IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN RE: BIOMET M2a-MAGNUM HIP IMPLANT PRODUCTS LIABILITY LITIGATION

CAUSE NUMBER 3:12MD02391

MONDAY, DECEMBER 7, 2015

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
204 South Main Street - Room 323
South Bend, Indiana 46601
debra_bonk@innd.uscourts.gov
574-246-8039

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APPEARANCES:

FOR PLAINTIFFS:
MR. NAVAN WARD
MS. BRENDA FULMER

FOR BIOMET:
MR. JOHN WINTER
MS. ERIN LINDER HANIG

(see docket for addresses.)

THE COURT: This is our December status conference in 3:l2MD2391, also MDL2391, and we have present in court, from the Plaintiffs' Leadership Committee, Brenda Fulmer and Navan Ward, and, for the Defendant, Erin Hanig and John Winter.

And as we discussed in general terms in chambers, at the meeting that lets me know what I'm going to be looking at when we get out here, I think I listed three, but it may be four issues that need to be addressed in your proposed scheduling order. We talked about the number of witnesses that could be deposed, the time table, spoliation. And the first thing I noticed when I picked this up is we may have some issue as to how to handle the statute of -- well, no. Wait a minute. That's spoliation, isn't it? Never mind. I think we have just that. No, the statute of limitations, as to how to handle those.

And I guess what we talked about is that each side can tell me why they think it ought to go in the scheduling order as they have proposed, and let me start with the Plaintiffs, and you can take them in whatever order you want.

MS. FULMER: May it please the Court.

Brenda Fulmer on behalf of Plaintiffs.

THE COURT: Hold on. I don't think that's on.

COURTROOM DEPUTY: (Turns on PA system.)

THE COURT: Try now.

MS. FULMER: Is that better? Much better.

Thank you, Judge.

Judge, if it's okay with the Court, Navan and I have, actually, split the issues in the scheduling order --

THE COURT: Okay.

MS. FULMER: -- and so he's going to do part of it, and I'm going to do it, as well.

And I guess my other question for the Court would be: Would you like us to go through the entire Plaintiffs' position or do you want to, kind of, do it by section, hearing from both sides?

THE COURT: Why don't you go through all of it.

MS. FULMER: Okay.

THE COURT: And, as I said back there, I'll give you whatever rulings I can. But, if not, it will be some time not too deep into next week.

MS. FULMER: Okay. Well, we were going to just start and go through it page by page, if that's okay with the Court.

THE COURT: Okay.

MS. FULMER: So the first issue -- and it's a minor issue -- where the parties have a difference of opinion has to do with regard to the statute of limitations, and one of the concerns that we have is these are case-specific issues with regard to statute of limitations, and so we had concerns, and we asked that language be added in here that, as far as scheduling of depositions, that that be done directly with

Plaintiffs' counsel. My concern was a burden on the Steering Committee or the Executive Committee to become, basically, the scheduling secretaries for all these various depositions. Certainly, we want to be aware of what's going on, but we don't see the need for the Executive Committee to, actually, be involved in scheduling depositions of individual plaintiffs, so that's, kind of, just one of the small changes that we had wanted to see with respect to the scheduling order.

The other thing that concerns us, tremendously, is there's language in there that says, once the order and dates of depositions is agreed to, Biomet cannot adjourn a deposition, and, absent a good-cause showing, a case will be dismissed.

We think that that language is too harsh. We understand, obviously, that there needs to be deadlines, and they need to be adhered to. But, you know, if something happened, something unforeseen, and a deposition cannot take place, as scheduled, dismissal seems too harsh. It's, certainly, something to be included in the scheduling order.

The parties are going to do their best to comply with the scheduling order, and we would ask that that section be left out and, if there is an abuse, have it brought to this Court. But, otherwise, we don't think that any Plaintiff should suffer dismissal if, for whatever reason, a deposition has to be canceled.

The other change that we have, the difference between our version and the Defendant, is at the bottom of Page 3, and the only -- it's language that we've asked be added, you know, identifying that the summary judgment motions, under this section, should be only with regard to the assertion of a statute-of-limitations defense. That's not language that is included in Biomet's version, so that's something that the Plaintiffs would ask be included.

