

1 **THE COURT:** Good morning.

2 **MS. FULMER:** Good morning.

3 This is Brenda Fulmer.

4 **THE COURT:** Okay. Let me set the stage, and then
5 I'll seek introductions here.

6 This is our Cause Number 12MD2391, MDL Docket Number
7 2391, **In Re: Biomet M2a-Magnum Hip Implant Products Liability**
8 **Litigation.**

9 We are gathered by telephone, wisely not an in-person
10 conference, as it turns out, given our weather here, and we are
11 gathered by phone for our periodic status conference.

12 Now, if I could ask you folks to state your
13 appearances for the record, please.

14 **MS. FULMER:** Brenda Fulmer, on behalf of the
15 Plaintiffs' Steering Committee.

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

17 **MS. FULMER:** Good morning.

18 **THE COURT:** Are you the only one?

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

21 **THE COURT:** Mr. Diab.

22 Anybody else?

23 **MS. HANIG:** Erin Hanig and John LaDue, on behalf of
24 Defendants.

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

1 John Winter, on behalf of Biomet.

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

3 Do we anticipate anybody further for the Steering
4 Committee, other than Ms. Fulmer and Mr. Diab?

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

6 **THE COURT:** Okay. We don't have a very long agenda
7 so I'll go ahead and start down through the copy that I have
8 and let you folks speak up.

9 **(Telephone interruption.)**

10 **THE COURT:** Who has just joined?

11 **(No response.)**

12 **THE COURT:** Hello.

13 **(No response.)**

14 **THE COURT:** Okay. The first item on the agenda is
15 active case count.

16 Ms. Hanig, you're usually the person who speaks to
17 that so let me start with you.

18 **(Telephone interruption.)**

19 **THE COURT:** I think we may have fallen apart here on
20 the conference call.

21 Are you there, Ms. Hanig?

22 **MS. HANIG:** Can you hear me, Judge?

23 **THE COURT:** Yes, I can now.

24 **MS. HANIG:** You can hear me? Okay.

25 Okay. So the current number of cases that we have as

1 unsettled is right around 300. The exact number is 303 on my
2 list. However, we're close to resolving a fair number of those
3 so what we would do is propose to give you an updated and
4 complete pending list before the next case management
5 conference so you can see exactly what's left.

6 **THE COURT:** Okay.

7 **MS. HANIG:** The other thing is, I communicated with
8 Jen Darrah, in the Clerk's Office, yesterday, and, by her
9 count, the CM-ECF pending number is 443, so we're getting close
10 to reconciling the number of pending to the number actually on
11 the docket, so that's a good sign.

12 **THE COURT:** Okay. I think it was day before
13 yesterday, I think, quite a few dismissals made it to the
14 docket entry. I don't know if that 443 is before or after
15 those, but --

16 **MS. HANIG:** It's after.

17 **THE COURT:** After?

18 **MS. HANIG:** It's after about 88 dismissals.

19 **THE COURT:** Okay. Do those numbers come reasonably
20 close to what the Plaintiffs figure, Ms. Fulmer or Mr. Diab?

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

22 **THE COURT:** Okay. Discovery update, who wants to
23 speak to that?

24 **MS. HANIG:** So, Your Honor, I'll take that one, from
25 the Defendant's side.

1 Just to give you an update, we are nearly complete
2 with all of Group 2 discovery. There are a handful, I would
3 say maybe 10, of Group 2 cases where physician depositions have
4 not been able to get scheduled before December 26th, in every
5 instance because of the lack of cooperation from a physician's
6 office, so we have informally agreed to extend the Group 2
7 deadline in those cases for the sole purpose of completing
8 those depositions. Some of those physicians are going to have
9 to be under subpoena. We anticipate they will all be completed
10 by mid-January.

11 And my question to you is: Would you like us to file
12 a formal motion for extension in those cases or are you okay
13 with us operating under the understanding, in those cases, that
14 both parties are okay with the extension for that sole purpose?

15 **THE COURT:** My thought would be that, given the fact
16 that we've got a lot of Plaintiffs' attorneys out there who are
17 keeping up -- I know Ms. Fulmer is doing her best to keep
18 everybody updated, but given the fact that we also have some
19 checking the dockets periodically, it might be helpful to -- if
20 you want to submit a stipulation, obviously I'll be happy to
21 approve it, but it would probably be a good thing to get on
22 record.

23 **MS. HANIG:** Okay. So we'll do that in the individual
24 cases that need extensions.

