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TELEPHONIC APPEARANCES:
FOR PLAINTIFFS:
MR. NAVAN WARD
MR. JUSTIN PRESNAL
MR. ALEX DAVIS
MS. BRENDA FULMER
MS. KRISTEN BARTON

IN-PERSON APPEARANCES
FOR BIOMET:
MR. JOHN WINTER
MR. JOHN LaDUE
MS. ERIN HANIG

(see docket for addresses.)

1 **THE COURT:** It's 1:11. We'll go ahead and get
2 started.

3 This is Judge Miller.

4 This is our 12MD2391 --

5 **(Telephone interruption.)**

6 **THE COURT:** I don't know what that meant --

7 **Biomet M2a-Magnum Hip Implant Products Liability.**

8 We are gathered telephonically and with some in
9 person for our regularly-scheduled status conference.

10 We have in the courtroom, for Biomet, Mr. Winter,
11 Mr. LaDue, and Ms. Hanig.

12 A lot of people have joined the call, but the
13 operator has been telling us each of you are anonymous, which
14 is a challenging way to make a record. So if I could ask those
15 who are here from the Plaintiffs' Steering Committee, those who
16 are on the phone, if you could, please, state your appearances
17 for the record.

18 **MS. FULMER:** Brenda Fulmer on behalf of the
19 Plaintiff.

20 **THE COURT:** Who was that? I'm sorry.

21 **MR. WARD:** Navan Ward.

22 **THE COURT:** Mr. Ward.

23 Who was that before?

24 **MS. FULMER:** I'm sorry, Your Honor. It's Brenda
25 Fulmer on behalf of the Plaintiffs.

1 **THE COURT:** Ms. Fulmer, okay.

2 **MS. BARTON:** And, Your Honor, this is --

3 **MR. PRESNAL:** Justin Presnal on behalf of the
4 Plaintiffs, Your Honor.

5 **THE COURT:** I'm sorry. I wasn't able to hear.

6 **MR. PRESNAL:** Justin Presnal on behalf of Plaintiffs.

7 **THE COURT:** Mr. Presnal.

8 **MS. BARTON:** And Kristen Barton, appearing on behalf
9 of Ahmed Diab, for the Plaintiffs.

10 **THE COURT:** Ms. Barton.

11 Anybody else?

12 **(No response.)**

13 **THE COURT:** Okay. Well, welcome to all, either
14 physically or telephonically.

15 I do have my agenda here in front of me, and I guess
16 we can work our way down through it.

17 The first agenda item is active case count. I don't
18 know who was going to speak to that.

19 Ms. Hanig.

20 **MS. HANIG:** Your Honor, if you don't mind, I'd like
21 to start with the discovery status first and work our way
22 through.

23 **THE COURT:** Okay. Let me ask everybody if you folks
24 would remain seated. I think you'll be picked up by the
25 microphone better. No, normally, I would want you to stand,

1 but for the sake of people who aren't here.

2 So you want to start with Item 2, discovery status?

3 **MS. HANIG:** Right.

4 So, discovery status, we're working through Groups 1
5 and 2.

6 In terms of Group 1, I think all the Plaintiff
7 depositions have been conducted. Group 2, Plaintiff
8 depositions have all been scheduled. We're working through
9 those. We're also working through surgeon depositions for
10 those cases, as well as some sales rep depositions.

11 In terms of the employee custodians who've been
12 requested, approximately three or four of those depositions
13 have already been taken, and there are five depositions that we
14 are working on scheduling with the PSC right now. We're just
15 working on getting those dates scheduled before September 26.

16 There is one case that I wanted to bring to your
17 attention, which is **Virginia Baker**, and she is one of the
18 spoliation bellwether cases.

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

20 **MS. HANIG:** And there is a deposition request out for
21 a sales representative in that case that is not going to be
22 able to be completed before September 12th due to scheduling
23 issues on the Plaintiff's end. We would like to extend that,
24 if possible, just for that one particular case. If we do that,
25 though, it will also bump out the briefing on that particular

1 case, so I don't know if you would like us to do a written
2 motion for that case only.