So other than coordinating the scheduling of the depositions, the ramifications for a canceled deposition, as well as limitation of summary judgment motions to be specifically for statute-of-limitations issues, that's, in substance, the difference between the Plaintiffs' position and the Defense position.

And there's one other section. I'm sorry. I spoke too soon before I flipped the page. If you look at the top of Page 4, under the statute of limitations, the Plaintiffs have, also, added a provision in there that -- I can't tell you exactly what the circumstance might be, but the Plaintiffs may require a deposition, themselves, in order to be able to adequately defend the motion for summary judgment, and we, certainly, would like the Plaintiffs to have that opportunity, as opposed to be foreclosed from doing any depositions in order to be able to respond to the motion.

THE COURT: So this would be discovery after the

motion is filed, between the time it's filed and the time the Plaintiffs' response is do?

MS. FULMER: I would assume so, yes, Your Honor.

THE COURT: Okay.

MS. FULMER: The only thing I can think of is, maybe, perhaps, a sales rep, but, honestly, it's hard for me to, really, think of what the circumstances might be, but I, certainly, would want to have some kind of an escape valve for Plaintiffs so they could at least ask for permission to take a deposition, if necessary.

I believe that's the extent of our comments and our disputes with regard to the statute-of-limitations section.

The next section has to do with spoliation, and, in this particular section, we do have a much bigger difference of opinion between the Plaintiffs and the Defendants. We have a conceptual problem, to begin with. We're not real certain what the spoliation section of the order even applies to.

Are we talking about cases where the device is just no longer here, for whatever reason, or are we talking about cases where a Plaintiff was represented by counsel at the time that your order was entered, a revision surgery occurred after that order, and, basically, they didn't comply with the Court's order?

I think those are two very different circumstances, and I'm not real certain which circumstance or whether this

spoliation scheduling order is applying to both, so I think it's a really important thing.

The Plaintiffs believe that this is just, really, not an appropriate area for this Court to be involved at all. Spoliation is a really unique issue. The law is different in every state. And, for every case, this is going to be a very fact-specific inquiry for the Court, so I'm not real certain what we seek to gain here.

That being --

THE COURT: I understand your position a little better, given that you weren't sure what the spoliation meant, but if it is -- and I think, at an earlier conference, Mr. Winter indicated it would be -- and, certainly, he can speak for himself -- but that it would be cases in which the preservation had been ordered, the explant took place, and the device wasn't preserved -- if it's those cases and limited to those cases, I'm not sure how state law comes into play and the differences in state law, because it would, simply, be what happens when a specific order isn't followed in federal court, wouldn't it?

MS. FULMER: I don't disagree with you at all, Your Honor.

If, in a particular case, a Plaintiff has violated the Court's order, then that needs to be dealt with in that particular case.

If you go one step further, though, if that's the situation, and we're talking about a Plaintiff -- not to pick on Oklahoma -- in Oklahoma, in that particular case, then why would we be choosing bellwether or representative cases for the purposes of these challenges?

I think that the Court should deal with Plaintiffs and counsel who have failed to comply with the Court's order on a case-by-case basis, but I don't believe that that's appropriate for a scheduling order, and it's, certainly, not appropriate for something that, kind of, looks like a bellwether where we're picking representative cases, because what happened in each case is so unique, you can't have representative cases.

So I agree with you that, if we're talking about violation of the Court's order, that should be dealt with, but I don't know that it needs to be dealt with in a scheduling order, and it, certainly, should not be dealt with, in my opinion, with regard to some kind of a bellwether process, because it just doesn't make sense, and that's why there's a little bit of confusion about what we're, really, talking about here.

The other thing, to the extent that the Court is going to go forward and make an order with regard to the spoliation program, the Plaintiffs are, also, concerned that this particular proposal may not anticipate all of the

discovery that might be necessary. Much like the statute-of-limitations issue, this is all, kind of, one-sided discovery. And if a Plaintiff is going to be facing dismissal, and we're not just talking about violation of the Court's order, then we believe that the Plaintiff should have an opportunity to engage in discovery, as well, that's relevant to this issue.

