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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

WEDNESDAY, AUGUST 10, 2016

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

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DEBRA J. BONK
Federal Certified Realtime and Registered Merit Reporter
United States District Court
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*Proceedings reported in machine shorthand. Transcript
produced by computer-aided transcription, Eclipse.*

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TELEPHONIC APPEARANCES:

FOR PLAINTIFFS:

- MR. NAVAN WARD**
- MR. AHMED DIAB**
- MR. JUSTIN PRESNAL**

FOR BIOMET:

- MR. JOHN WINTER**
- MR. JOHN LaDUE**
- MS. ERIN HANIG**

(see docket for addresses.)

1 **MR. DIAB:** Good morning.

2 This is Plaintiffs' liaison counsel, Ahmed Diab.

3 You have, live with you, the liaison counsel for both
4 sides, as well as the Plaintiffs that are listed.

5 **COURTROOM DEPUTY:** Okay. Thank you. The judge will
6 be right in.

7 **MR. DIAB:** Thank you.

8 **THE COURT:** Good afternoon.

9 We have two matters, both MDLs, on the calendar this
10 afternoon, and we'll start with the discovery conference in our
11 Cause Number 12MD2391, also 12 MDL Panel Number 2391, **Biomet**
12 **M2a Magnum Hip Implant Products Liability Litigation**. This is
13 one of the conferences that we had tentatively set in case
14 anybody needed to address any issues.

15 I was told that the Plaintiffs' Steering Committee
16 had a matter that it wanted to raise. I have reviewed the
17 letters that you folks submitted.

18 If I could ask you to, first, state your appearances
19 for the record.

20 **MR. DIAB:** Good morning, Your Honor.

21 You have Ahmed Diab, Plaintiffs' liaison counsel.

22 **THE COURT:** Mr. Diab.

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

24 This is, also, Navan Ward, Plaintiffs' Steering
25 Committee.

1 **THE COURT:** Okay. Mr. Ward, are you on -- Mr. Ward,
2 are you on a speaker phone or a cell phone?

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

4 **THE COURT:** Well, we'll try it. We have trouble with
5 that, but we'll see what we can do. I may need to have you
6 repeat yourself a couple of times, but, hopefully, this will
7 all go well.

8 **MR. WARD:** I can attempt to call in on a land line,
9 if that helps.

10 **THE COURT:** It might -- it might be good. The
11 reception here isn't very good, and, of course, the court
12 reporter has to try to make a record. So I'll let everybody
13 else --

14 **MR. WARD:** I'll call back.

15 **THE COURT:** Okay. I know you said something, but we
16 couldn't get it, which is, I guess, indication that we need to
17 do it this way.

18 Let me get the other appearances while we're waiting
19 for Mr. Ward to call back in.

20 Anybody else here for the Plaintiffs?

21 **MR. PRESNAL:** Judge, this is Justin Presnal.

22 **THE COURT:** Mr. Presnal.

23 **MR. PRESNAL:** I am on a cell phone because I'm
24 returning from a **Pinnacle** hearing this morning, but I'm going
25 to put my phone on mute.

1 **THE COURT:** Okay. That would be good. That's
2 helpful.

3 Anybody else for Plaintiff?

4 **(No response.)**

5 **THE COURT:** And who do we have for the Defense?

6 **MR. LaDUE:** Judge, John LaDue for Biomet.

7 **THE COURT:** Mr. LaDue.

8 Anybody else?

9 **MS. HANIG:** Erin Hanig for Biomet.

10 **THE COURT:** Ms. Hanig.

11 Anybody else?

12 **(No response.)**

13 **THE COURT:** Okay. We will wait for --

14 **MR. DIAB:** Your Honor, this Ahmed Diab for
15 Plaintiffs.

16 I believe Mr. Winter called in. I don't know if he's
17 on the phone at the moment.

18 **THE COURT:** It doesn't sound like it.

19 **MR. DIAB:** Very well.

