

1 **THE COURT:** This is Cause Number 12MD2391,
2 Multi-District Litigation Docket 2391, **In Re: Biomet**
3 **M2a-Magnum Hip Implant Products Liability Litigation.**

4 We are gathered, I guess, in person, and also there
5 are some people on the phone, I'm told, for a status conference
6 today.

7 If I could ask you folks to state your appearances,
8 for the record, please.

9 **MS. FULMER:** Brenda Fulmer --

10 **MR. DIAB:** Amend Diab, Plaintiffs' Steering
11 Committee.

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

13 **MR. DIAB:** Ahmed Diab, on behalf of the Plaintiffs'
14 Steering Committee.

15 **THE COURT:** Mr. Diab.

16 **MS. FULMER:** Brenda Fulmer, on behalf of the
17 Plaintiffs.

18 **MR. WARD:** Navan Ward, on behalf of the Plaintiffs.

19 **MR. LaDUE:** John LaDue, on behalf of the Defendants,
20 Your Honor.

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

22 John Winter, on behalf of Defendants.

23 **THE COURT:** Okay. And, I guess, for the record,
24 Mr. Diab is with us by phone, and everybody else who spoke up
25 is here in person.

1 I do have the agenda that was submitted. Point 1 is
2 the active case count.

3 **MR. LaDUE:** I'll take that, Your Honor.

4 We're at --

5 **THE COURT:** I don't see Ms. Hanig here.

6 **MR. LaDUE:** I'll be playing the role of Ms. Hanig.

7 **THE COURT:** Okay.

8 **MR. LaDUE:** We're at 248 on the active case count.

9 And just, then, quickly, to the second agenda item on
10 the discovery update, Group 3 closes discovery tomorrow, and
11 we're on track to wrap it up. Then, we have one or two cases
12 that were -- we had a deposition rescheduled and agreed to take
13 it beyond the deadline, but, other than that, Group 3 will be
14 wrapped up on schedule.

15 Group 4, we're beginning with Plaintiffs' and
16 surgeons' depositions.

17 We do have a couple of cases where we've got
18 authorizations that are past the deadline for two Plaintiffs --
19 those are the **Bauman** case and the **Guyenn** case -- and we need to
20 remedy that if we're going to continue to keep them in that
21 group.

22 And then Mr. Winter will address Item Number 3.

23 **THE COURT:** Okay. That's the Group 5 cases?

24 **MR. WINTER:** Yes.

25 Again, good afternoon, Your Honor.

1 **THE COURT:** Good afternoon.

2 **MR. WINTER:** Your Honor, I want to say early in July,
3 Ms. Fulmer and I had a conversation about putting Group 5
4 together, and what I said at the time was: There were not
5 sufficient numbers of new cases where a completed fact sheet
6 and authorizations had been provided to, sort of, meaningfully
7 put something together. And, I said, you know: As soon as we
8 get to that point, we'll meet and confer and figure out what
9 Group 5 looks like.

10 Ms. Fulmer reminded me yesterday, I believe, that we
11 needed to do that. And what I said to Ms. Fulmer is: We will
12 send you a proposed Group 5 list next week because we've gone
13 back and checked a number of recently-submitted fact sheets.
14 We also told Ms. Fulmer that we think there are a couple of new
15 cases or cases that, with discovery, fit the summary judgment
16 rulings you made on statute of limitations.

17 So what we would like to do is figure out a way,
18 given the road map that you have created -- whether it's five,
19 whether it's seven cases -- come up with a procedure to do
20 discovery in some of them and then tee up whatever motion
21 practice would flow from that, but we, I think, will have a
22 Group 5 together middle of September.

23 **THE COURT:** And that would be about fifty --

24 **MR. WINTER:** Yeah.

25 **THE COURT:** -- but some of them, five to seven of

1 them, would involve the issues that you want to address because
2 of the prior rulings?

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

4 I mean, the working hypothesis is we would come up
5 with a group of, approximately, fifty cases. And, in July, we
6 were pretty short of that number so that's why we've delayed it
7 a bit.

8 **THE COURT:** Is that approach agreeable to the
9 Steering Committee?

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

11 **THE COURT:** Okay. All right. Then, I will assume
12 you folks will put together a Group 5 and I will wait to see
13 what it gets filed.

