

1 **THE COURT:** Good afternoon.

2 This is our Cause 12MD2391, MDL Cause 2391, **In Re:**
3 **Biomet M2a Magnum Hip Implant Products Liability Litigation.**

4 We are gathered for our regularly-scheduled joint status
5 conference.

6 If I could ask counsel to state their appearances for
7 the record.

8 **MR. WARD:** Good afternoon, Your Honor. Jasper Ward
9 on behalf of Plaintiffs.

10 **THE COURT:** And Mr. Ward is present in Court.

11 I understand there are other counsel on the line from
12 the Steering Committee?

13 **MR. WARD:** Yes, Your Honor. I believe --

14 **MS. PALMER:** Yes, Your Honor.

15 **THE COURT:** Who is here?

16 **MS. FULMER:** Your Honor, it's Brenda Fulmer on behalf
17 of the Plaintiffs.

18 **THE COURT:** Ms. Fulmer.

19 Anybody else from the Steering Committee who's going
20 to participate by phone?

21 **MR. DIAB:** Good morning, Your Honor. Ahmed Diab for
22 the Plaintiffs.

23 **THE COURT:** Mr. Diab.

24 Is that it?

25 Okay. And for the Defense?

1 **MS. HANIG:** Erin Hanig on behalf of the Defendants.

2 **MR. WINTER:** Good afternoon, Your Honor. John Winter
3 on behalf of Defendants.

4 **MR. LaDUE:** John LaDue for Defendants, Your Honor.

5 **THE COURT:** Counsel.

6 I have your joint status conference. I've got a
7 couple of questions this time as we go along, but let's go
8 ahead and proceed in the order that you put things.

9 First would be the active case count, and I generally
10 turn to Ms. Hanig for that.

11 **MS. HANIG:** Sure, Your Honor. So, we are at 310
12 cases currently pending that we think are active, with a couple
13 cases on the way from transfer.

14 **THE COURT:** Okay. Any disagreement from the
15 Plaintiffs?

16 **MR. WARD:** No, Your Honor. Thank you.

17 **THE COURT:** Okay. Discovery update?

18 **MS. HANIG:** Your Honor, on the status of Group 5, we
19 are underway. We have received updated authorizations and
20 plaintiff fact sheets for a good group of those Plaintiffs. We
21 are in the process of scheduling Plaintiff depositions, so
22 we're moving pretty smoothly, so far.

23 **THE COURT:** Okay. Agreed?

24 **MR. WARD:** We agree. Thank you.

25 **THE COURT:** All right. Proposed statute of

1 limitations, statute of repose, and spoliation groups?

2 **MR. WINTER:** Your Honor, the parties are still
3 meeting and conferring over the four corners of the order that
4 we intend to submit to you. We've imposed, on both sides, a
5 deadline of getting something to you in less than two weeks
6 from today.

7 **THE COURT:** Tell me generally -- obviously, I don't
8 want to know the nuts and bolts of the dispute, but tell me
9 generally what you folks are working toward.

10 **MR. WINTER:** We've taken your order from December --
11 I'm blanking the date -- in 2015 and have followed the same
12 template for statute of limitations and spoliation and now
13 statute of repose for a group of the cases that didn't fit in
14 the first couple of groups. But based on obvious dates, based
15 on your rulings before on spoliation and statute of
16 limitations, we think those cases fit into the criteria, as
17 you've already defined them.

18 **THE COURT:** Okay. Now, when we went through this
19 before, I know you had your bar date argument, and I understood
20 that, but I assume it was so that you didn't waive anything.
21 There were also several state court arguments, and I did kind
22 of find myself swimming with state law in Arkansas.

23 Is that where we are headed here or would this be
24 more of a uniformed law approach? I'm not clear what you're
25 contemplating.

1 **MR. WINTER:** Your Honor, you ruled on, I believe,
2 eight statute of limitations summary judgment motions.

3 **THE COURT:** Yeah.

4 **MR. WINTER:** And in those eight rulings, you were
5 pretty clear as to how you thought the statute of limitations
6 would work. We all know what is a two-year or three-year state
7 and when the revision was and what was in a medical record, so
8 we've followed the same template, same mindset that applied
9 when you ruled the last go round.