20 **THE COURT:** Okay. Mr. LaDue or Ms. Hanig, I imagine,
21 if Mr. Winter got disconnected and can't get back on the line,
22 he'll probably let you know, so let us know if that happens.

23 And we'll wait a moment -- we'll wait a moment for
24 Mr. Ward.

25 **MR. WARD:** I'm back on.

1 **THE COURT:** Mr. Ward, you're on?

2 **MR. WARD:** Yes, sir.

3 **THE COURT:** Oh, you are. Okay.

4 **MR. WARD:** On the land line.

5 **THE COURT:** All right. Good. Thank you. It makes a
6 huge difference here.

7 Mr. Ward, it appears that you are the one who is
8 seeking a ruling, so I don't know who bears burdens or
9 anything, but let me have you lead off.

10 **MR. WARD:** Sure. Thank you, Your Honor.

11 As the parties requested, this is, essentially, a
12 hearing where we -- the Plaintiffs' Steering Committee is,
13 essentially, seeking an extension with regards to the deadlines
14 in order to take some of the depositions that have been
15 required from the scheduling order that you ordered back in
16 December.

17 I don't want to rehash the parties' -- or at least
18 the things that are in the letter that the parties submitted
19 earlier. And I appreciate you allowing us to be able to submit
20 the one two-page letter clarifying our positions. But,
21 essentially, PSC2 has an extreme concern about being able to
22 proceed with depositions of Biomet witnesses prior to the
23 production of a significant number of documents that will be
24 produced within the next few weeks.

25 Practically speaking, doing what Biomet would

1 propose, which is take depositions now and then retake these
2 same witnesses' depositions once these documents are produced,
3 would put a tremendous burden on Plaintiffs' Steering Committee
4 with regards to expenses, time, and resources that would be
5 required to retake these depositions.

6 We've already seen in, for instance, the Florida
7 litigation, where those counsel -- that counsel has experienced
8 frustration with regards to not having appropriate documents in
9 order to either proceed with depositions which has resulted in
10 either needing to retake depositions or postponing upcoming or
11 future depositions.

12 Essentially what we have here is the privilege logs
13 that Biomet has produced, the twelve sets that they've produced
14 over the time that this litigation has ensued, have been
15 produced both in the MDL, as well as Florida. Therefore, the
16 documents that will be produced from the recent Florida order
17 will, essentially, be relevant not only to the Florida cases
18 but to the MDL cases and probably more so to the MDL cases
19 because it would have a broader impact because of the number of
20 MDL cases versus the Florida cases that are out there.

21 These documents --

22 **THE COURT:** Let me cut in to ask one question.

23 When you talk about -- I can't tell if you're saying
24 "document being produced" or "documents being produced." I
25 thought, at the beginning, you were talking about the

1 production of several documents.

2 But, as I understand Judge Moreland's order in the
3 **Zaremba** case, she's simply ordering -- I don't want to say
4 better because that -- a more detailed privilege log, as I read
5 it.

6 She hasn't actually ordered the production of any
7 more documents, has she?

8 **MR. WARD:** Well, Your Honor, as a result of that
9 order, Biomet has agreed -- in producing a more streamlined and
10 efficient privilege log, Biomet has agreed to produce
11 additional documents that were previously withheld under the
12 privilege log, and it's those documents that the Plaintiffs'
13 Steering Committee is concerned about and is interested in
14 being able to gather, obtain, review, and utilize, in order to
15 move forward with the remaining depositions, corporate
16 depositions, that we have yet to be scheduled.

17 **THE COURT:** Okay. I understand.

18 **MR. WARD:** And so I am referring to -- and I
19 apologize for whatever communication issues with the phone, but
20 I am referring to documents being produced in relationship to
21 the privilege log.

22 Now, going back and forth with the Defendants over
23 The last few weeks, it is our understanding that, once these
24 documents -- or it would take at least a few weeks for these
25 documents to be actually produced, documents resulting from the

1 Florida court order, and so it's our simple position that it's
2 better to go ahead and wait a few weeks for Biomet to produce
3 these documents, in order for us to be able to, again, have an
4 opportunity to look at them and utilize them in these
5 depositions, and, that way, neither party is prejudiced.

