asterisks by some pro se people and some not, and so that would
4 be a question more properly directed towards the defendants.

5 **THE COURT:** Okay.

6 **MR. PRESNAL:** If I may, Judge, I prepared the
7 position statement and incorporated the case list. I was going
8 to ask them the same question, what the asterisk means, so I
9 don't know.

10 **THE COURT:** Okay. Okay. We'll wait just a minute.

11 Was this an agenda item, at least from the
12 plaintiffs' standpoint, just for information, that there's
13 nothing anybody needs, other than knowing how many cases there
14 are?

15 **MR. WARD:** Well, Your Honor, I think, in order to --
16 as we move forward in litigation with the MDL, it's very
17 important for the judge, Your Honor, as well as the parties, to
18 be able to know the totality of the cases that are filed in
19 various other jurisdictions. Whether it's as we move forward
20 to either remands or whether we move forward to another global
21 settlement, those numbers are very pertinent. And so these are
22 also numbers that -- in every other MDL that I'm involved with,
23 that's a typical part of --

24 **THE COURT:** No, I understand I need the information.

25 But was there anything that was to be raised along

1 with the information, or is this purely an informative agenda
2 topic?

3 **MR. WARD:** Well, the initial information that they
4 had provided us, in comparison to the information that we had,
5 did seem inconsistent, so where there are inconsistencies, we
6 want to make sure that those are resolved.

7 For instance, where you asked, in chambers, how many
8 Indiana cases we have, but was not familiar or sure the
9 totality of those Indiana cases.

10 But there are other jurisdictions where we know that
11 there are several cases filed there, and the numbers that at
12 least Biomet had didn't match. And so in order to make sure
13 that both parties are on the same page with the number of cases
14 that are out there and the jurisdictions --

15 **THE COURT:** When you say "other jurisdictions," do
16 you mean state courts? Do you mean other federal districts?

17 **MR. WARD:** Other state courts, Your Honor.

18 **THE COURT:** Okay. Okay.

19 **MR. WARD:** I would assume the ones in federal court
20 will soon find their way here.

21 **THE COURT:** They seem to.

22 So by "other jurisdictions," are you aware of cases
23 pending that would fit within the scope of this docket in state
24 courts, other than Indiana?

25 **MR. WARD:** Yes, Your Honor. Yes, Your Honor, and I

1 think that will be part of their report with regards to the
2 various different jurisdictions.

3 **THE COURT:** So they're going to give me the report
4 that I keep asking you about?

5 **MR. WARD:** Well, I can keep giving you my -- making
6 up answers.

7 **THE COURT:** Well, let's see what they know.
8 Mr. Winter.

9 **MR. WINTER:** Answering the questions on the
10 asterisks, Your Honor, that list was a list that was compiled
11 at a time when there were motions to withdraw as counsel.

12 **THE COURT:** Okay.

13 **MR. WINTER:** So when they went to pro se, we didn't
14 take out the asterisks.

15 Some of them that have law firm names with an
16 asterisk, that was at a time there was a pending motion, other
17 than a motion to withdraw.

18 **THE COURT:** Okay.

19 **MR. WINTER:** So that was our internal working list.
20 The asterisks have no meaning, other than those were two
21 tracking things we were using.

22 **THE COURT:** So when I see someplace that says, "Pro
23 se," asterisk, that means that there originally was a firm with
24 an asterisk and was substituted?

25 **MR. WINTER:** Right.

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

2 **MR. WINTER:** So to answer the other question, there
3 are five cases in Florida, two of which Biomet is actually not
4 a defendant. The lawyers, for reasons which they can explain,
5 sued the distributor, but did not sue Biomet, but we include
6 them in the five.

7 There's one case in California, one case in South
8 Carolina, one case in Missouri, another case in Missouri that
9 had many plaintiffs in it. We believe almost all of those
10 cases were resolved. I think there were seven or ten of those
11 cases that were dismissed without prejudice, so I don't know
12 precisely what happened to those individual cases.

13 And then we think there are five cases in Indiana,
14 four of which are associated with Mr. Dassow. One of those is
15 a non-revision case, and we have to go back to Mr. Dassow,
16 because our records indicate that those cases probably were
17 resolved. He just didn't get us the releases.

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

19 Updating CMOs. I think you indicated that was purely
20 informational. If you want to go ahead and give me the
21 information.

22 Ms. Fulmer.

23 **MS. FULMER:** Yes, Your Honor.

24 There's several CMOs that we felt needed to be
25 updated, mostly with regard to where particular items need to

1 be served. Like, for instance, the fact sheet service we've
2 changed over to a new e-mail address at my law firm. Also,
3 they're being updated to reflect the merger between Zimmer and
4 Biomet. Those will be submitted to the Court shortly, but
5 those are, primarily, the changes that we are asking for.