And I think that's, pretty much, the total of our comments with respect to the spoliation section.

If you don't mind, I'm going to turn it over to Navan because I think the next section is core discovery.

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

Mr. Ward.

MR. WARD: Thank you, Your Honor.

As Ms. Fulmer indicated -- again, Navan Ward, for the record.

As Ms. Fulmer indicated, what I intend to do is discuss some of the issues that the parties have with regards to both core discovery, as well as the scope of the expert and case-specific discovery, as well.

And so, as we continue to move on in the proposed order, I want to be able to notate a couple of things on Paragraph 5, where it talks about the list of core depositions, custodians, the 67 custodian files that have been already produced by Biomet. Now, we wanted to clarify that. To the

extent that, obviously, PSC 2 continues with their core discovery and either rely on old discovery or new discovery, to the extent that the new PSC finds or deems that there are additional witnesses outside of the 67 custodians that have already been produced, then we, certainly, want to have the opportunity to include those custodians in a listing of deponents that we feel are necessary to our case.

The same is true for Paragraph 6, where, essentially, that is just a time frame for supplemental lists of custodial files which are over a time frame that, again, both of the parties agree with.

When we get to Page 8, start talking about the parties and the differences that the parties have with regards to the activation and the remand issue, on Paragraph 7, both parties agree with the time frame with regards to Group 1 cases, from oldest to newest cases, of 50 being activated for case-specific discovery. Both parties agree with that.

The only difference, in that particular section, that the Plaintiffs propose is that, if there are other cases, upon a good showing -- a showing of good cause, those should be ruled on and/or separate from the Group of 50 cases activated for remand. Those cases could range from a variety of different things.

Obviously, you're aware of the Master Settlement Agreement, failed mediation cases, which, under the Master

Settlement Agreement, require a remand. It is our position that those cases, for the Plaintiff attorneys who seek to use the Master Settlement Agreement as a reason for remanding those cases, should not be a part of the 50 cases we're talking here.

You, also, have issues where Plaintiff's failing health may very well activate a need for that particular client and/or counsel to seek remand. You have the cases that you have devices and/or -- are not, otherwise, appropriate for this particular litigation that, also, may seek to remand, which, also, should, again, not be a part of the 50 cases, the first 50, and then, of course, Group 2's second 50, and so on. So we, simply, add a clause in Paragraph 7 that would notate and point to those particular type of cases.

Paragraph 8 deals with the scope of case-specific discovery, and, here, the parties, essentially, agree with the dates and time frame of this particular discovery. However, we disagree with the scope of it.

As we've mentioned before and as this issue has come up before, the parties agree that written discovery, such as interrogatories, requests for production, requests for admission, as well as the Plaintiff's deposition, and one other fact witness outside of a treating or revising doctor, as well as excluding sales reps, those are the -- that's the difference, where the Plaintiffs seek to limit to that, a group of additional clients, additional witnesses.

The Defendants, they want to include the treating physicians, including but not limited to the prescriber, as well as the treating or advising surgeon, and a sales representative, or multiple sales representatives, depending on who all were involved with the surgeries.

Again, it's our position that, in order to, at this stage of litigation, take those particular witnesses, would be of great expense to the parties, at this particular time. When you compare it to the timetable and the schedule that even the parties agree with, with remand, by the time it gets back to their local jurisdiction, and a local jurisdiction sets their own 12- to 18-month time frame for a trial, a lot of that testimony, much of that testimony would be stale, and it would, therefore, need or require a need to retake those depositions, again, which would be a very expensive proposition.

In addition to that, Your Honor, this time frame of taking the case-specific depositions for both Group 1, as well as Group 2, because we get to Group 2 a little later on in this proposal, would be going on simultaneous with the core discovery that the parties have agreed to go forward with and that Your Honor will be making rulings on.