6 On the other hand, if we go forward and are forced to
7 take these depositions now and then have to retake these
8 depositions once we get documents that are certainly relevant,
9 having to retake these depositions, again, it will definitely
10 create prejudice to the the Plaintiffs' Steering Committee,
11 more so than the Defendants, when it comes to, again, time,
12 expense, resources, and the other reasons and areas that we've
13 listed in our letter to you.

14 And so, again, essentially, we are requesting, as it
15 relates to the corporate depositions, that we extend the amount
16 of time or the deadlines that are applicable with regards to
17 the initial depositions, as well as the supplemental
18 depositions, and that would likely necessitate an extension for
19 the expert depositions, but, again, that won't prejudice either
20 party.

21 And there's a lot of stuff that has been going on and
22 continues to go on with regards to the Group 1 depositions,
23 case-specific depositions that are currently going forward, the
24 Group 2 case-specific depositions that are currently going
25 forward, as well as the Exhibit A and B cases that are

1 finalizing the discovery that is required under the Court
2 order, under the scheduling order, and the various deadlines
3 that are associated with those particular sets of cases.

4 And so, again, that's, essentially, our position,
5 with regards to getting these additional documents and having
6 enough time to be able to utilize them in depositions, which
7 would require an extension. Now, how long that extension would
8 be, we would certainly need to get a better understanding from
9 the Defendants as to how much longer they anticipate it would
10 be in order for those documents to be available.

11 **THE COURT:** So when your letter talked about ninety
12 days, or three months, you're not confident that that's what's
13 going to be needed at this point because you haven't seen those
14 documents yet?

15 **MR. WARD:** We are hopeful -- based on our
16 conversations with Biomet and their estimations, we're hopeful
17 that ninety days would be appropriate. But, you know, to the
18 extent that they have come across additional information since
19 the last time I've personally talked with them or just come
20 across any other information that would either suggest that
21 documents would be available, either sooner or later, that
22 would affect the ninety-day estimation that we've provided the
23 Court.

24 Certainly, if they are able to say, "Hey, these
25 additional documents are going to be available tomorrow," then

1 the ninety days would not be necessary, and we would, you know,
2 certainly be able to come to a deadline extension much sooner
3 than that.

4 **THE COURT:** Okay.

5 **MR. WARD:** But based off of the few weeks that I've
6 understood it would take, once the Florida court order was
7 actually ordered, it was our rough estimation of ninety days to
8 be something that would be an appropriate time, but, obviously,
9 again, getting more input and insight into a specific date from
10 the Defendants would give us a much more efficient way of being
11 able to determine how long that extension would need to be.

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

13 Mr. LaDue, I know you wrote the letter.

14 Are you the spokesperson for Biomet?

15 **MR. LaDUE:** Yes, I am, Judge.

16 And I will also not repeat my letter but focus on the
17 difference between Biomet's production of privilege logs under
18 Case Management Order Number 2 in the MDL and what's going on
19 in other cases because I think that will help here.

20 Judge, you issued Case Management Order Number 2 back
21 in September, 2013, and that order explains the requirements
22 for logging privilege documents in a privilege log in the MDL.
23 Case Management Order Number 2 also describes a procedure that
24 the party should follow if a party challenges a privilege
25 assertion in the MDL. And neither party has raised any

1 challenge under the procedure in Case Management Order Number
2 2. The only challenge we've had to the privilege logs has come
3 up in the state court cases that are pending in Sarasota
4 County, Florida.

5 And, Judge, you've seen Judge Moreland's order. The
6 challenge there was that Biomet's privilege log, the formatting
7 that we used in the MDL --

8 **(Mr. LaDue's telephone connection lost.)**

9 **THE COURT:** Did we lose you?

10 **MR. LaDUE:** (No response.)

11 **THE COURT:** I think we fell off.