6 Do you want me to go ahead and go through --

7 **THE COURT:** No. Let me ask.

8 Do you anticipate being able to work that out and
9 submit a joint proposed order or are there some things that
10 I will have to --

11 **MS. FULMER:** We anticipate being able to work those
12 out with the defense.

13 And I believe some of the issues that might require
14 some additional work, we're meeting next week to work out that
15 with respect to, I think, retrievals and explants,
16 preservation.

17 **THE COURT:** Okay. So in the next few weeks, though,
18 I should see the jointly proposed order changing Zimmer/Biomet,
19 changing the e-mail addresses, and the sort of thing you've
20 talked about?

21 **MS. FULMER:** I would hope it would be even sooner
22 than that.

23 **THE COURT:** Okay.

24 **MS. FULMER:** Thank you, Your Honor.

25 **THE COURT:** I always build in a little extra time.

1 Sound about right to Biomet?

2 **MR. WINTER:** That's correct, Your Honor.

3 **THE COURT:** Okay. Good.

4 And I think Biomet had put dismissal of improper
5 defendants on the agenda.

6 **MS. HANIG:** Yes, Your Honor.

7 We would simply request that the Court issue a
8 follow-up order to your previous order in 2013 that would
9 dismiss Biomet entities that were named that were either
10 non-existent or improper, other than the four Biomet entities
11 that are listed in section 2 of CMO number 1. Unless the Court
12 feels that this should be handled differently, Biomet believes
13 it would be the easiest and most efficient process for the
14 Court to enter an order and then clean the docket of any
15 entities that aren't the four main Biomet entities.

16 **THE COURT:** Okay. And is there any dispute?

17 **MR. PRESNAL:** We don't have any objection to that,
18 and we would go even further and say, once we know exactly the
19 defendants we're talking about, we'd be happy to send something
20 out to all of the folks we know about that have these cases,
21 telling them, "You need to be aware of this order, and these
22 are the entities you need to be suing, nobody else."

23 **THE COURT:** You mean going forward?

24 **MR. WARD:** And, Your Honor, as we mentioned before,
25 we have already done that with regards to making them aware

1 already, and, of course, we would be able to follow up with any
2 subsequent order on that.

3 **THE COURT:** So going forward, you're going to try to
4 take care of it, and you're looking at what's already happened
5 since last time?

6 **MS. HANIG:** Right.

7 And for efficiency purposes, rather than putting it
8 on the individual plaintiff to do their own motion to
9 dismiss --

10 **THE COURT:** No, I'd do it.

11 **MS. HANIG:** -- it was easier the first time for the
12 Court to do it, but --

13 **THE COURT:** Yeah, I think that's right. I think
14 their letting the plaintiffs know not to include them, to begin
15 with, I think, will be very helpful. Okay.

16 **MR. PRESNAL:** May I ask a question directly?

17 Is there a change in the name of any of the entities
18 that are on that CMO 1?

19 **MS. HANIG:** No, not on the four, so it should still
20 be the four that are listed in CMO 1.

21 **MR. PRESNAL:** The four should be the same.

22 **MS. HANIG:** Although --

23 **MR. PRESNAL:** Your corporate disclosure is the one
24 that has the change?

25 **MS. HANIG:** Correct, the corporate disclosure

1 changes.

2 **MR. PRESNAL:** Got it.

3 **MS. HANIG:** However, I will note that CMO number 1,
4 at the time that was entered, I believe that "Biomet
5 Manufacturing LLC" was still named "Biomet Manufacturing Corp."
6 And there was a later order that changed that, and we did an
7 updated corporate disclosure. So of those four, it shouldn't
8 be "Corp." It should be "Biomet Manufacturing LLC."

9 **MR. PRESNAL:** I assume we will submit a jointly
10 proposed order to him that --

11 **THE COURT:** It would be helpful, especially if
12 there's been one name change.

13 **MS. HANIG:** We should include that in the joint CMO
14 change because that could just fit right in.

15 **MR. PRESNAL:** Well, that way, we have it all in one
16 place going forward, rather than --

17 **MS. HANIG:** Correct.

18 **THE COURT:** Okay. So I'll look for that in the
19 modified CMOs.

20 **MR. WARD:** And, Your Honor, just on one clarification
21 with the modified. I think you mentioned it, but, to be clear
22 for the record, the modified CMOs are, again, for
23 non-substantive changes.

24 **THE COURT:** Right.

25 **MR. WARD:** And the parties do reserve the right to

1 bring substantive changes at a later point if we need to go
2 back in.

3 **THE COURT:** Sure. That was my understanding. We're
4 just kind of cleaning up on what's happened in the last couple
5 of years.

6 Then the next one talks about what happens in the
7 next couple of years, the discovery schedule.

8 **MR. PRESNAL:** Thank you, Judge.