Being able to handle both core -- the PSC 2 being able to use resources to handle both core discovery, as well as whatever case-specific issues there may be that PSC should be addressing, of course, that would be, certainly, a time-onerous

type of proposition, to be able to lend any assistance where we would need to in the case-specific depositions that would extend beyond the Plaintiff and the one additional fact witness.

In addition to that, again, the core discovery that we would be seeking, again, simultaneously, will result in a good number of materials that would be needed in these treating physicians' depositions that we, obviously, would not have the ability to have received from discovery, marketing materials, what things that -- the different things that Biomet -- representations Biomet made to doctors, just one of many examples of things that we would seek to get in core discovery that we would, also, want to use in a prescribing or implanting physician's deposition and/or, for that matter, a revising surgeon's deposition.

And with a simultaneous time frame, under either the Plaintiffs' proposal or the Defense proposal, the Plaintiff would not have the ability and/or the opportunity to be able to utilize those materials in that discovery in order to go forward with those depositions, and so, therefore, it is the Plaintiffs' position that the additional depositions of implanting, revising surgeon, as well as the sales representatives should not be a part of the case-specific discovery.

THE COURT: Let me back up to one thing you said

before. You talked about the expense to the Steering Committee if there's six categories of depositions, rather than two.

Ms. Fulmer talked about having the Plaintiffs' counsel, the originating counsel, rather than the PSC, being involved on case-specific statute of limitations.

MR. WARD: Yes.

For clarification, I was meaning the expense to the individual Plaintiffs and Plaintiffs' counsel who would be going forward with those depositions.

THE COURT: Okay.

MR. WARD: It would be, essentially, a double expense for those particular -- whoever is affected on Group 1 and Group 2.

THE COURT: Okay. Then I'm not sure I'm following your argument.

Why would there be a double expense?

Suppose Biomet wants to take the deposition of somebody who was in the operating room during the implant or revision surgery, which is one of their categories that you don't have, and Jane Doe is the attorney who filed the case. This is her client.

Why would there be a double expense, if she was involved in the taking of that deposition, rather than you?

I may have misunderstood.

MR. WARD: Yes, and I apologize. That, certainly,

may be communication, with me failing to communicate this.

THE COURT: It's Monday. I may not have picked it up.

MR. WARD: No, no.

It is not PSC's intention to relay that it would be a PSC expense, a PSC expense to take these depositions. When I refer to there being a double -- it being an expensive proposition, one, just to take these depositions, in general. But, by the time -- when I say "a double expense," meaning we would likely have to take many of these depositions, again, by the time these depositions are set for trial in their local jurisdictions. During this time frame, for case-specific discovery, if it were to include implanting surgeons, as well as revision surgeons, those surgeons -- those depositions would, of course, take place now. But by the time these cases are sent back to their local jurisdictions and a scheduling order and trial is set, much of what would be discussed and testified to, at this point in time, would need to be either updated or stale, at that point in time, where an additional deposition of those same witnesses would need to be taken, again. And so, when I say, "a double expense," I'm meaning --

THE COURT: Why would they have to be taken, again? I'm not following.

MR. WARD: As time goes on, for instance, a revising surgeon, for some of the clients or some of the Plaintiffs who

have had revision surgery, they may be a year or less than a year out from revision.

THE COURT: No, I understand that, that you might have to keep up with how the Plaintiff himself or herself has done since the deposition in the MDL.

But as far as the Biomet rep who processed the request, the people present in the operating room, theirs wouldn't have to be retaken, would they?

MR. WARD: Those wouldn't, necessarily, have to be retaken, unless, unless, through the process of the core discovery, we're --

THE COURT: Yeah. No, I understand that issue.

MR. WARD: -- able to obtain what we expect to be able to obtain. We would, certainly, need to retake those depositions in order to, of course, question and present that type of evidence to those particular type of witnesses.

THE COURT: Okay. Thank you.

MR. WARD: And so Paragraph 9 and 10, essentially, mirror 7 and 8 with regards to activation of Grade 2 cases at the five-month period, as well as the subsequent medical authorizations that would need to be completed by the six-month period. The parties agree, as it relates to that particular issue, under Paragraph 9.