10 And on spoliation, it's the same. You've set pretty
11 clear ground rules there. Following the ground rules you've
12 already set, we think there's a finite group of new cases that
13 fit the criteria, as you've defined it, so we're not plowing
14 any new ground at all.

15 The only other thing I'll add, Your Honor, is now we
16 have statute of repose issues, which, I mean, Indiana has a
17 10-year statute of repose, so those are not really hard to
18 figure out. You figure out the date of implant, the date of
19 sale, and whether it's six years, ten years, or twelve years,
20 you have a lawsuit filed, so it's a pretty -- very
21 straightforward, not difficult approach to particular matters.

22 **THE COURT:** Mr. Ward, does that sound generally --
23 and I'm not asking you to agree or disagree with what happens,
24 but is that your understanding of the direction we're headed?

25 **MR. WARD:** I believe so, Your Honor. I think that

1 it's just something we need a little more time to work through
2 with them, and we hope, in two weeks, we can get something to
3 you.

4 **THE COURT:** Okay. I have looked over your proposals
5 regarding remand procedures pretty thoroughly, and I guess the
6 best thing to do would be, if anybody wants to expand on them,
7 I would hope to get something out this week so we know
8 generally what we're doing.

9 But let me first turn to the Plaintiffs and see if
10 there's anything that you want to expand on or add or retract.

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

12 We were not -- we received the Defendants' proposal
13 at the same time the Court did and so we have not had a chance
14 to meet and confer with them on various differences, and we
15 would be open to that process. However, to the extent the
16 Court is ready to get moving, we are, as well.

17 The only, I think, major area of disagreement would
18 be the expert trial testimony. I think that's something that
19 we would like an opportunity to discuss today in more detail
20 and, if possible, to follow up with some papers, because we
21 think a pretty clearly settled way to handle MDLs is to take
22 one general causation testimony expert. We had sort of
23 envisioned it occurring in this courtroom and with Your Honor
24 presiding over it and ruling on objections and then making that
25 available in a remand trial package.

1 The parties on remand can designate various parts of
2 that testimony, as they see fit, and the remand package would
3 include this Court's instructions to the transferor courts on
4 how to handle various objections and how to handle various
5 rulings. We think that that would be the most appropriate way
6 to move the cases forward.

7 Having what we think -- well, we think Biomet sort of
8 conflated the expert issue with the summary judgment issue in
9 discussing that it would need to be a state-by-state or a
10 case-by-case analysis. On summary judgment, we think the
11 Court's already been pretty clear on the **Daubert** ruling, and we
12 would not want this to be an opportunity for them to get
13 another bite at the apple on challenging expert testimony, so
14 that's the legal side of it.

15 **THE COURT:** Wouldn't there be difference in the
16 phrasing of opinions between, say, Minnesota and Texas? Might
17 they not have to give differently worded, similar opinions?

18 **MR. WARD:** Well, and that's what we would envision
19 the trial testimony in this court being, would be we would go
20 and be comprehensive and get as much testimony as we could from
21 those experts, and let Biomet challenge and let Biomet
22 cross-examine, and then a Plaintiff in Texas would take a
23 different designation from that transcript and from that video
24 than a Plaintiff in Minnesota, you know, to the extent that
25 their laws are different, so we would attempt to elicit every

1 phraseology or every magic word required, and the Court could
2 rule on the substance, obviously, at the time. But our goal
3 would be to provide Plaintiffs in those states with a
4 ready-made trial package, which would both save their
5 resources, save judicial resources, not having to deal with
6 experts coming in live at trial and dealing with objections
7 during trial and basically redoing the **Daubert** process, once
8 the parties got back to state court or to court in their home
9 state.

10 **THE COURT:** Anything else you wanted to address in
11 your proposal?

12 **MR. WARD:** I mean, I think that the timing -- I think
13 we're a little bit different on timing. Again, we're happy to
14 work with them on that. We're fine moving forward, according
15 to our schedule or some combination thereof between ours and
16 theirs, but I think this issue will impact what that schedule
17 looks like, because we had envisioned having these trial
18 packages ready to go for remand, and I think the scheduling of
19 that would be -- if we are going to have one expert for all the
20 case, which we think we should, scheduling that would be a
21 necessary step before remand or at least having it on the
22 calendar would be necessary before remand.