9 Justin Presnal on behalf of the plaintiffs.

10 We submitted a position statement. It was meant to
11 be informal and just sort of lay out our thoughts in the
12 transition period, as we've met and sort of analyzed how we
13 think the case ought to go, what our position is. We had a
14 meet-and-confer with the defendants a couple of weeks ago just
15 to sort of see where they were. I'm not trying to advocate
16 their position. My understanding is they're, generally,
17 content with the original scheduling order and the structure
18 that it imposed.

19 And for the reasons stated in our position statement,
20 we don't think that's entirely correct. We don't think that's
21 exactly the right way to go. There are some elements of that
22 order that I think could be applied to the current state of
23 where we are. The biggest, probably, disagreement between us
24 and Biomet is with regard to the concept of whether we line up
25 and structure the case with the ultimate goal of trying a

1 bellwether trial or whether we structure the case moving
2 forward as a way to get cases ready for trial upon remand.

3 There are some things that can be done. There are a
4 lot of things that can be done here that really advance the
5 ball to getting all of the cases resolved. But as we point out
6 in our position statement, there are -- the bulk of the cases
7 that are currently pending in your court are post-group 2 cases
8 which simply were not eligible for settlement under the MSA.

9 The about 85 to 90, rough number, cases are group 1
10 or group 2 cases that, for one reason or another, didn't
11 settle. Our position on those is, whether it's a situation
12 where the plaintiff simply didn't agree with what they were
13 entitled to receive under the MSA or a situation, which is
14 probably the case in most situations, Biomet contested the
15 amount that plaintiff thought they were entitled to, offered a
16 reduced sum as they had the right to do under the MSA, and the
17 plaintiff elected not to accept that settlement.

18 In most of those cases, that has resulted from an
19 allegation by Biomet of one of a number of things, either
20 there's insufficient evidence of damage caused by the product
21 or other confounding problems. Those are case-specific,
22 generally, causation-related matters that, really, will not
23 inform the future resolution of the case if any one of those
24 are tried.

25 If you have, for example, a plaintiff that had a bad

1 cup placement -- I'm just making up an example -- and that case
2 is tried, no matter what the outcome is, it doesn't really
3 apply to the other cases that we have and will have in the
4 future.

5 So our goal is to try and -- consistent with, you
6 know, what we talked about with you the last time we were here,
7 we have to figure out a way to efficiently -- and I mean not
8 just in terms of time, but in terms of resources -- advance the
9 ball on behalf of all the plaintiffs' lawyers that we are sort
10 of standing here for in a way that allows them to get their
11 cases ready to be resolved, some way or another, whether it's
12 through settlement as the case moves forward or whether it's
13 through trial in various courts all over the country, in front
14 of you, in an appropriate venue, or wherever that may be.

15 So we certainly recognize that there's a lot of room
16 for discretion here and movement, and our way is not the only
17 way. We're, simply, trying to lay out some of the concerns
18 that we have.

19 One of the things that was listed in your original
20 scheduling order was a way of addressing cases where they have
21 potential limitations issues, and I know that's something that
22 you have raised in other hearings before.

23 Candidly, we think that is an issue that you should
24 try to put up front and deal with on some basis. The way that
25 it was proposed in the original scheduling order was, really,

1 along the lines of a bellwether-type process where you were
2 going to take a selection of cases, issue rulings on those, and
3 then sort of figure out what that meant with any of the others.

4 As the Court is probably aware, the master settlement
5 agreement did provide for compensation for cases that had
6 limitations issues. We assume -- although we don't have all of
7 the numbers on this, but we assume that a lot of the cases that
8 had limitations issues should have been resolved -- that were
9 eligible under the MSA -- should have been resolved through
10 that process. If there are cases still pending, either that
11 weren't resolved but were eligible, or were post group 2 cases
12 that have limitations issues, we think we can come up with a
13 framework to get those cases before you and have them resolved.

14 We've asked Biomet for a list of the cases that they
15 contend have limitations issues, and what we would propose is
16 to sort of work with them to figure out what that number is.
17 Is that five? Is it fifty? Is it somewhere in between there?
18 Because whatever the number is will inform how we recommend to
19 you that you go forward on trying to address those issues.

20 **THE COURT:** Okay.

21 **MR. PRESNAL:** With that, if you have any other
22 questions about our position statement --

23 **THE COURT:** I do.

24 **MR. PRESNAL:** Sure.

25 **THE COURT:** The original case management plan, of

1 course, stopped in its tracks when the MSA came up.

2 **MR. PRESNAL:** Sure.