THE COURT: Now, theirs talks about discovery in Group 2 cases ending 360 days from the date of the order, I

guess just short of a year, and yours doesn't have any language in there.

Was that --

MR. WARD: Are you talking about as far as Paragraph 9, just with activation?

THE COURT: Yeah, Paragraph 9, down at the bottom of Page 9 and spilling over to 10.

MR. WARD: That would, actually, be Paragraph 10, which --

THE COURT: Oh, I'm sorry.

MR. WARD: -- which discusses scope.

THE COURT: Yes, you're right. You're right. You're right.

MR. WARD: -- which discusses scope of Group 2, and, yes, there is differences between the two.

But with regard to Paragraph 9, it would just, simply, be -- the only caveat that we would have, as the parties have agreed to the time frame under Paragraph 9, would be the same caveat we would have in Paragraph 7 with regards to the ability for other good cause, for good cause for other cases. That would still be in play, so to speak, for those clients outside of that Group of 50.

THE COURT: Right.

MR. WARD: And then as you were referencing, Paragraph 10, when we look at the scope of Group 2, it's,

again, the same issues that we see under Paragraph 8, with regards to the amount of witnesses the Defendants would want to take under the case-specific. The same arguments would apply to the Plaintiffs' position, a proposal to limit those, again, to the Plaintiff him or herself, as well as one additional fact witness, excluding any of the treating physicians and/or sales representatives.

And so as we move forward, Paragraph 11 --

THE COURT: Let me back up to 10.

Ten didn't include the same deadline. I guess, here, they're both numbered 10.

MR. WARD: Yes.

THE COURT: The PEC's 10 doesn't include the same deadline as Biomet.

Was that just an omission or did you want a different deadline or did you want to leave it open?

MR. WARD: The PSC has no problem with the Defendant's time frame of 360 days.

THE COURT: Okay. All right. Okay. Now I'm on to 11 with you.

MR. WARD: Paragraph 11 just speaks to, at a certain point in time, the parties anticipate, after Group 1 and Group 2 cases have been activated for case-specific discovery leading to a remand, at this particular time, which would be, essentially, be eight months after the signing of the order,

this would give the Court and the parties an opportunity to discuss how the MDL would move forward, at that point in time, if the Court would want to, at that point in time, remand all the cases and/or give whatever stage of remand moving forward, at that point in time, and/or handle whatever issues that we may have come across, up to that point.

Paragraph 11 talks about the expert report deadlines, and, essentially, Your Honor, these are the typical and standard general expert report deadlines, and there is about a two-month difference between what the Defendants propose and what the Plaintiffs propose, and the reasoning for the difference, from the Plaintiffs' perspective, is that they're somewhat tight deadlines, when looking at the Defendant's expert report, production, and when the Plaintiffs' expert depositions start, which would make it -- which would make it a little -- somewhat more difficult to get our experts prepared in the appropriate amount of time.

However, that, certainly -- this is, certainly, an area that the Plaintiffs don't mind compromising, with regards to getting a date that is fair for both sides.

THE COURT: Okay.

MR. WARD: And so, to that extent, we, certainly, are more than willing to compromise on the dates that we have here for the general expert reports and depositions for both of the parties.

Finally, Your Honor, Paragraph 13 discusses the time frame for the general expert, **Daubert** evidence, 702 reports. The difference is the Defendants seek to add summary judgment motions at that particular time. And, Your Honor, as you know, when you deal with making a ruling on summary judgment motions, there are a lot of case-specific information that both sides will be arguing. Whether you go with the Defense or the Plaintiffs' proposal for case-specific discovery, neither one will be -- neither one's proposal for case-specific discovery will be complete, at this particular time, and so the parties would not have had an opportunity to fully brief and/or be able to argue summary judgment motions during this particular time, as, again, case-specific discovery would still be ongoing and open. And so, therefore, it is the PSC's position that this -- the dates that the parties agree with should apply only to the **Daubert** issues and not summary judgment issues or motions directed at admissibility under Federal Rule of Evidence 702, as opposed to issues dealing with summary judgment issues.