3 **THE COURT:** Well, how much time do you need then?

4 **MS. HANIG:** To be safe, I would say, if we could bump
5 the deposition deadline out until the beginning of October, and
6 then do a reciprocal --

7 **THE COURT:** Move everything?

8 **MS. HANIG:** -- two weeks for the summary judgment
9 motion.

10 **THE COURT:** I'll tell you; it may be we would do well
11 for you to file a written motion so that the originating
12 attorney can have a chance to respond because he or she -- is
13 the originating attorney somebody who's on the line now?

14 **MS. HANIG:** Probably not on the line, no. It's Jeff
15 Lowe and Andy Cross. They've requested the extension so
16 they're obviously in agreement. But if you want a formal
17 motion, just so we're on the same path, we can do that.

18 **THE COURT:** Probably best.

19 **MS. HANIG:** Okay.

20 **THE COURT:** Yeah, probably best, but I will be happy
21 to grant it when it comes through.

22 **MS. HANIG:** So, other than those updates, unless you
23 have any specific questions about discovery, that's the general
24 status.

25 **THE COURT:** No. It sounds like we're moving along

1 pretty well.

2 Anything from the Plaintiffs to add to that?

3 **MR. WARD:** No, Your Honor.

4 I think Defense counsel has adequately relayed the
5 state of where we are with regards to the different tracks for
6 the discovery with the missing device cases, the general
7 discovery with the corporate representatives, as well as the
8 Group 1 and Group 2 tracks of cases.

9 There are a few witnesses in the general discovery
10 that the parties need to discuss with regards to their ability
11 with regards to them being former employees or not employees of
12 the Defendants. The parties certainly will meet and confer
13 over those few witnesses remaining and the initial group of
14 corporate rep depositions, as well as the supplemental group of
15 depositions that will be going forward after the initial group
16 is over.

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

18 Do you want to move on to Item 3 or Item 1 next? I
19 know we skipped one.

20 **MR. WINTER:** Your Honor, discussing Item 3 in
21 conjunction with Item 1 will make a little bit of sense, we
22 hope.

23 **THE COURT:** Okay.

24 **MR. WINTER:** Your Honor will recall that your
25 December 21, 2015, order required the parties to meet and

1 confer at a certain point in time, which is at or about now --

2 **THE COURT:** Right.

3 **MR. WINTER:** -- regarding what to do with cases after
4 Groups 1 and 2.

5 We have had a dialogue back and forth with the PSC
6 regarding the number of cases that would be in the queue, and
7 what has evolved over the past sixty to ninety days is there's
8 been substantial discussion between Biomet and several firms
9 with reasonably-sized inventories such that there's a big group
10 of cases which we are cautiously optimistic, in the next thirty
11 to sixty days, will be resolved.

12 So what we did is, in conjunction with that, we said
13 to the PSC, "We want to back out all of those cases for now
14 with the caveat that, if they don't resolve, they would
15 actually go into Group 3," and then we said, "as long as you
16 had a completed Plaintiff Fact Sheet by June 30th of this
17 year," backed out pro se litigants and a small group of cases
18 which we had previously said we didn't think had much value,
19 like a metal-on-poly case. There's a group of sixty-four
20 cases.

21 Now, we have to give the PSC that list, which we
22 worked on last week. Presumably we true up on that list, and
23 we should be able to do that in the next two weeks. What we
24 have proposed to the PSC is that we jointly submit that list to
25 you so that, as of the end of September, we activate Group 3,

1 and we would just track, you know -- I mean, you gave about six
2 months to do the discovery in Groups 1 and 2. We'd just apply
3 those same dates in a proposed order to you.

4 Once that happens, and assuming we are successful
5 with the ongoing resolution efforts, that will leave, when you
6 take into account pro se litigants, the statute of limitations,
7 the spoliation motions, and a few other odds and ends,
8 approximately 160 or so cases.