3 **THE COURT:** Are you -- have you been able to
4 determine what lies out ahead of you, as far as discovery,
5 whether we're heading for bellwether or heading for remand, for
6 docket-wide discovery? Obviously, not the specific case,
7 case-specific things, but what remains to be done, as you see
8 it now, and this isn't to pin you down forever.

9 **MR. PRESNAL:** Sure. Sure.

10 And I would say we have done a lot of work trying to
11 figure out what that is. I can't tell you that we've reached
12 finality there.

13 **THE COURT:** Right.

14 **MR. PRESNAL:** In general, broad terms, what we would
15 say is we intend to focus -- again, for cost-efficiency
16 reasons -- we intend to focus on Biomet witnesses that we
17 believe, truly, have core information that's relevant not just
18 to one particular case but, really, to all the cases to the
19 extent we can, key people that were involved in the development
20 of this product, testing of this product, things like that,
21 with the idea of encapsulating or capturing those witnesses'
22 testimony by video so that they can be used in any trial, state
23 court, federal court, anywhere else. That's our goal. It's
24 not, really, to do a bunch of, you know, all-over-the-map
25 discovery, because, candidly, we can't really afford to do

1 that, and we're farther enough along in the case that I don't
2 think that that's really appropriate.

3 So what we are trying to do now is figure out -- and
4 this is one of the things that your original scheduling order
5 contemplated. You had a list of prioritized witnesses. I
6 think there were two groups of them that were sort of in there.
7 What we're trying to do is figure out who we think those
8 witnesses are. And then the next step would then be to go to
9 Biomet and say, "These are the folks that we think we need to
10 depose." And, you know, if there's a prioritization to that, we
11 probably would want to do that.

12 I can't tell you how many that's going to be, but
13 it's probably going to be on the order of fifteen or so, I
14 would guess, witnesses that apply globally or core or generally
15 or whatever you want to say. That's aside and apart from
16 whatever we may decide to do on case-specific work-up that
17 would, generally, be plaintiff depositions, maybe treating
18 physician depositions, things like that.

19 Does that answer your question?

20 **THE COURT:** Yeah, it does.

21 **MR. PRESNAL:** Let me back up and say one other thing.

22 **THE COURT:** Okay, sir.

23 **MR. PRESNAL:** We also believe that there are
24 document-production issues that we will need to revisit with
25 Biomet and, perhaps, with you, based on some things that have

1 happened through the course of the settlement and some issues
2 that have come up there. That's not ripe for us to really
3 discuss with you now. We've never even talked to Biomet about
4 it. But that's another part of it, and, obviously, that's kind
5 of the horse/cart situation. We probably need to deal with the
6 document issues before we, really, get into the witnesses.

7 But we don't anticipate this being a three-year
8 project to do the discovery we're talking about. I think we
9 advocated for eighteen months. I still think that's a
10 reasonable number, assuming that we can get somewhere
11 productive on the documents in the meantime.

12 **THE COURT:** Okay. I think you may have just answered
13 the question I was about to ask.

14 But I know Biomet, at the time we stopped for the
15 MSA, indicated that it had produced the documents it thought it
16 was supposed to produce, and I know there's often disagreement
17 as to such things.

18 **MR. PRESNAL:** Sure.

19 **THE COURT:** Other than the issues that have arisen
20 since, did you anticipate a new wave of document requests or
21 anything of that sort or is this just basically tweaking what
22 you've already got or are you far enough into it to know?

23 **MR. PRESNAL:** I can't say that we're far enough in
24 that to know. I wouldn't say that it would be necessarily a
25 number of new document requests. It would, really, be

1 addressing questions about whether or not previous document
2 requests were adequately responded to, interrogatories were
3 adequately responded to, those types of things. I don't think
4 we're talking about going back to square one and sending a
5 bunch of new requests that haven't been out there and on the
6 table for some time.

7 **THE COURT:** Okay. And the other question -- and I
8 did ask this in our pre-conference just so I'd know if there
9 was something I needed to address. But what you laid out --
10 and I know it was a sketch. What you laid out didn't address
11 any **Daubert** motions with respect to, you know, does this stuff
12 cause damage, all those things that would be common to all the
13 cases.

14 Is my understanding correct; you're not sure there
15 will be any, and that's why you didn't list it?

16 **MR. PRESNAL:** I think it kind of depends on the
17 category, and here's what I would say, generally speaking. We
18 anticipate probably -- again, we've not finalized any of this.
19 We're still, you know, gaining our ground or catching our wind
20 here on this. But we anticipate having experts that are
21 designated prepare reports that are generic in nature, meaning
22 their testimony, their report covers the waterfront in terms of
23 they're not going to talk about any specific client. They're
24 going to talk about the device and what it does, generically
25 speaking, so that those could be used by the other lawyers out

1 there that, ultimately, have to try their cases.