THE COURT: Okay. Thank you, Mr. Ward.

MR. WARD: Thank you, Your Honor.

THE COURT: Mr. Winter or Ms. Hanig.

MR. WINTER: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. WINTER: Your Honor, starting with the statute of limitations, we had always contemplated coordinating with the

Plaintiffs' Steering Committee as to the order of the depositions and the discovery on the statute of limitations. If it's the Plaintiffs' Steering Committee's position now that they want us to handle that ourselves, we're more than willing to do so.

As to the sanction that we put in to someone not appearing for their deposition, the way we drafted it, we can't adjourn the deposition, and it, specifically, says, absent a showing of good cause, the plaintiff who doesn't appear has their case dismissed, which is, clearly, contemplated explicitly, in Rule 37(b)(3) for not appearing for a deposition. So we have a reasonably tight schedule here for many different moving parts, and we believe that this type of order, which, clearly, puts everyone on notice as to their obligations, will ensure that everyone complies, and we did say, absent good cause.

On the other part, as to the need for discovery once we file a motion, we would be silly, Your Honor, if we said -- after we filed a motion for summary judgment, a Plaintiff says, "I need discovery." I can't oppose the motion without the discovery. That would mean you would, in all likelihood, if it was good faith that they needed the discovery, deny the motion, so we would have to consent to something with good cause, you know, as described by my good colleagues.

On the spoliation track, Your Honor, we made it very

clear, we thought, that what we're talking about with this particular track is cases where a revision occurred after the entry of your October 2012 order, which Paragraph 13 puts everyone on notice that we have to preserve evidence.

If we were to look at Rule 37, again, you are the judge who's supposed to rule on whether or not someone violated your order, which is what Rule 37, clearly, contemplates. Rule 37 has a framework to it. We all are aware of it. You entered an explicit order.

What we had proposed is doing some basic discovery in all the cases that fit into that category, and we provided our colleague with that list back in September. We're not sure it's perfect, today, but we can make that list perfect to everyone's satisfaction.

You have an order. The question is: Was it complied with? Was the device preserved? Then, did the person have notice of that order, which, I think, is going to be, like, as a matter of law. I'm not going to prejudge that. Then, was that evidence relevant, which is going to be across the board for, virtually, every case. Were we prejudiced if, in fact, it's not there, which, again, is going to apply across the board.

The only variation will be consequences for that violation in a particular state. There is some variation, we agree, so we suggested doing 10 representative summary judgment

motions after meeting and conferring so you would then have the ability, assuming you go with the parties' suggestions after we explain our reasons, to be able to have cases where you can say, "This looks like willful misconduct. This was negligent," and that is going to inform, in a very efficient and meaningful way, how this issue is addressed across the board, not only for the 10 cases, but it's probably 50 or 60 other cases that fit into that order and any case filed thereafter.

So we think it's very important to the efficient administration of this MDL for you to rule on that question. But, I think, more fundamentally, whatever circuit we were looking at, it's your order. If it's been violated, you make the Rule 37 ruling.

And we did look a little bit, Your Honor. We found, in the PPA multi-district litigation, now 10 years ago, a variation on this came up in terms of complying with CMOs of Judge Rothstein on fact sheets in a multiple different set of areas. Judge Rothstein went after -- let me rephrase that.

Defendants filed motions saying, "Judge Rothstein, your orders were not complied with," made Rule 37 motions in groups of the cases. She sustained some. She denied some.

The case went to the Ninth Circuit, and the Ninth Circuit said that's like -- in an MDL, the MDL judge decides Rule 37 motions in violation of a CMO that the MDL judge entered. The case is **Allen versus Bayer**, 460 F.3d 12 --

THE COURT: 466?

MR. WINTER: 460, 4-6-0, F.3d 1217.

I apologize for my voice, Your Honor. I was at a football game yesterday, and --

THE COURT: And they gave you overtime to yell through, too.