23 Any other questions I can answer, I'm happy to.

24 **THE COURT:** No. Thank you.

25 **MR. WARD:** Thank you.

1 **THE COURT:** Who speaks for Biomet? Mr. Winter?

2 **MR. WINTER:** Your Honor, here or where do you want me
3 to stay?

4 **THE COURT:** Probably there, just so the microphone
5 picks it up for those who are on the phone.

6 **MR. WINTER:** Yeah.

7 Your Honor, I think it is fairly obvious that the
8 Plaintiffs' approach to this MDL is very different than
9 Biomet's approach. And, very candidly, Your Honor, we can all
10 talk about our MDL experience. The PEC's, the second Steering
11 Committee's, approach to this MDL, I have never seen or heard
12 of anything similar.

13 You have, on multiple instances invited whether we
14 have a bellwether trial, and they say they're not waiving
15 Lexicon. You've made offers for different types of discovery,
16 in terms of experts, and they have not taken that up.

17 They, meaning the PEC, has been really circumspect in
18 the discovery they asked Biomet for, and we appreciate that.
19 And when it came time for **Daubert** motions, they took a position
20 which they're entitled to take. And at summary judgment, they
21 took positions which they're entitled to take.

22 But you can't say, "Judge Miller, you can't rule on
23 summary judgment because there's too many issues of state law."

24 And you, you know, you're like the umpire. You call
25 balls and strikes. So you decided that it was a strike or a

1 ball, depending on how you want to approach something, that you
2 were not going to engage in that level of analysis. We thought
3 you should have, but, you know, you've ruled. But that ruling
4 means that these cases go back to the transferor courts in the
5 state that they are in now.

6 The notion that, somehow, one expert could sit in
7 this courtroom -- and I'm going to suggest to you we're going
8 to be doing it for days -- where a question comes up, "Object
9 to the form, Your Honor. What state is that question linked
10 to," that's what we would have to do; or, "Objection,
11 Your Honor. That's a question that goes to whether Biomet's
12 regulatory compliance is a rebuttable presumption of adequacy
13 of warnings. So what state is that question geared to,
14 Your Honor;" or, "We object to the form of the question
15 because, in Texas and in" -- I'll make up another state -- "New
16 Jersey, there's a rebuttable presumption of adequacy, and it
17 applies to 510(k)s. It doesn't apply in Michigan. So we want
18 this question phrased that way for the New Jersey and Texas
19 Plaintiffs," that's what we would have to do, in theory.

20 We, Biomet, identified multiple experts, because we
21 believed, when there was going to be no bellwether trials --
22 which is how most of this gets sorted out. In fact,
23 universally that's how this gets sorted out -- by saying no
24 bellwethers, we realized we were going to have the possibility
25 or probability of multiple trials in different transferor

1 courts at or near the same time, so we needed multiple experts
2 so that we could try those cases.

3 The Plaintiffs -- I mean, we'll debate whether like
4 they can have two experts or one. They picked one expert. So,
5 okay. They want to ride that particular horse, that expert.
6 Then that expert's going to have to go multiple places.

7 Now, at some point, after ten trials in transferor
8 courts, we probably will have a sense of what evidentiary
9 rulings are. Maybe it will happen sooner. And the process
10 then gets a little bit more streamlined, but that would be how
11 that process works itself out.

12 I mean, Your Honor, to say, "Now we're going to do
13 like some canned expert deposition," I mean, we've laid out to
14 you all the reasons why expert testimony live, particularly,
15 you know, in cases where it's a battle of the experts, is so
16 critical.

17 So, you know, if they want a specific case that's
18 pending in New Jersey, and they have a case in Oklahoma, and it
19 turns out the expert can't be in both places at one time, well,
20 then, that's how you do de bene esse depositions, and everyone
21 works it out.

22 We actually put that in our proposal. We're not
23 saying it wouldn't be impossible, in a specific case, to have
24 someone videotaped, but that's like a standard way things work.

25 Just to have this other aspect, Your Honor, we

1 vehemently object to it.