2 Candidly, we don't think those types of experts that
3 we're envisioning, really, present any **Daubert** issues, but --
4 and the other side probably will disagree with that. And if
5 they do, I think that is something that would be appropriate
6 for you to consider on the generic side of things.

7 When we get into case-specific issues, what a
8 treating physician says about a particular plaintiff, what a
9 pathologist may say about a particular plaintiff, an
10 examination of a particular plaintiff's device, something like
11 that, that sort of also introduces potential **Daubert** issues.
12 But where those are considered and by whom, I think, is up in
13 the air. It could be considered by you, if you intend to, sort
14 of, oversee case-specific work-up discovery. We would submit
15 that it's probably more appropriate to be considered by
16 whoever's going to try the case, because **Daubert** is,
17 ultimately, an evidentiary situation that ought to be dealt
18 with by the trial court. That's our position.

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

20 **MR. PRESNAL:** Any other questions, Judge?

21 **THE COURT:** No. I think I understand.

22 **MR. PRESNAL:** Thank you.

23 **THE COURT:** Mr. Winter.

24 Thank you, Mr. Presnal.

25 **MR. WINTER:** Your Honor, when we started this MDL

1 back in 2012, both sides submitted initial statements -- I
2 forget what you solicited in your first pretrial order -- about
3 what we thought the issues in the cases were, and we believe
4 that all of those issues identified by the plaintiffs and by
5 Biomet still are in play. And when we met in early 2013, there
6 were 212 pending cases, and we had a robust discussion about
7 setting **Daubert** motions, bellwether trials, discovery of
8 Biomet, discovery of plaintiffs to work up this MDL, consistent
9 with your first pretrial order that said no case will be
10 remanded until all discovery is completed to your satisfaction.
11 I'm paraphrasing Paragraph 12 of your first order, Judge, but I
12 think it's a fair paraphrase.

13 You entered an order in December of 2013, and you had
14 told the parties, multiple times, you thought fifteen months
15 was a fair amount of time from when discovery started to where
16 you got to whether or not you try a case after summary
17 judgment, after whatever **Daubert** motions are. The order you
18 entered in December of 2013, I think, gave approximately
19 eighteen months. I went back and checked. I think 540 days
20 was, approximately, when you said the first trial would be from
21 the date of your order, and you had all sorts of -- you know,
22 after the fact, I went back and could see there was 75. There
23 was 90.

24 That, to us, Judge, is the right way to do this, but
25 we think you, actually, should shorten the periods of time,

1 because we've all had the advantage of collecting medical
2 records. And maybe 90 percent or 80 percent of the pending
3 cases will probably have discussions and disputes about
4 discovery. But with ten million pages already been produced,
5 it sounds like it will be focused discovery of Biomet. We
6 appreciate that.

7 But you had, in your order, discovery of plaintiffs
8 in preparation for identifying bellwethers. We thought that
9 was a great idea. I think we need more case-specific discovery
10 being done in tandem, because, through no fault of anyone, you
11 know, we have cases from 2013, and we need to move them along.
12 So to sit here without getting cases ready I don't think serves
13 anyone any good, so we would think that we would need more
14 case-specific discovery supervised by you as we move along
15 here.

16 And just a few issues, Judge, that we think are
17 global issues. One is spoliation, negligent or intentional.
18 It's going to apply to at least 100 of the pending 250 cases,
19 because based on the plaintiff fact sheets, they don't have
20 their device. So assuming the answer was truthful, that they
21 didn't have it, we're going to have to work through that issue,
22 and there's lots of different permutations, so we're going to
23 need to take different types of discovery, so you can maybe
24 come up with a template for any case where the device doesn't
25 exist. I think that would benefit the litigation immensely.

1 State of the art is still very much in play. We have
2 many case where the device was implanted before, if you look at
3 the plaintiffs' complaint, notice to Biomet of a problem in
4 2006, so that's a question both of expert discovery and
5 case-specific discovery. I don't see them being divorced, as
6 my learned colleagues do.

7 Statute of limitations. Candidly, Judge, I have to
8 go back with my colleagues and check, because there are cases
9 which we believe are statute-of-limitation cases that are
10 pending. I think a fair percentage of those cases -- and I'm
11 not giving you a definitive answer -- are now pro se litigants,
12 which is a different issue. And doing a bellwether, pro se
13 litigant, I don't think makes a lot of sense, Your Honor. We
14 super sixteen pro se litigants now. Who knows what we'll have.
15 That's a separate management issue.

16 But I have to go back and look at what's left in
17 terms of statute of limitations cases with counsel, and we'll
18 meet and confer, we'll say this is what we think, and then
19 we'll, hopefully, come to some meeting of the minds on what we
20 could propose to you.

21 But our view is we should be redoing December 10,
22 2013, a little shorter, with a lot more case-specific
23 discovery.