14 What we're going to do at our end, we're going to
15 send out a list of cases and invite your comment on them.
16 They're cases that we don't show in any group. And, just from
17 a chronological standpoint, it felt like they should be there.
18 And I know some of them may have been settled and not dismissed
19 yet, but just so we know the status of those, if there's a
20 reason they got skipped or if they fell through the cracks or
21 the word on them fell through the cracks. So we'll get that
22 out next week and give you folks a period of time to let us
23 know if they were in a group; if they're not in a group, why,
24 okay.

25 Deposition scheduling issues in pro se cases.

1 **MR. LaDUE:** We had noted two of those, Your Honor.
2 These are both cases where we were having trouble getting the
3 Plaintiff to agree to sit for a deposition.

4 The issues in Mr. Babcock's case have been resolved
5 because Plaintiff Babcock is now represented, so we've got that
6 under control.

7 We still haven't been able to schedule a deposition
8 in -- Plaintiff's deposition in the **Hamm** case. We've tried
9 several times. We just want to bring it to the Court's
10 attention. We're going to try one more time. And if we're
11 unable to do that, we'll move to dismiss.

12 And then last time we were together, Your Honor,
13 before the last CMC, we had identified two cases that were ripe
14 for dismissal: The **Pendlebury** case and the **Jarquio** case. I
15 believe, during the last case management conference, Your Honor
16 agreed that those were ripe for dismissal. I just wanted to
17 remind the Court.

18 **THE COURT:** I just dismissed it within the last two
19 hours.

20 **MR. LaDUE:** Thank you.

21 **THE COURT:** You probably don't have word yet, but
22 they are working their way toward a docket entry.

23 **MR. LaDUE:** I have not.

24 And, Your Honor, if it's okay with you, we'll skip
25 Number 5 for a second and just move on to Number 6, with

1 pending motions, because we can get through those pretty
2 quickly.

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

4 I will tell you, also, that yesterday I granted the
5 extension of time in **Elkins**. You may have gotten that. I
6 don't know about travel.

7 **MR. LaDUE:** I saw that. I saw that one, Your Honor
8 so we don't need to talk about that.

9 I don't think we need to talk about **Eastman** either
10 because I just saw the Court's order giving Mr. Eastman until
11 September 14th to respond to Biomet's motion for summary
12 judgment.

13 That leaves the **Beltran** issue, and Mr. Winter will
14 address that.

15 **MR. WINTER:** Your Honor, this is a case that was
16 actually subject to motion practice some months ago, in terms
17 of whether or not it should go into Group 3, and you said it
18 should go into Group 3.

19 The Plaintiffs, in **Beltran**, now want to deviate from
20 the set procedures for any case in a group, and we don't think
21 that that's right for multiple reasons, and we'll be filing our
22 opposition, I believe, next week.

23 **THE COURT:** Okay. Are you folks handling the **Beltran**
24 case or is that another originating counsel?

25 **MR. WARD:** That's originating counsel, Your Honor,

1 and so the PSC can't speak for the Plaintiffs in that.

2 **THE COURT:** Okay. That's fine.

3 You might want to just let originating counsel know
4 that a motion is anticipated next week so they're not getting
5 swamped with motions in the other 247 cases and watch for this
6 one.

7 **MR. LaDUE:** And, then, Your Honor, you're aware; the
8 **Daubert** motions have been filed. Most of the oppositions have
9 been filed, as well, and then we have reply briefs due on the
10 28th of this month.

11 The briefing on the **Daubert** motion regarding
12 Dr. Kantor has run on a bit of a different schedule. The
13 response to Biomet's motion to exclude Dr. Kantor's testimony
14 is expected on the 31st of this month, and then our reply will
15 follow, and those should be fully briefed mid-September.

16 **THE COURT:** I think the summary judgment briefing is
17 running just a little behind that.

18 **MR. LaDUE:** That's true; yes, Your Honor.

19 **THE COURT:** So everything should be ripe by
20 mid-September then --

21 **MR. LaDUE:** Yep.

22 **THE COURT:** -- at least unless something arises that
23 we don't foresee?

24 **MR. LaDUE:** That's correct, Your Honor.