9 Currently, we're at about 325 --

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

11 **MR. WINTER:** -- plus or minus, so we should, if we do
12 our jobs right, collectively, cut this in half in relatively
13 short order.

14 **THE COURT:** Okay. Now, you mentioned sixty-four
15 cases. Those are ones that are now in Groups 1 or 2 and would
16 move to Group 3? I may have misunderstood.

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

18 Group 3 would be the sixty-four cases that followed
19 Group 2.

20 **THE COURT:** Okay.

21 **MR. WINTER:** So, you know, you just go in index
22 number.

23 **THE COURT:** Sure.

24 **MR. WINTER:** So that's what would be left.

25 Groups 1 and 2, it just so happens, will have

1 approximately sixty cases left, in Groups 1 and 2, so it sort
2 of breaks out a little symmetrically but more by chance.

3 **THE COURT:** You had talked about, though, a group of
4 cases that might resolve themselves, and I've lost track then
5 of what you proposed to do with those as far as the scheduling.

6 **MR. WINTER:** Right.

7 Well, some of those cases are in Groups 1 and 2
8 already --

9 **THE COURT:** Right.

10 **MR. WINTER:** -- so that's just closing out cases.

11 With the cases that otherwise could have been in
12 Group 3 --

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

14 **MR. WINTER:** -- what we've said is, if we can't
15 resolve those cases -- and I can't tell you off the top of my
16 head what the number is, Your Honor, but whatever that group is
17 of cases that don't resolve, we would say, put them in Group 3,
18 so Group 3 could get expanded --

19 **THE COURT:** Right. Okay. Now I get it.

20 **MR. WINTER:** -- so we don't have cases that have PFSs
21 submitted as of a reasonable point in time that are sitting.

22 **THE COURT:** So there are cases in Groups 1 and 2 that
23 might resolve themselves, and others that, if they don't, they
24 would be moved to Group 3?

25 **MR. WINTER:** Correct, Your Honor.

1 **THE COURT:** Okay. All right. So what would you need
2 from me today, just an extension of the deadline for the
3 meet-and-confer on Group 3?

4 **MR. WINTER:** That would be preferable, Your Honor.
5 We should be able to have Group 3 on an agreed-upon, you know,
6 exhibit to a proposed order to you, you know, within two or
7 three weeks.

8 **THE COURT:** Okay. But I gather it would be helpful
9 for me to extend that to the end of September; is that what you
10 said?

11 **MR. WINTER:** That would be preferable, Your Honor, so
12 that we could submit an order that would activate Group 3 at
13 the end of September or the first week in October.

14 **THE COURT:** Okay. All right. Anything from the
15 Plaintiffs to add, agree, disagree?

16 **MS. FULMER:** No, Your Honor.

17 I believe that Mr. Winter has adequately explained,
18 you know, the content of our discussions so far on this issue,
19 and the Plaintiffs are in agreement with the plan.

20 **THE COURT:** Okay. Thank you, Ms. Fulmer.

21 So we're 325 now, may drop to 160 within the next
22 couple of months?

23 **MR. WINTER:** Yes, Your Honor, hopefully.

24 **THE COURT:** Okay. Yeah. Okay.

25 I assume the Lone Pine Order contribution to the

1 agenda was made by the Defense?

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

3 **THE COURT:** Okay. You may proceed.

4 **MR. WARD:** Your Honor.

5 **THE COURT:** Yes.

6 **MR. WARD:** Your Honor, if I may, I want to make sure
7 that Alex Davis, for the Plaintiff, is on the phone.

8 **THE COURT:** Could you speak up a little, Mr. Ward?
9 I'm having a hard time with the --

10 **MR. WARD:** I apologize.

11 **THE COURT:** Okay.

12 **MR. WARD:** I apologize, Your Honor.

13 When you did the roll call earlier, Alex Davis should
14 be on the phone, was having technical difficulties, so I just
15 wanted to make sure he is on the right line, the line that is
16 able to speak, so I just wanted to see if he was on the line.