24 **THE COURT:** So what I hear from you is that the main
25 difference -- I mean, other than when this gets done and when

1 that gets done and what it all adds up to -- the main
2 difference between what you're saying and what Mr. Presnal is
3 saying are whether we should have bellwethers -- and Biomet
4 thinks we should, and, apparently, the plaintiffs think we
5 shouldn't -- and whether there should be any case-specific
6 discovery. And for the reasons you've said, you think there
7 should be. And for the reasons Mr. Presnal said, they don't
8 think it would be helpful.

9 Are there any other broad-based disagreements that
10 you have from what -- that's what I detected, and I may be
11 missing something.

12 **MR. WINTER:** I don't want to say you're
13 over-simplifying, Your Honor, but I can't say that you're
14 wrong. I think the two -- we want to re-do your December 10
15 order, a little bit more compressed, that had bellwethers,
16 **Daubert**, some case-specific discovery. We think that was
17 appropriate. We just think you should have more case-specific
18 discovery.

19 To the extent my colleagues don't want to do
20 bellwethers and don't want to do **Daubert**, then that, obviously,
21 is an area of disagreement. To the extent they want to do
22 case-specific after remand, that would be an area of
23 disagreement, Your Honor.

24 **THE COURT:** Okay. And just to be sure I understand
25 your position, before you sit down, the case-specific discovery

1 you'd be looking for would be things where you think it would
2 apply to some multiple of cases? It wouldn't be case specific
3 as to this particular plaintiff, but would apply to, I think
4 you said with respect to the spoliation issue, a hundred cases?
5 Maybe state of the art would be a significant number also, but
6 not docket wide; is that fair?

7 **MR. WINTER:** That's fair, Your Honor.

8 But, also, if we're going to do bellwethers, we're
9 going to have to work up a group of cases in order to then come
10 to a judgment as to whether we can pick the bellwethers or you
11 can pick them.

12 The last order, you had us taking ten plaintiff
13 depositions relatively quickly --

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

15 **MR. WINTER:** -- to aid how we would then figure out
16 what cases to do discovery in for the bellwethers.

17 I think that pool should be a bigger pool and work
18 through that to get to the bellwethers.

19 **THE COURT:** Okay.

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

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

22 Mr. Presnal.

23 **MR. PRESNAL:** I would like to clarify a couple of
24 things, Judge.

25 First of all, I'm not sure we're in total

1 disagreement on the issue of case-specific discovery. Our
2 point of disagreement, really, focuses more on the concept of
3 whether we do a bellwether trial, which we think would not be
4 helpful, or not.

5 In terms of case-specific discovery, although I
6 didn't discuss it in our position statement, it's very common
7 for an MDL judge to allow case-specific discovery to go on
8 while core discovery is going on, and I think that probably
9 makes sense here, too.

10 My concern -- and I'm not trying to suggest that they
11 would do this, but our concern is that they would attempt to
12 overwhelm us with forty plaintiff depositions and anywhere from
13 forty to eighty treating physician depositions, when I don't
14 know that we really need to be doing all of that while we're
15 doing the core discovery. Working up and selecting some older
16 cases or cases that are appropriate for case-specific work-up,
17 I think, is fine.

18 As I used the term "case-specific," they generally
19 would only apply to that particular case, deposing a particular
20 plaintiff about his or her situation and where they are and
21 what they went through, that plaintiff's treating physicians.

22 What we would say is case-specific discovery, at this
23 point, along those lines, should be restricted to certain
24 categories of people and not the plaintiff and, necessarily,
25 his or her spouse or any other witnesses that they claim, you

1 know, know about their situation, where we don't end up taking
2 forty depositions that, really, don't advance the overall
3 course of the MDL. That's more appropriate for once the case
4 is remanded, in our view.

5 With regard to --

6 **THE COURT:** Is there -- and I just throw this out
7 because it occurred to me, and I'm trying to run back over MDLs
8 to think if anybody has done this. But is it workable, a good
9 idea, impossible, whatever, for -- if Biomet wanted to do that
10 kind of case-specific discovery, that you're thinking, you're
11 concerned that the plaintiffs' steering committee wouldn't have
12 the personnel and time to be able to attend all those
13 depositions?

14 **MR. PRESNAL:** Fly all over the country, attend them,
15 correct.

16 **THE COURT:** Right.

17 Would the steering committee be able to make
18 arrangements for, if John Smith is being deposed, John Smith's
19 lawyer, who would be doing it on remand, to do it before
20 remand?

21 **MR. PRESNAL:** We would do that. That is exactly what
22 we would try to do. We would still try, where we could, to
23 keep some participation in those depositions, simply because
24 they're looking to us for guidance. We know more about the
25 case than they do because we work on it every day and they

1 don't, so it's not something that we can divorce ourselves from
2 altogether.