25 And then that leaves just the discussion about timing

1 on remand and so on.

2 **THE COURT:** Let me throw out something that might
3 short circuit that. Although, if you want to talk about it
4 after I'm done, I'll be happy to.

5 It seems to me that we can't really talk very
6 meaningfully about what we do as far as the next step toward
7 wrapping up the MDL, whether it involves more trials or just a
8 fond wave, until we know what's going to happen with the
9 **Daubert** motions and the summary judgment motions. So, I think
10 what I would propose to do -- and I appreciate and I have read
11 your submissions and appreciate your giving thought to it and
12 it's given me food for thought on those, as well -- but I think
13 probably we'd do best to save our discussion of it until after
14 the rulings are out in **Daubert** and the summary judgment
15 motions, just so we can talk realistically about what we're
16 going to do.

17 Did I read in somebody's submission that you're
18 planning to do trial depositions -- depositions of the experts
19 or videos of the experts intended for use at trial?

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

21 The Plaintiffs' Steering Committee intends to
22 preserve the testimony of the generic expert witnesses so that
23 that could be utilized by Plaintiffs' counsel across the
24 country after remand. It seems the most efficient way to deal
25 with that because the expert availability might be a problem

1 for them later on down the road.

2 **THE COURT:** Do you plan to do it -- and "you" is
3 everybody in the room here -- do you plan to do it for both the
4 Defendants' experts and for Plaintiffs' experts?

5 **MS. FULMER:** We haven't had an opportunity to speak
6 with the Defendants about whether they would like to preserve
7 testimony, as well, but we felt that it was essential for the
8 Plaintiffs, and it's pretty much, you know -- pretty standard
9 procedure for MDLs that are going into a remand phase.

10 **THE COURT:** Okay. I was just curious as to where you
11 stood on that.

12 As far as the timing of the ruling on the **Daubert**
13 motions and the summary judgment, ordinarily I hold oral
14 argument on dispositive motions, including **Daubert** motions,
15 which are potentially dispositive. I've been trying to
16 visualize how we would do that with, what, seven **Daubert**
17 motions, nine, and a couple of summary judgment motions. So, I
18 guess my anticipation -- and, again, I'm happy to -- none of
19 this is written in stone, but my anticipation is we might do
20 best for us to just go ahead and rule on the paper, unless
21 somebody has a specific case where they think argument would be
22 helpful.

23 I have not looked at them to see how much overlapping
24 there is, but I would think it would probably not be so much
25 that you could actually stand up and make an argument that

1 applies to all the **Daubert** motions. I think you would have to
2 be, sort of, expert specific, at least that's how it looks to
3 me at this point.

4 Do the Plaintiffs have anything to suggest on that?

5 **MR. WARD:** Well, Your Honor, we're fairly confident
6 in our briefs in that they speak for themselves. I think,
7 ultimately, the decision on if any clarification is needed, it
8 would be by the Court.

9 **THE COURT:** Okay.

10 **MR. WARD:** And so I don't know if the Court would
11 want to, first, view them, and then if they have any issues
12 that may need clarification -- maybe not all of them but some
13 of them -- request oral arguments or allow us to request oral
14 arguments in order to clear up any of those issues.

15 **THE COURT:** Okay. And for the Defense?

16 **MR. WINTER:** Your Honor, we'll be guided by, you
17 know, your thinking. When you have reviewed all of the papers,
18 you may decide that there are issues that you want discussion
19 on. And however that gets structured, we're, you know, ready
20 willing, and able to do that.

21 **THE COURT:** I'm a fan of oral argument, but I was
22 trying to just picture exactly how we would go about doing it,
23 unless we did all of them back to back to back.

24 **MR. WINTER:** Your Honor, just to go back to this
25 trial preservation --

1 **THE COURT:** I had the sense that there wasn't a full
2 agreement on that yet.

3 **MR. WINTER:** You're a hundred percent correct,
4 Your Honor.

5 And not to go into the merits of someone saying, "You
6 shouldn't preside over a trial," to then say, "We want to take
7 trial preservation testimony," after you've said everything is
8 case specific so there's no need for a trial -- so let's put
9 that discussion to the side for a second -- we don't believe
10 that we should have trials by video on remand, so, it's -- I
11 mean, and I know they, my colleagues, say it's standard
12 practice. I mean, we've all been doing these type of
13 proceedings for many, many years, and I've never seen it as,
14 quote/unquote, standard practice when you don't have trials,
15 but you do trial preservation depositions.