2 We said, when we had this discussion back in 2016,
3 that you can't have your cake and eat it too. Either you were
4 going to decide a lot of these issues, and the parties would
5 have to consent to it, or you're not going to decide a lot of
6 those particular issues. And you took that path of there's too
7 many state law questions, and a consequence of that is this
8 thing that's been proposed, A, would be inconsistent. It's
9 almost like we're at a law of the case point here, that you
10 can't do that.

11 As to the other aspects of remands, we're actually
12 not too far apart. We're all actually -- you know, we're
13 tracking maybe -- we may be 30 or 45 days off, which, you know,
14 that's like easily solved. You know, you could split the
15 difference almost, Your Honor. And how they would get
16 remanded, the order, I think everyone, more or less, is in sync
17 on that. I don't think anyone is going to debate that, when
18 these cases go back to the panel to then go to wherever they're
19 going to go, a road map needs to be created.

20 But it's just this one particular issue, Your Honor,
21 we feel really strongly. The way this MDL has been litigated
22 by our esteemed colleagues, they took a path. And, you know,
23 you make your bed; you've got to sleep in it. It's that
24 simple, Your Honor.

25 **THE COURT:** Let me ask a couple of other questions

1 that came to mind as you were speaking, and I didn't want to
2 interrupt, so now I have to recapture them.

3 On the remands, one place you're different is how
4 many and where they would come from, I think fifty or a hundred
5 and that sort of thing.

6 What would be wrong with making waves based on the
7 group that the case is in, so there can't be any dispute except
8 if somebody says, "My client is in serious health problems or
9 infirm"? Would that be cleaner than -- as clean, I guess, as
10 what's been proposed by both sides?

11 **MR. WINTER:** Your Honor, we said fifty; they said a
12 hundred.

13 **THE COURT:** Right.

14 **MR. WINTER:** But, actually, we're saying the same
15 thing, because, right now, there are just a little more than
16 fifty Group 1 and 2 cases left.

17 So our colleagues said, "Group 1 and 2 is a hundred
18 cases. Send the hundred."

19 Group 1 and 2, today, right now, I think, is like
20 fifty. We gave you the numbers. So we're both on the same
21 page going by Group 1 and 2.

22 And to the extent, when we get to the actual remand,
23 if five, six, seven, or eight of them went, you would pull from
24 Group 3 into that first. And then whatever was left in Group
25 3, Group 4, and Group 5 would be the next wave to go. And then

1 whatever is left, I think, is the third wave.

2 So the parties actually are contemplating the same
3 thing. And we'd go through Groups 1 and 2, and maybe part of
4 3, just to make it fifty, and then whatever is left makes the
5 next fifty. So I think everyone is -- what you're suggesting
6 is what the parties have proposed, I believe.

7 **THE COURT:** Okay. It looked to me like you had seven
8 waves and they had three or four.

9 **MR. WINTER:** No, no. We were thinking three waves or
10 maybe four waves, whatever comes in, until the cutoff of --
11 like no direct filing and no -- that group of cases that would
12 come in basically in 2018 would become Group 7, which would be
13 the last remand group, but I think we said three different
14 waves, which would capture, basically, everything filed through
15 the end of 2017.

16 And if it turns out that we get to a point where
17 there's, somehow, a group of cases from early this year that
18 could be remanded at the end of 2018, that would be fine. In
19 fact, we suggested making Group 6 bigger than traditionally has
20 been so we can capture more of the cases, to get them out and
21 in an efficient, expeditious way.

22 **THE COURT:** Thank you. I think that's all I can
23 remember I wanted to ask.

24 **MR. WINTER:** Your Honor should feel free to interrupt
25 me going forward.

1 **THE COURT:** That's fine.

2 Mr. Ward, do you want to respond?

3 **MR. WARD:** Yes, Your Honor, if I could respond,
4 briefly.

5 And this is something we would be happy to brief, on
6 the issue of the general expert, causation depositions and
7 trial testimony.

8 Just last year, in the Ethicon pelvic mesh
9 litigation, MDL 2327, this exact same issue came up. The
10 parties briefed it, and the magistrate judge, in PTO268,
11 allowed the plaintiffs to take a de bene esse deposition of one
12 of the experts.