3 But, yes, the idea would be, if a particular
4 plaintiff is being deposed, that person's lawyer ought to be
5 the primary -- you know, absent some unforeseen circumstance,
6 that person's lawyer ought to be the one that's primarily
7 responsible for handling that deposition, yes.

8 It gets a little bit trickier when you get into
9 physicians, because that gets a lot more complicated in terms
10 of people's knowledge and ability to handle the deposition, so
11 it gets a little trickier there.

12 **THE COURT:** And I think you still had something to
13 say when I asked --

14 **MR. PRESNAL:** Well, other points I wanted to mention.
15 Mr. Winter has mentioned the issue of spoliation. He mentioned
16 it at the last hearing. That's something that, I know, he
17 intends to raise at some point in time. I think it clouds
18 issues right now. That is a case-by-case basis that, I think,
19 frankly, we're going to have a major dispute over whether or
20 not it even applies in this case.

21 State of the art, I think, is also something he
22 mentioned that I don't think is appropriate at the MDL-type of
23 status, because many, many states don't recognize state of the
24 art as a defense to a product liability claim. So why would we
25 be addressing something like in cases that are literally

1 pending, according to our information, all over the country?

2 So those are the types of things that, really, are
3 more appropriate once a case is, truly, farther down the line,
4 in terms of, okay, we've now done core discovery, we've done
5 some basic case-specific discovery, where are we on the
6 substantive law that applies to this particular case, the
7 causes of actions that are available, the defenses that are
8 available, and how the facts that exist in that particular case
9 apply to that particular case. So those are things that, I
10 think, are way, way down the road before we can even really
11 consider them.

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

13 **MR. PRESNAL:** Thank you.

14 **THE COURT:** Mr. Winter, there was a question I was
15 going to ask you, and I forgot, so let me exercise the
16 privilege of the chair and ask.

17 As I understand the plaintiffs' position on the
18 bellwether trials, it's that we not only know a ballpark worth
19 of the cases as a result of the MSA, but the fact that the
20 cases that were eligible for settlement are here, we know a
21 little bit more because we know what the plaintiff thought it
22 was worth for settlement purposes and what Biomet thought it
23 was worth for settlement purposes.

24 What would we gain by bellwether trials?

25 **MR. WINTER:** A lot, Your Honor, because we've looked

1 at medical records and said "X" or "Y," and that decides the
2 value of the case.

3 But you could have someone who had a device implanted
4 in 2005. Once the surgeon says, "Well, this is what I knew.
5 This is why I did it. I thought it was an appropriate
6 judgment. There's risks and benefits. I went over them with
7 my patient," and it turns out that there was no way for Biomet
8 to be on notice of some problem and/or the evidence is that the
9 instructions for use adequately described the risks at that
10 time on the failure-to-warn claim. That has not at all been
11 addressed as part of these settlement discussions. We think
12 our warnings always talked elevated ion levels, which means we
13 would win on learned intermediary, from our perspective. That
14 is a dispositive issue across many of these cases, which hasn't
15 been touched at all by this settlement process. So we think
16 there are very important factual and legal positions that
17 bellwethers, really, will help in terms of letting one side or
18 the other realize, you know, we made a mistake by not resolving
19 our cases or we made a mistake by not doing something different
20 with someone else. I mean, that's the unknown here. We have a
21 group of cases that both sides thought about and have different
22 views about the merits of the case, which makes the bellwether
23 process very important here.

24 **THE COURT:** Thank you, sir. I understand your
25 position.

1 **MR. PRESNAL:** May I, briefly, respond, Judge?

2 **THE COURT:** Yeah, very briefly.

3 **MR. PRESNAL:** I'll do it from here to make it fast.

4 I fundamentally disagree with Mr. Winter.

5 I have a case where my plaintiff was implanted in

6 2005 and had received full compensation under the master

7 settlement agreement. So why wasn't that case singled out?

8 Why wasn't that defense raised in that particular case?

9 The bottom line is we are in a different state now

10 than we were when you issued that scheduling order. Biomet has

11 paid over \$50 million to settle over 1800 cases that they

12 claimed, before the settlement, were meritless, so we are in a

13 fundamentally different position than we are now. We need to

14 focus on the issues that will advance the ball on resolving

15 unresolved cases.

16 **THE COURT:** I think I understand your positions, and

17 I think what I need to do is to get something down on paper, as

18 far as what we would do when, and see where it leads, but I

19 don't want to start taking dates arbitrarily. So if I could

20 ask each side -- and, again, I'll let you figure out the timing

21 on this -- each side submit just a proposed -- you don't need

22 to do any argument -- but a proposed case management plan, and

23 you can use the December 2013 as a template. Use different

24 numbers, take things out, put things in. But just, if you

25 could, write the case management plan, what it would look like,

1 and then I can work from there. And I don't know what kind of
2 timetable that will put you on from the plaintiffs' standpoint.
3 I think we ought to just do a simultaneous submission.