12 **MR. WARD:** I'm still here, Your Honor.

13 **THE COURT:** Okay. Well, we'll have to get word to
14 Mr. LaDue's office that --

15 **MR. WINTER:** I think Mr. LaDue fell off, Your Honor.

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

17 **MR. WINTER:** I think Mr. LaDue fell off, Your Honor.

18 **THE COURT:** I think so, too.

19 Can we get word to Mr. LaDue's office that he is no
20 longer talking to all of us or, for that matter, any of us?

21 I hate phone conferences.

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

23 I just sent Mr. LaDue an e-mail.

24 **(Discussion held off record.)**

25 **MS. HANIG:** Your Honor, Erin Hanig here.

1 I know Mr. LaDue is at O'Hare Airport, and that might
2 explain why he's having a hard time getting back on. I've
3 texted him, as well, so I assume that he's trying to get back
4 on right now.

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

6 **MR. LaDUE:** Judge, this is John LaDue. I think I
7 must have got disconnected there somehow.

8 **THE COURT:** You did.

9 So why don't you go ahead and pick up.

10 **MR. LaDUE:** Did you hear any of what I said?

11 **THE COURT:** A little bit, just the very beginning. I
12 think you were beginning --

13 **MR. LaDUE:** My apologies.

14 **THE COURT:** You can go ahead and proceed, though.

15 **MR. LaDUE:** Okay. Your Honor, I guess the main point
16 is the effort we're making to reformat privilege logs in the
17 Florida State court proceedings was based on Judge Moreland's
18 order that the privilege logs we produced in the MDL and shared
19 in the Florida state court proceedings didn't comply with the
20 privilege log formatting requirements under Florida Rules of
21 Civil Procedure, and, specifically, what the judge asked us to
22 do there was to state an independent basis for withholding the
23 attachments to privilege documents.

24 So, for example, if an attorney in Biomet sent an
25 e-mail with an attachment to someone in Biomet who was seeking

1 legal advice about the attachment, we specifically agreed, in
2 the MDL, under Case Management Order Number 2, that there was
3 no need to state a separate basis for withholding the
4 attachment. Judge Moreland said, under Florida law, we have to
5 state a separate basis for the attachment, for withholding the
6 attachment as privileged.

7 So, that process is requiring us to take some time
8 and go through, look at each of the attachments to privilege
9 documents, and that's a pretty time-consuming process. We
10 should be done with that sometime in October.

11 And, I think, that, you know, for now, Biomet wants
12 to keep the MDL discovery process moving according to the
13 Court's scheduling order, and this reformatting effort we're
14 making to conform to Judge Moreland's order in Florida
15 shouldn't cause us to delay the depositions in the MDL. We
16 should stick with the Court's scheduling order and proceed
17 according to plan.

18 **THE COURT:** Help me understand what Mr. Ward was
19 telling me about, about Biomet volunteering to produce
20 additional documents in the course of reformatting the
21 privilege log.

22 **MR. LaDUE:** I think what he's referring to is the
23 attachment issue that I just discussed, Judge.

24 In the process of us going through each attachment to
25 a privilege document, some of the attachments may not be

1 privileged, and so we may be producing those attachments.

2 **THE COURT:** Help me understand your conditional
3 "may." You used the term "may."

4 Have you indicated to the Plaintiffs that there will
5 be? When you say there "may," do you think there might be a
6 few; there might be a lot? I'm not sure I understand where we
7 stand when you said, "There may be more."

8 **MR. LaDUE:** It's hard to tell because we're just
9 getting going with the process, Judge, but I'm certain we will
10 be producing multiple documents because, I imagine, many of the
11 attachments that were included in privileged documents, as I
12 described earlier, are not privileged themselves.

13 **THE COURT:** Okay.

14 **MR. LaDUE:** The communication about them in the
15 privilege document is privileged, and that's why we withheld
16 it, but the attachment itself may not be.

17 Is that clear, Your Honor?

18 **THE COURT:** Yeah, you are, but I didn't understand
19 that when we walked in, and I think I need to ask you a
20 question or two about this.