13 And so we feel like this is something that might be a
14 little easier to deal with in briefing, if the Court would like
15 that.

16 **THE COURT:** Well, my only hesitation is I'd like to
17 get the timetable out quickly. I may want it. I'm not sure
18 I'm going to be ready to rule right now, but I don't want to
19 delay getting the -- I think you're right, that the rest of the
20 timetable turns on that a little bit. If you don't need time
21 to take up to -- I don't know -- nine depositions to preserve
22 testimony, that's one thing. If you do, that's another thing.
23 So I don't know how long I would want to wait on briefing.

24 Let me ask you this, though: How do you --
25 Mr. Winter outlined a prospect of continued objections

1 throughout the proceeding. How do you anticipate the testimony
2 proceeding, and would my -- not **Daubert**, because that may be
3 seen as a pretrial matter. But in trial evidence rulings, do
4 you see -- what impact does that have on the transferor court,
5 since I don't have the right to try the case, absent a Lexicon
6 waiver.

7 **MR. WARD:** Well, and I think that's where it would
8 depend on what the objections were and what the issues were. I
9 think the efficiency would come from one set of testimony that
10 has been ruled on by **Daubert** and that your evidentiary rulings
11 would be consistent with that **Daubert** ruling.

12 I think that we could do it many different ways.
13 And, again, we're happy to brief it and think that through a
14 little more and put that on paper because I think it could go a
15 lot of different ways.

16 I think that we could -- if we had a trial testimony
17 that was uncut and unedited, and that once the parties
18 designated, the trial judge -- there were certain issues that
19 you could leave to the trial judge to decide, based on
20 evidentiary rulings, based on that circuit's law, I think that
21 would be one way to go. It could be a mix.

22 There could be issues that you could rule on. There
23 could be issues that, once the parties argued about it, once an
24 objection was made, you could say, "Well, that's not really for
25 today. I will leave that to the transferor court."

1 And I think the goal would be to get the trial
2 package in as much detail and as much pre-remand work and
3 efficiency as possible. But there absolutely will be issues
4 that could be left to the trial court, but that's why we would
5 have a consistent testimony, a consistent record, and the
6 parties could designate testimony. And to the extent this
7 Court -- to the extent you didn't feel comfortable ruling on
8 it, there could be issues that could be left to the transferor
9 judge. I think we can work through that, and I think there
10 would be some questions that would be appropriate for one
11 decision that would apply to this expert's testimony under the
12 **Daubert** standard and then other questions that might be under
13 state law, but those could be dealt with on remand.

14 That would be better than having 250 or 300 or so
15 cases with 250 or 300 separate expert disclosures, briefings,
16 trial testimony, and objections that could have inconsistent
17 rulings, it could be inconsistent with, frankly, the way this
18 Court has ruled. And so that's why -- that's sort of our job
19 as the PEC, is to work up these cases for the individual
20 clients on an efficiency basis and on a fairness basis so that
21 they don't have to do that and start from scratch, once the
22 cases are remanded. I mean, it takes time and money and effort
23 to work these up and to get these experts ready. And if that's
24 what people are going to have to do when these cases first get
25 remanded, it's going to add a lot of time to that process.

1 **THE COURT:** What do you contemplate? When you say
2 you would be happy to brief it, how long a period and what do
3 you plan to brief? I'm not clear. I think I have got the
4 authority to rule either way, so I'm not sure what it is you
5 want to brief.

6 **MR. WARD:** We would like to, I think, show examples
7 in MDLs where the avenue that we're proposing has been taken
8 before. I think that it's not as clear as saying that this is
9 how it's done and it's always done this way because I think
10 that that's not really true.

11 I think that the bellwether process, for instance, in
12 the Pinnacle MDL has not produced the sort of resolution to a
13 case that one would expect because every MDL goes differently,
14 so I think what we would ask the Court to do would be to review
15 some of the cases that we cite that are MDL specific and expert
16 testimony specific.

17 The cases that they cite are sometimes a one-off
18 case, sometimes in different procedural posture. And so to the
19 extent that we hadn't had a chance to respond in writing to
20 their briefing on the issue, we'd like to respond. We wouldn't
21 need a ton of time. We could do this relatively quickly.