25 **THE COURT:** Okay. Group 3 case list is next on the

1 agenda.

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

3 After this Group 3 list was submitted to you, it was
4 brought to the attention of the Plaintiffs' Steering Committee
5 and Biomet that there were two cases which initially were
6 entered into the parties' respective systems as spoliation
7 cases, and it turns out an amended fact sheet had been served
8 indicating where an explanted device was --

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

10 **MR. WINTER:** -- and that was the reason those two
11 cases had not made Group 3, so it is the consensus of the
12 Plaintiffs' Steering Committee and Biomet that those two cases
13 that are on the agenda really should be part of Group 3.

14 **THE COURT:** Okay. Ms. Fulmer, Mr. Diab, anything to
15 add on that one?

16 **MS. FULMER:** No. That is correct, Your Honor. We
17 would like these two cases added to the Group 3 list.

18 **THE COURT:** Okay. I think I can do that, just
19 including it in the order summarizing today's conference,
20 rather than do anything separate, since we've got the cause
21 numbers, so I'll go ahead and include that here.

22 The next one --

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

24 **THE COURT:** The next one is one that I want to throw
25 something out, too, but I want to hear from you folks, first.

1 The Lone Pine order did go out yesterday for the
2 pro se litigants. And I think everybody knows, but let me
3 state for the record, it was slowed down some by us trying to
4 figure out how exactly to do an order for the pro se Plaintiffs
5 and the metal-on-polyethylene Plaintiffs, and, finally, we
6 split it. The order that went out yesterday was just for the
7 pro ses because it was very hard to do an explanation as to why
8 we were doing it for the represented Plaintiffs in the MOP
9 cases. So that's still out there as to what we're going to do.

10 What I was going to throw out as a question to you
11 folks -- it appears we've got five of them. It appears that
12 four of them were direct files. The fifth came out of
13 South Carolina, was transferred here by the Panel in
14 Conditional Transfer Order Number 93. The Panel did not
15 formally expand the scope of this docket to include anything
16 other than metal-on-metal.

17 I know, when I was on the Panel, I was concerned
18 about the unintended expansion of the scope of dockets by
19 unopposed CTOs because those things can happen for any reason,
20 and I guess my question to you folks is whether these cases
21 really belong in our docket. If they do, that's fine; I'm
22 happy to keep them. But, if not, whether it would be better to
23 enter an order inviting everybody to show cause why I shouldn't
24 suggest remand to the Panel and then send them off, either
25 where they would have been filed originally or back to South

1 Carolina.

2 I guess, since the Defendant probably filed the -- or
3 probably notified the Panel -- maybe not. I don't know how it
4 got into the CTO. But does anybody wish to speak to that or
5 have better ideas? This isn't anything I'm wedded to. I guess
6 I'll start with the Plaintiff.

7 Ms. Fulmer.

8 **MS. FULMER:** Your Honor, I think -- yes, Your Honor.
9 The Plaintiffs' Steering Committee, I believe we've argued in
10 past hearings that we really needed to keep this MDL limited to
11 the cases for which we're actually seeking active discovery, so
12 the Plaintiffs' Steering Committee would be very much in
13 support of these cases being remanded back because we believe
14 they really should not have been included in the MDL from the
15 inception.

16 **THE COURT:** Okay. What's Biomet's view?

17 **MR. WINTER:** Your Honor, when we did the master
18 settlement in this MDL two years ago, there were, I'm going to
19 guess, Your Honor, about a hundred metal-on-poly cases --

20 **THE COURT:** Oh.

21 **MR. WINTER:** -- that was specifically covered by the
22 Master Settlement Agreement. So for people to have filed
23 cases, got them to the MDL, gotten the benefits of that
24 resolution, for those who filed before, whether direct filing
25 or that one case from South Carolina, to, at this point, say,

1 "Okay. Remand our cases," when we're at a point where we think
2 we can efficiently deal with these five cases, rather than have
3 five individual cases, you know, it's -- we think now this is
4 gamesmanship as to what people do in an end game in an MDL. I
5 mean, my colleagues on the other side always want an MDL for
6 certain reasons. Then there's efficiency that kicks in, and
7 everyone understands that there's a benefit to the system for
8 having you efficiently deal with all the cases that were filed.
9 And for them now to say, "Okay. Remand them," which makes this
10 inefficient for us, meaning Biomet, we think the Lone Pine
11 order that actually everyone had agreed to up until, you know,
12 three minutes ago, Your Honor, is what you should enter.