17 Alex, are you on this particular line?

18 **MR. DAVIS:** Yes, I'm on.

19 **THE COURT:** Okay. And who is this?

20 **MR. WARD:** Okay.

21 **MR. DAVIS:** Alex Davis of Jones Ward for the
22 Plaintiffs' Steering Committee.

23 I apologize for the technical difficulties.

24 **THE COURT:** Oh, that's right. We have two lines to
25 choose from, and it doesn't always work out exactly right.

1 Okay. Thank you.

2 So does the Defense want to address the Lone Pine
3 Order issue?

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

5 Right now, there are, I think, fourteen or fifteen
6 pro se litigants, and these group of pro se litigants all were
7 previously represented by counsel and had a parting of ways
8 with their counsel, all because of the MSA process and, you
9 know, an inability to agree. I mean, I won't go into the
10 particulars of what some of these pro se litigants did, but we
11 think we're at a point, Your Honor, where, with this group of
12 litigants who had counsel, made choices, which they're entitled
13 to make, as to whether or not they follow the advice of their
14 counsel, if we're going to move -- we want to move this whole
15 process along. And to the extent -- every time you go through
16 a group of cases, you get more pro se litigants.

17 **THE COURT:** Right.

18 **MR. WINTER:** And we would like to have an order from
19 you sometime in the next sixty days or so, subject to a
20 meet-and-confer with the PSC as to the form of the order, and,
21 in essence, we would like an order to show cause that says:
22 Please provide a letter, medical report. I mean, we're not
23 talking about a Rule 26 document, but something that says
24 you've spoken to a physician or some expert who says you have a
25 legitimate case.

1 Now, that's obviously an amorphous concept, but we
2 would be very much in favor of that because I think we need to
3 clean up this docket, and, you know, it's a reasonable thing to
4 do at this point in time, having had people be pro se litigants
5 now, you know, eighteen months. Some of them, over time, have
6 been adopted by someone on the PSC, and those cases are fine to
7 deal with that way. But for the ones that have resisted that,
8 I think, you know, it's come time to do that.

9 **THE COURT:** Who wishes to address that on the
10 Plaintiffs' side?

11 Thank you, Mr. Winter.

12 **MS. FULMER:** Your Honor, I'll address it, Brenda
13 Fulmer on behalf of the Plaintiffs.

14 It would be the Plaintiffs' position -- we understand
15 the need for the Court and the parties to address the pro se
16 litigants, but we would like to ask the Court to address it in
17 a way that falls something short of the Plaintiffs having to
18 come forward with a causation report. In other MDLs, the judge
19 even issuing a show cause order asking the Plaintiffs to come
20 forward and, you know, basically state their desire to go ahead
21 and proceed on a pro se basis with an understanding of what
22 that means has been sufficient to kind of clear the docket.

23 The Plaintiffs' Steering Committee has already
24 communicated twice in writing with those pro se litigants.
25 We've provided them with a list of all the attorneys who are

1 active in the litigation, so we feel like, you know, the timing
2 is right to deal with it. Our only concern is that the Court
3 find the best, you know, avenue possible for dealing with that,
4 and I believe that it could be something, you know, short of
5 requiring any type of an expert report from these Plaintiffs.

6 **THE COURT:** Okay. Let me propose this. Let's see.
7 When will this be? Okay. The timing is going to be
8 challenging. What I was just going to propose is that, say,
9 within thirty days, the Plaintiff submit -- they just have to
10 be one of these orders that you're talking about that another
11 court did, to have them come forward so we have something on
12 the table, and then thirty days after that have the Defendants
13 file their responses as to, if they believe that's inadequate,
14 why they think that, and also to give you folks time to talk
15 about the language of a Lone Pine Order, if that's the way I
16 decide to go.

17 Let me drop down to what I was adding as an agenda
18 item so we can talk about the timing on this because my other
19 agenda item is going to foul up the timing here.