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

23 **MR. WARD:** Thank you.

24 **THE COURT:** Mr. Winter, the right to close on your
25 position, since both submitted your own propositions.

1 **MR. WINTER:** Your Honor, you have effectively said
2 pretrial proceedings in this MDL have concluded. I mean, you
3 haven't put that in an order, but that clearly is what you've
4 expressed to the parties. MDLs are for pretrial proceedings.

5 What my colleague is describing, I'm not quite sure
6 what it is. You've issued a comprehensive **Daubert** opinion so
7 any judge would know what is the fair, four corners of any one
8 of the experts who have been subject to a **Daubert** motion in
9 front of you. So now then the issue becomes, in a particular
10 state, what are the requirements for regulatory compliance,
11 design defect, adequacy of warning, and how does your almost
12 fifty-page opinion apply to a particular expert.

13 That's the way, you know, it generally works. And
14 it's going to be up to the transferor judges to decide, in a
15 particular case, what is fair ground for an expert to give
16 opinions on and how the form of the question works.

17 My colleague brought up the mesh. There's been, I
18 think, 15 or 20 mesh trials.

19 **THE COURT:** One in this district last week.

20 **MR. WINTER:** Right.

21 **THE COURT:** So that is like a very mature litigation
22 that's like gone on in different ways.

23 And, sure, at some point, you do something with a
24 de bene esse deposition, but you've clearly set out the ground
25 rules here in your summary judgment ruling. And, you know, if

1 everyone wants these cases to go, which, clearly, we actually
2 want them to go because that's how we think we get to the end
3 of this sooner rather than later, we hope you can rule. And,
4 you know, if we need to tweak something, we'll tweak something.
5 But, hopefully, Your Honor, we'll move this along.

6 Thank you.

7 **THE COURT:** Thank you, Mr. Winter.

8 I think I would prefer to just try and get a ruling
9 out. I keep track of what's happening in other MDLs pretty
10 thoroughly, so I'm not sure that citations to others would help
11 a great deal. And I do know that, at least in the mesh case
12 that came back to this district, the depositions came back
13 adorned with many objections. And the lawyers, with the help
14 of the judge, worked their way through them, and I gather the
15 presentations went smoothly, so it apparently has all the
16 benefit that the Plaintiffs speak of and all the detriment that
17 the Defense speaks of. So let me take a few days to think
18 about it. I'll try to get a ruling out Friday or Monday on
19 that issue, and then give you folks -- because I do think
20 that's sort of a lynchpin issue as far as the rest of the
21 schedule -- give you folks a couple weeks to try to come up
22 with a schedule and work from there.

23 **MR. WARD:** Thank you.

24 **THE COURT:** I think that's about the best I can do.

25 On your pending suggestions of remand lists, I

1 understand we've got two that are ripe, one as of today and the
2 others working their way towards ripeness on Wednesday.

3 I have no hand to tip. I haven't gone down through
4 the briefs yet. I've just been watching them come in. But,
5 again, I hope to get a ruling out fairly promptly, not by
6 Friday or Monday but fairly soon because they need to know.

7 That puts me at the bottom of your agenda. Is there
8 anything else for the Plaintiffs, Mr. Ward?

9 **MR. WARD:** No, Your Honor. Thank you.

10 **THE COURT:** Or for the Defendants, Mr. Winter?

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

12 **THE COURT:** Okay. Let's try to pick a date for the
13 next one, build in enough time for us to get the schedule in
14 place.

15 How about 1:00 on May 10?

16 Well, no, actually, I think we're probably getting
17 close to Notre Dame graduation, so the airport would be rough.

18 How about 1:00 on the 17th of May -- that's a little
19 further than where I would go normally, but I've got some
20 conferences to be at -- would that work?

21 **MR. WINTER:** We can make it work, Your Honor.

22 **THE COURT:** Okay. Does that work for Plaintiffs?

23 **MR. WARD:** Yes, Your Honor, we can make it work.

24 **THE COURT:** Okay. And, hopefully, by that time,
25 we'll have the order put together for the rest of the process.

1 Okay. I'll see you then. Have good early springs,
2 have quick early springs.

3 **LAW CLERK:** All rise.

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

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