13 **THE COURT:** Okay. Well, I want to clarify. It's not
14 the Plaintiffs in the MOP cases that are proposing remand.
15 That was me.

16 **MR. WINTER:** No, no. I understand that, Your Honor.
17 I apologize.

18 **THE COURT:** I think I was afraid I was misunderstood
19 because you thought it might be gamesmanship, and I can
20 understand that position, but I don't think we've heard
21 anything from them, much less any attempt to gain the system.

22 Okay. Well, the cases on -- you folks put the case
23 on the agenda. Was there anything you were going to propose or
24 simply want to raise the status of the Lone Pine order with
25 respect to those?

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

2 I think we put it on the agenda just to make sure
3 that, you know, it was discussed. We thought we had an
4 agreement with the Plaintiffs' Steering Committee as to the
5 Lone Pine order for the pro ses and for the metal-on-poly
6 cases.

7 **THE COURT:** Okay. Well, let me go back over what's
8 been proposed then. And if I don't have agreement from you
9 folks, then I think it might be inappropriate to go to a
10 suggested remanded at this point. I'll try to get out the Lone
11 Pine order handling it separately. The reason I broke it off
12 is I was afraid I was going to confuse people representing
13 themselves as to who these other people were and that sort of
14 thing, so I'll try to put together a separate order for the MOP
15 Plaintiffs and get that out in the next few days.

16 **MS. FULMER:** Your Honor, may I speak, just to clarify
17 the PSC's position, with respect to this particular issue?

18 **THE COURT:** Sure, please.

19 **MS. FULMER:** We engaged in good-faith discussions
20 with Biomet, and we are not -- you know, if the Court chooses
21 to go down the path of a Lone Pine order for the metal-on-poly
22 cases, then we have not, in any way, backed off from the
23 agreement that we've already reached with Biomet.

24 Today, though, for the first time, since you threw
25 out the option of remand, certainly I feel it's our obligation

1 to say, you know, we believe that that is, perhaps, a better
2 solution than a Lone Pine order, but we have not, in any way,
3 changed our position with regard to the agreement that we
4 reached with Biomet with regard to the language of the Lone
5 Pine order on the metal-on-poly cases.

6 **THE COURT:** Okay. And that's how I understood it.
7 Thank you for the clarification.

8 For the last few weeks, I've been struggling with how
9 to do this in such a way that it wouldn't confuse pro se
10 Plaintiffs who are already getting something they might have
11 trouble understanding any way, and then started wondering
12 whether the MOP cases belong here. I had forgotten that we had
13 a bunch of them to start with and so I'm happy to continue with
14 what you folks had agreed to, except breaking them into two
15 orders.

16 Pending motions. I know we have the motion to
17 enforce settlement agreement. I think Mr. Ward had indicated,
18 at our last conference, that he was going to look into
19 withdrawing that and approaching it differently.

20 Does anybody know -- Ms. Fulmer or Mr. Diab, are you
21 able to speak to that?

22 **MR. DIAB:** Your Honor, Ahmed Diab.

23 I'm not able to speak to that, but I believe Alex
24 Davis, from Mr. Ward's office, may be on the line.

25 **THE COURT:** Speak up, if you are.

1 **(No response.)**

2 **THE COURT:** Okay. Well --

3 **LAW CLERK POTTS:** I don't think he can, Judge.

4 **MR. DIAB:** Your Honor, let me do this: I'm just
5 going to open up the lines, just to see, because he may be
6 muted, so bear with me one second here.

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

8 **MR. DAVIS:** Good morning, Your Honor.

9 This is Alex Davis.

10 **THE COURT:** Mr. Davis.

11 **MR. DAVIS:** Good morning.

12 We continue to work with -- we continue to work with
13 both doctors involved in that motion to obtain proposed dates
14 for the depositions, and we're making progress.

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

16 **THE COURT:** Sir, Mr. Davis, hold on just a moment.
17 There was some background noise. Let me ask you to start over.

18 **MR. DAVIS:** Sure, no problem.

19 On behalf of the Plaintiff in question, the **Harris**
20 Plaintiff, we are continuing to work with both doctors in
21 Germany and Hawaii to obtain dates.

22 And I just e-mailed with Erin and other counsel for
23 Biomet yesterday on this topic, so we're moving forward slowly.
24 There is a language issue in Germany, but we're making
25 progress, and we will update the Court accordingly.