20 I can't tell you how excited I am to report that, on
21 September 14th, I'm having surgery on my other rotator cuff --
22 this is now a two rotator-cuff MDL for me -- and I will be out
23 of action for a time. I don't know how long that will be, but
24 I'm sure it would include about sixty days from now -- or
25 thirty days from now. Well, I guess, if that's just to give

1 the Defendants a chance to comment, that's probably workable,
2 and work on the hope that, within sixty days or shortly after
3 that, I'll be ready to dive back in this.

4 So let me go back to my original proposal, then, to
5 give the Plaintiffs thirty days to submit either, if you want
6 to draft it yourself or just submit an order that's been
7 entered in another case, something short of a Lone Pine, and
8 then give Biomet thirty days after that to explain its position
9 as to why, if Biomet believes that's insufficient, why, and
10 also to give both sides, then, time to talk about the language,
11 if a Lone Pine Order is to issue, see if the language can be
12 agreed on.

13 I will tell you that I still have some hesitance
14 about a pro se Lone Pine Order simply because a lot of these
15 folks, from what I can tell -- and I don't mean to put this as
16 a value judgment -- seem to have been abandoned by their
17 attorneys because they declined a settlement offer. In that
18 situation, there's no reason to believe their cases are any
19 less meritorious and, I guess, if we look through the
20 Plaintiffs' eyes, probably reason to think they are more
21 meritorious than the cases that remain.

22 On the other hand, we're moving along to what appears
23 to be a potential conclusion of this case within the next
24 several months, this docket, within the next -- I don't mean
25 four or five months, but months after that, and we have to do

1 something, so I would look forward, very much, to both
2 possibilities.

3 Would that be agreeable, Ms. Fulmer, from the
4 Plaintiffs' standpoint?

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

6 **THE COURT:** Okay. And would that work for Biomet?

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

8 **THE COURT:** Okay. So we'll show that the Plaintiffs
9 have requested something short of a Lone Pine Order and are
10 afforded thirty days within which to submit such a proposed
11 order, either one that has been used in a case already or one
12 of their own drafting; and then thirty days after that, A,
13 Biomet can respond to any inadequacy it sees in the Plaintiffs'
14 proposed order; and the parties would be to submit a proposed
15 Lone Pine Order, if that's the way the Court goes, and,
16 hopefully, we can find some appropriate way of handling the
17 situation that we're in.

18 Proposed second order to show cause, that sounds like
19 a Biomet submission.

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

21 So, I know we did this once. Basically, we just want
22 to do it again. So, we've already circulated to the PSC a
23 proposed form of order and a list of cases that have been
24 funded and settled and we believe are ready for dismissal. So,
25 as soon as we get signed off from the Plaintiffs' Steering

1 Committee, we would like to propose that to you and have you
2 issue it in the same method as before where we would give
3 Plaintiffs approximately thirty days to respond as to why they
4 don't think their case should be dismissed, and then we can
5 clean up another substantial group of cases from the docket.

6 **THE COURT:** We have many -- not many -- several that
7 don't seem to have been categorized in either still pending or
8 settled.

9 How long would it take us to get an order out just
10 showing what those cases are?

11 **(Discussion held off the record.)**

12 **THE COURT:** Okay. Why don't you give us a couple
13 days to put an order out saying what we can't fit into any
14 category, and maybe they're all on your list. But just in
15 case, you folks can doublecheck where they stand and at least
16 let us know on that.

17 **MS. HANIG:** Okay. And then we could do that before
18 we submit the second proposed show cause order.

19 **THE COURT:** Is that agreeable, both Ms. Hanig's
20 proposal and the one I just rolled out? Is that agreeable to
21 the Plaintiffs' Steering Committee?

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

23 **THE COURT:** Okay. I think I probably -- I think
24 Agenda Item Number 6 is probably in my lap, unless somebody
25 wanted to add something.