21 What that sounds like is that, while nobody
22 complained about the privilege log in the MDL, there are
23 documents that Biomet withheld from discovery that, apparently,
24 once you get down into the weeds with the attachment, checking
25 the attachments, should have been producing because they're not

1 privileged.

2 And if there are documents that should have been
3 produced and were not, how does Biomet square going ahead with
4 depositions, forcing the Plaintiffs to move ahead without
5 documents that they apparently should have had?

6 **MR. LaDUE:** Well, Your Honor, I think that the
7 documents that are attachments, to the extent they are not
8 privileged, first, I think they're going to be documents that
9 the Plaintiffs already do have.

10 But I just want to -- I disagree with one
11 proposition, Judge. I don't think these are documents that
12 should have been produced in the MDL. The Court's Case
13 Management Order Number 2, Paragraph II(A)(2), the parties
14 expressly agreed, for example, in (2), Subparagraph (b), that
15 e-mails from an attorney and attachments may be withheld as
16 privileged. In other words, there was no need to state
17 separate basis for privilege for an attachment to a privilege
18 document.

19 **THE COURT:** Okay.

20 **MR. LaDUE:** So, in other words, just to simplify our
21 position, Judge, we complied with all of the Case Management
22 Order Number 2 rules for logging privilege documents in the
23 MDL.

24 Judge Moreland thought we needed to do more under the
25 Florida Rules of Civil Procedure, and specifically the piece

1 that's time consuming for us now is that she's asked us to go
2 back and state a basis for each attachment to a privilege
3 document.

4 **THE COURT:** Okay. All right. Thank you, Mr. LaDue.
5 Mr. Ward, the right to close.

6 **MR. WARD:** Yes.

7 And just to follow up on Mr. LaDue's comments, there
8 is a big question as to the documents that quote/unquote were
9 attached to what they proposed as privilege documents being
10 from an attorney or not. Now, there's a definite big question
11 with regards to how many of those documents are out there,
12 again, documents that were attached to e-mails, so to speak,
13 from attorneys versus non-attorneys. And to the extent that
14 there are either, quite frankly, these are documents that,
15 again, as you pointed out, are nonprivileged documents that
16 should have been produced to the Plaintiffs' Steering
17 Committee.

18 **THE COURT:** Well, am I right with that? If the
19 attachments were exempted from production, as long as the
20 e-mail was listed on the privilege log, am I right that they
21 were wrongfully withheld when I said that, mistakenly? Let me
22 put in "mistakenly."

23 Go ahead.

24 **MR. WARD:** That's certainly -- that's certainly our
25 position.

1 And to the extent these are things that we have been
2 -- when I say "we," the Plaintiffs' Steering Committee -- have
3 been notating with regard to these privilege logs, we also
4 understood and knew that the Plaintiffs and the Florida counsel
5 were also going forward with the same issues and the same
6 problems that they've seen with the same privilege log that
7 was, again, produced in the MDL and the Florida litigation, and
8 so that what you have properly stated is the core of what our
9 concern is and the core of what we are asking for, because
10 these are documents that should have been produced. We want
11 the ability to be able to receive them. They're going to be
12 produced, both in the Florida litigation and the MDL
13 litigation, and so, therefore, we should be able to utilize
14 those, as we move forward with these depositions.

15 And, you know, the nuances, to the extent of, again,
16 e-mails that are from attorneys versus non-attorneys, that's
17 certainly an issue and a question mark that we would have, but
18 it is our position that those attachments were improperly
19 withheld and documents that we should be able to utilize.

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

21 **MR. LaDUE:** Judge, this is John LaDue.

22 Can I reply because I think Mr. Ward is raising a
23 separate issue from what we came in to talk about today?

24 And the question about whether any of the MDL
25 privilege documents were wrongfully withheld or wrongfully

1 designated as privileged, this Court's order, Case Management
2 Order Number 2, sets forth a process for challenging privilege
3 assertions --

4 **THE COURT:** I understand that.