16 **THE COURT:** I think I probably zipped on down the
17 road with that question because, obviously, you folks are still
18 looking forward to meeting and conferring, but I had just seen
19 that in the status reports or the proposals and was curious
20 about it.

21 **MR. LaDUE:** Your Honor, if I can make a suggestion on
22 the Daubert motions?

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

24 **MR. LaDUE:** It would be difficult to hold oral
25 argument on every pending motion. I think it would probably,

1 largely, be a waste of time to try to address them all at once
2 because we'll probably be rehashing ground you don't need any
3 guidance on.

4 But if the Court had specific questions, perhaps the
5 next time we meet for a case management conference, you could
6 just tell us, "I would like to have an argument, but I want you
7 to focus your argument on these questions that I have. When
8 can we set that," and then we can agree to a date and argue it
9 then. I think that might be an efficient way to handle it, if
10 the Court has any questions. Perhaps next time we meet you'll
11 say you don't.

12 **THE COURT:** No, I think that is what I would be doing
13 because I think that -- again, not having been through them
14 because I'm waiting until they're ripe, I don't know if I will
15 have such motions, but, obviously, I won't hesitate to say,
16 "Everybody, let's get together on such and such a date, even if
17 it's only by phone, and talk about this issue," because I find
18 hearing from you to be very helpful.

19 **MR. WARD:** And, Your Honor, I know that -- right here
20 (indicating) -- I know that, in the past, we've had biweekly or
21 bimonthly meetings between CMCs, case management conferences,
22 and so if the Court saw fit to utilize one of those time frames
23 to give us any type of feedback that you may have on those, I
24 know the Plaintiffs would be, certainly, amenable to being able
25 to hear your thoughts on whatever needs clarification during

1 that time frame.

2 **THE COURT:** Appreciate it.

3 Or, I guess, the flip side of that is I might let you
4 know a couple weeks before the conference that I want to hear
5 about such and such so we can keep it moving.

6 That covers everything on your agenda. And, other
7 than issuing the list of cases that we can't find a group for,
8 that covers everything on my end, other than picking a date for
9 the next get-together.

10 Anything further for the Steering Committee?

11 **MR. WARD:** No, sir.

12 **MS. FULMER:** I don't believe so, Your Honor.

13 **THE COURT:** Or for the --

14 **MR. WINTER:** Nothing from Biomet, Your Honor.

15 **THE COURT:** Why don't we run out about two months, at
16 this point, because obviously -- if something comes up that you
17 need me to rule on, that's fine. But, otherwise, I think we
18 would do best for me to focus on the **Daubert** matters and the
19 summary judgment motion. And, obviously, if something comes up
20 in between those times that I need input on, I'll get hold of
21 you.

22 So, I guess we'd be looking sometime around October,
23 the tail end of October. How about 1:30 on October 26th?
24 That's a Thursday. And we can do it by phone, if there's no
25 reason to get together. I have no -- I don't know that there's

1 going to be a lot happening between now and then, other than
2 possibly ruling.

3 **MS. FULMER:** Does that work for you? I don't have my
4 calendar.

5 **THE COURT:** Does that work for Plaintiffs?

6 **MR. WARD:** Yes, that works for Plaintiffs.

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

8 **MR. WINTER:** Works for the Defendants, Your Honor.

9 **THE COURT:** Okay. I guess, why don't we show it as
10 live, but if it turns out a week or so before that -- well,
11 that doesn't work because -- well, yeah. If it turns out a
12 week or two before that we don't have anything worth getting
13 together in person, incurring the travel expenses, we can
14 convert it to phone, okay.

15 Okay. Good seeing you all, and I will --

16 **MR. LaDUE:** Thanks, Your Honor.

17 **MR. WARD:** And, Your Honor -- I'm sorry -- what time?
18 Did you give a time?

19 **THE COURT:** Oh. One-thirty.

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

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

22 **MR. WINTER:** Have a good day.

23 **THE COURT:** Thanks. You, too.

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

25