1 I've been trying to revise what Biomet submitted, and
2 I understand that Biomet did not intend for it to sound like we
3 were making the state courts do anything. I agree with the
4 Plaintiff to the point that it can be read that way, sort of an
5 I'm from the federal government and I'm here to help you. And
6 I was trying to soften it. But then, after my complaints that
7 nobody is taking cases to trial, we had trials each of the last
8 two weeks, so I don't quite have it done, but I would
9 anticipate finishing it in the next couple of days and enter an
10 order proposing it, and give everybody ten days or so, or
11 fourteen days, I guess, to tell me why it's good or bad.

12 Was there something else to be addressed, other than
13 what am I doing?

14 **MS. HANIG:** No, Your Honor.

15 **THE COURT:** Okay. And does that cover it from the
16 Plaintiffs' standpoint? Is that workable?

17 **MR. DAVIS:** Yes.

18 **THE COURT:** Okay.

19 **COURT REPORTER:** Who was that, Judge?

20 **THE COURT:** Who was that? I'm sorry.

21 **MR. DAVIS:** That was Alex Davis for the Plaintiffs,
22 Your Honor.

23 **THE COURT:** Okay. Okay. Thank you, Mr. Davis.

24 That's the end of the agenda, even with my rotator
25 cuff added to it.

1 Was there anything else the Plaintiffs wanted to
2 address today?

3 **MS. FULMER:** No, Your Honor.

4 **THE COURT:** Anything for the Defendant?

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

6 **THE COURT:** Do we have a date? We don't have a date
7 for our next conference, do we?

8 I'll tell you what. Maybe -- no. Let's pick a date.
9 And if I have to move it, I move it. How about -- I'm just
10 trying to be sure that I will be able to operate. And,
11 obviously, if you need something between now and then, we've
12 got a magistrate judge, if I'm not available, who knows a lot
13 about what's going on here.

14 How about November 3rd? That's a Thursday. That
15 might be the safest time. I think we have been doing it at
16 1:30, and we moved this because of the possible hearing in
17 Saint Joseph Circuit Court, Indiana. So how about 1:30 on
18 November 3rd?

19 I see nods from people physically here.

20 **MR. WARD:** Your Honor, this is Navan Ward.

21 I'll actually be in trial at that time, but to the
22 extent one of the other Plaintiffs' Steering Committee
23 members or others in the Plaintiffs' Steering Committee is
24 available, then that will certainly work for us.

25 **THE COURT:** Okay. Well, I can adjust it. I'm afraid

1 I'd have to move it further down the road, and maybe we'd do
2 better to keep it there, if you're comfortable with -- if the
3 the Steering Committee is comfortable with the others handling
4 it.

5 **MS. FULMER:** Your Honor, this is Brenda Fulmer on
6 behalf of Plaintiffs.

7 Unfortunately, I'm going to be in depositions all
8 that day in South Carolina, so if it's possible to move it by
9 just a few days, I would request that of the Court.

10 **THE COURT:** How about November 7th? That's a Monday.

11 **MS. FULMER:** That's fine with me.

12 **THE COURT:** From Biomet?

13 **MR. WINTER:** Works for Biomet, Your Honor.

14 **THE COURT:** Okay. Well, let's set it for 1:30 on
15 November 7th. If something comes up between now and then, let
16 my chambers know. I may be able to handle it or, if not, I
17 entered the reference to Judge Gotsch. In case people don't
18 know, Judge Gotsch is the now former Saint Joseph Circuit Court
19 judge here in South Bend who was handling -- the Indiana
20 Supreme Court had centralized several of the state cases, state
21 Biomet metal-on-metal cases, in front of him, and he began as
22 our magistrate judge about two weeks ago, so he's a little
23 further up to speed than another new magistrate judge might be.

24 But, hopefully, I'll be able to handle whatever comes
25 up, and, alternatively, nothing will come up between now and

1 1:30 on November 7th.

2 Okay. Thank you very much, folks.

3 **(Proceedings concluded.)**

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