5 **MR. LaDUE:** -- Paragraph (B.) Nobody has ever
6 utilized that. We've never met and conferred about any of
7 that.

8 **THE COURT:** I understand that, Mr. LaDue. Mr. LaDue,
9 I understand that.

10 **MR. LaDUE:** I'm sorry, Your Honor.

11 **THE COURT:** Let me go ahead and rule.

12 This, obviously, is an unusual situation. Maybe
13 others with MDLs have had it, but I haven't.

14 We do have a situation where the parties agreed to a
15 process for the privilege logs. I approved it and ordered it,
16 and, apparently, there is no claim that the disclosure in the
17 MDL privilege logs failed to comply with the terms of the order
18 that was entered in this docket.

19 Obviously, my order on case management doesn't limit
20 Florida law or what is to be done in the Twelfth Judicial
21 Circuit of Sarasota County, Florida, and it's well within the
22 authority of that judge and that state to order a different
23 format, to order separate listings of things that weren't
24 required to be separate under this order, so it's awkward for
25 me to rely on a failure to comport with Florida law in trying

1 to decide what to do here.

2 Having said that, it certainly is possible that some
3 of these attachments will turn out not to have been disclosed
4 earlier and to not be duplicative of earlier discovery and turn
5 out to be not privileged and turn out to bear on the testimony
6 of the -- of eighteen or so custodians yet to be deposed, but
7 that certainly falls short of a certainty. I can't weigh the
8 likelihood of it, but I know it's far less than a hundred
9 percent, and we would have a delay, it sounds like, of three
10 months minimum, a delay that would then spill over into the
11 expert witnesses' depositions.

12 I've commented before that we've got a pretty old MDL
13 here, and, again, it's nobody's fault because we had the
14 partial settlement, and everybody had to pick up not quite from
15 scratch, but it took everybody a little time to figure out what
16 was left to be picked up, and I'm not sure I can justify a
17 delay of three or four months in the custodian depositions,
18 which is still pretty early, and a concomitant delay in the
19 expert depositions, based on the chance, whether remote or
20 moderate, that something is going to turn up as a result of the
21 judge's order down in Sarasota.

22 So, what I'm going to do is to decline to stay the
23 deposition schedule that we have now, but add that, if it turns
24 out that one or more of the documents that are disclosed over
25 the course of the next couple of months, pursuant to the

1 Florida court's order, if those would bear on a deposition that
2 was taken, I'll be happy to hear argument as to who should pay
3 the expenses of resuming the deposition. But to stop
4 everything, based on the chance that there might be something
5 that would come through, I think, would be inappropriate.

6 So, I'll go ahead and show today that the Court
7 declines to stay the depositions of the record custodians, but
8 indicates that, if further developments with respect to the
9 privilege log in the Florida cases result in the production of
10 documents that would justify reopening any of those
11 depositions, I will entertain any arguments with respect to who
12 should cover those expenses.

13 Does that cover -- does that cover it from the
14 Plaintiffs' standpoint, Mr. Ward, or, Mr. Diab?

15 **MR. WARD:** Yes, Your Honor. Thank you.

16 **MR. DIAB:** Yes, Your Honor.

17 **THE COURT:** And, Mr. LaDue, and, Ms. Hanig, from --
18 oh, I'm sorry. Mr. LaDue, and, Ms. Hanig, from the Defendant's
19 standpoint, does that cover it?

20 **MR. LaDUE:** Yes, Your Honor.

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

22 And I guess I will be seeing you on the 29th at our
23 regularly-scheduled status conference, hearing from you. I
24 can't remember whether I'm seeing you or hearing from you, one
25 or the other. Okay. Thanks, folks.

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(Proceedings concluded.)

CERTIFICATE

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

DATED THIS 16TH DAY OF AUGUST, 2016.

S/S DEBRA J. BONK

DEBRA J. BONK
FEDERAL CERTIFIED REALTIME REPORTER