1 **THE COURT:** Okay. It may be a different case --

2 **MS. HANIG:** Judge, this --

3 **THE COURT:** Let me just inquire of Mr. Davis.

4 **MS. HANIG:** Yes.

5 **THE COURT:** We show it as the **Hix** case. 14CV619 is
6 the one we talked about at the last conference that Mr. Ward
7 was going to look into withdrawing the motion to enforce
8 settlement agreement, so I think you may be talking about one
9 of the Group 2 cases.

10 Do you know anything about that?

11 **MR. DAVIS:** Oh, I'm sorry.

12 **THE COURT:** That's okay.

13 Do you know anything about the **Hix** case?

14 **MR. DAVIS:** I do not, Your Honor.

15 **THE COURT:** Okay. All right. Then, depending on how
16 far down the road we set our next conference, I may enter an
17 order to Mr. Ward to indicate whether he intends to continue
18 with that motion, just so we know and can handle it, one way or
19 another.

20 But thank you, Mr. Davis. I appreciate your
21 willingness to clarify.

22 **MR. DAVIS:** Sure.

23 I don't think the **Hix** case is our case.

24 **THE COURT:** You don't think so? Well, maybe Mr. Ward
25 was going to be checking with the Plaintiff in that case.

1 Okay. Well, we'll just leave it there for the moment.

2 Somebody was about to speak, and I wanted to rephrase
3 my question to Mr. Davis.

4 Ms. Hanig, were you trying to say something?

5 **MS. HANIG:** Yes, Judge, it was me, and I was just
6 going to clarify that the **Hix** case is Navan Ward's case.

7 And Alex Davis is from a different firm, and he and I
8 and Ryan Edwards have talked about scheduling the depositions
9 in **Harris**, and that's moving.

10 And I think you're correct, that in order to get an
11 answer about **Hix**, we need feedback from Mr. Navan Ward's firm.

12 **THE COURT:** All right. Then we'll see what we can
13 do.

14 The other items are that there are nine
15 statute-of-limitations, motion-for-summary-judgment, and six
16 spoliation motions. I think they're all ripe, except there's a
17 pending motion for leave to file a second amended complaint in
18 the **Miles** case out of Florida, which is one of the
19 statute-of-limitations cases. But I think they're ripe, and
20 we're working on them, and my hope would be to have a ruling
21 out before our next conference in all of those cases.

22 Normally, I would invite oral argument, but I think
23 it might be pretty awkward to have oral argument in 15 cases,
24 so my plan is to just try to get rulings out as quickly as
25 possible and, hopefully, have them all resolved by the time we

1 are together next.

2 Is that acceptable to the Plaintiffs or do you have a
3 different proposal?

4 **MS. FULMER:** Your Honor, that's acceptable to the
5 Plaintiffs.

6 **THE COURT:** Okay. And for Biomet?

7 **MR. WINTER:** Acceptable to Biomet, Your Honor.

8 **THE COURT:** Okay. Other than picking a date for our
9 next conference, it looks like we're through this agenda.

10 Did anybody have anything further that didn't get on
11 the agenda that we need to talk about?

12 **MS. FULMER:** Nothing, on behalf of the Plaintiffs,
13 Your Honor.

14 **THE COURT:** Okay. I was looking for a date six or
15 seven weeks down the road. Number one, I don't want you to
16 fight your way into weather like this. I think Mr. LaDue and
17 Ms. Hanig can tell you that this is not a good day to be
18 traveling around in South Bend so far. But then I noticed that
19 February 27th, on the current deadline, we are to confer
20 regarding management of the remaining cases, and so I guess I
21 would propose a conference on the morning of February 27th to
22 address that and also to see where the dust fell after the
23 rulings come out on the statute-of-limitations and spoliation
24 motions.

25 Would that date work for everybody?

1 Ms. Fulmer and Mr. Diab?

2 **MS. FULMER:** It's acceptable for the Plaintiffs,
3 Your Honor.

4 **THE COURT:** Okay. And for the Defense, Mr. Winter,
5 Ms. Hanig, Mr. LaDue?

6 **MR. WINTER:** Works for us, Your Honor.

7 **THE COURT:** Okay. We'll show a status conference at
8 9:30, and we can do our pre-conference meeting at 9:00.

9 I think that covers everything that I've got.

10 Anything further for the Steering Committee?

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

12 **THE COURT:** Or for Biomet?

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

14 Happy holidays.

15 **THE COURT:** And to you. Stay warm.

16 Thank you, folks.

17 **(Proceedings concluded.)**

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