4 What kind of timetable would work for the plaintiff
5 on that?

6 **MR. PRESNAL:** In terms of a submission to you?

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

8 **MR. PRESNAL:** We can have that to you in two weeks.

9 **THE COURT:** Okay.

10 **MR. WINTER:** Two weeks it is, Your Honor.

11 **THE COURT:** See, we have agreement on a point.

12 So that would be September 17th for proposed case
13 management scheduling orders. Let me use that so we stay away
14 from the --

15 **MR. PRESNAL:** And may I clarify something?

16 You said use your 2013 order as a template. There
17 are sections in there that we think aren't appropriate.

18 **THE COURT:** No, leave out what you don't think is --

19 **MR. PRESNAL:** We can adjust that as we think --

20 **THE COURT:** Yeah.

21 No, I didn't mean just to fill in the date of the
22 template, but just as a starting point, if it will help you get
23 going.

24 **MR. PRESNAL:** Thank you.

25 **THE COURT:** So let's not call that a case management

1 order, lest we get confused with the updated case management
2 orders, but a proposed scheduling order.

3 And, as I understand it -- and I think this was
4 Biomet's list -- Item 6 is pending motions, and it lists about
5 ten. I know two of them are set for hearing yet today.

6 And do I understand, generally, that's just those are
7 there and we should get on it?

8 **MS. HANIG:** Correct, Your Honor. That was for
9 informational purposes, and, as we discussed, we think those
10 are ripe for ruling.

11 **THE COURT:** Okay. Any disagreement from the
12 plaintiff?

13 **MR. PRESNAL:** Not an issue.

14 **MR. WARD:** No.

15 **MR. PRESNAL:** He was looking at me.

16 **THE COURT:** We'll work this out.

17 **MR. PRESNAL:** We will.

18 **THE COURT:** Anything else to raise then as part of
19 the status conference? We'll have to rearrange some telephone
20 arrangements for the argument on the two pending motions. But
21 anything else from the scheduling -- oh, and we need to pick
22 another date for the scheduling conference.

23 **MR. WARD:** Yes, Your Honor.

24 **THE COURT:** Probably four weeks, give or take, is
25 safest in what is the early portion of this second time around.

1 How would you look for -- does the afternoon time
2 work better or worse for you? I don't know.

3 **MR. WARD:** Actually, afternoon time, I think, works
4 very well for plaintiffs' counsel.

5 **THE COURT:** Works okay, okay.

6 **MR. WINTER:** We'll make it work, Judge.

7 **THE COURT:** How about 1:30 on October 1st? That's
8 four weeks from today.

9 **MR. WINTER:** Your Honor, October 1st, I know, is not
10 good for me.

11 **THE COURT:** Okay.

12 **MR. WARD:** Well, Your Honor -- well, okay.

13 **THE COURT:** How about -- actually, the next week is
14 remarkably --

15 **(Discussion held out of stenographer's hearing.)**

16 **THE COURT:** The next week is remarkably clear. I
17 don't know who all settled.

18 But would you have a preference for a day, Monday
19 through Thursday, of that next week?

20 **MR. PRESNAL:** If I may, it's a completely personal
21 issue. My son plays football Thursday night.

22 **THE COURT:** Okay.

23 **MR. PRESNAL:** I prefer to get back home.

24 **THE COURT:** Get earlier in the week, okay.

25 **MR. PRESNAL:** So Wednesday is better for me, if that

1 works for the defendants.

2 **THE COURT:** October 7th?

3 **MR. WINTER:** Very good, Your Honor.

4 **MR. WARD:** Does that work for everyone?

5 **MS. FULMER:** I'm out of town, but you guys can cover
6 for me.

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

8 **THE COURT:** Yeah. As long as I've got one, that's
9 fine.

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

11 **THE COURT:** Okay. Let's take October 7th at 1:30 as
12 the next scheduling conference.

13 **MR. WARD:** And, Your Honor, do you anticipate meeting
14 with the plaintiffs' leadership beforehand?

15 **THE COURT:** Yeah, lead counsel and liaison counsel at
16 1:00, again, just so I get a little preview and don't hurt
17 myself with my jaw dropping onto the bench with an issue.

18 Okay. Thank you, folks.

19 And we'll take a short break to let Ms. Kirkwood do
20 whatever is needed to get the arguing attorneys on the line for
21 the **Harris** and **Chadwick** arguments.

22 How long do you think that will take, ten minutes?

23 **COURTROOM DEPUTY:** Less than, five.

24 **THE COURT:** Less, okay.

25 Well, we'll take a five-minute break.