MR. WINTER: -- and I was on the very unhappy side of that game, more times than not this year than I care to describe.

So, I think, Your Honor, that's where we come out on the spoliation, which is why we think the order that we proposed, it tracks the framework that you created for the statute of limitations before, and we built in very comparable types of time lines from the prior order. When we proposed this order, we looked at your December 2013 order, in terms of the time frames, expanded some, but, more or less, that's where we got the dates from.

On the case-specific discovery, Your Honor, if I had filed an individual case in front of you as a plaintiff, and I came here for my scheduling conference, initial case management conference, and I said, "Judge Miller, can we put off, like, the discovery of the surgeons and the doctors, the product liability case, for 18 months," for whatever reason, I suspect I know what the response would be.

Here, we have a history. We have a document

production that was done. We have a PSC now in place six months. When we proposed the dates to begin case-specific discovery, we went out 270 days and then 360 days. So we thought -- and you urged the parties to think a little differently in terms of the scheduling -- we're talking about 15 months from now, because the PSC has already -- 15 months from when the PSC started for case-specific discovery to start so they could inform whatever lawyer has a case what he or she would need to know to take a surgeon's deposition from information from Biomet.

I mean, that is a really long time. We need to do case-specific discovery, because if we don't do case-specific discovery, when we get to remand, whenever, a case is then going to go to -- back to a court in, you know, West Virginia, and then someone's going to say, "We need 18 months for discovery, Judge, because we didn't do it in the MDL, and it was a case filed in 2013."

That federal judge, I am guessing, will be very unhappy that he has a case or she has a case with a 2013 index number and someone saying, in 2018, "I need another year-and-a-half," or, in 2017, "I need another year-and-a-half for discovery." That will force, I'm pretty sure, chaos on both sides for all of these cases.

And the notion that, for some reason, we would have to retake the deposition of an implanting or revising surgeon

after remand, if you want us to stipulate that we can't do that, we're willing to stipulate, if we get this discovery here. It would never be our intention to go retake a deposition of a surgeon, somehow, to remember better, two years after he was deposed, about a surgery two years before that.

Yes, you're right, Your Honor, there will be some damage issues that, clearly, all things being equal, we might have to wait on. Or someone who's deposed and then gets, surprisingly, revised four years later, that could happen, but that remote possibility is far outweighed by the need to move all these cases forward.

What we proposed is, you know, a modest amount of case-specific discovery so that, if there are loose ends to be dealt with after a case is remanded, it can be done in a period of time that any judge who gets a case back will say it's reasonable and fair.

And, today, because we're, actually, trying to figure out some of these lists, we took a shot, Your Honor, this morning, of what that first group of 50 cases looked like of the oldest cases, and we took the liberty of backing out statute of limitations, spoliation, pro se litigants, and metal on poly. Of those 50, 22 or 23 of those cases are with someone on the Plaintiffs' Steering Committee. So if half of those cases are their cases, they're really capable and qualified and competent lawyers, so I would have thought that, you know, they

would want their cases to move along.

And what it, also, means, Your Honor, is that the learning curve for whoever has to take these depositions, you know, roughly, nine months from now, I mean, they're already the seasoned people that are running this MDL.

And, again, Your Honor, I don't see how someone who's filed a case in any federal court could say, "I don't know how to take an important deposition in my case. I need help from someone." I mean, if that was what someone wanted to say, I don't know how to answer that.

On the three other points, the one that came up about asking for more custodians, that had not come up, prior, in any prior discussions, Your Honor. On one level, it could make sense. But our only concern is that, if you're going to say, "I want 10 more custodians," just making up a number, that creates an obligation and a time line for us to go collect the information, retrieve it, make sure, you know, we do all the work that we need to do, pursuant to your orders, and then make it available. And given we're dealing with a reasonably tight discovery schedule here, if they're going to want more custodians, and we meet and confer on it, we just need to do it a lot sooner, rather than later, so that we can get everything done. But we recognize that that could be and it is a legitimate request, that we'll look at the 67. If we want more, we should -- the Plaintiffs have the right to ask for it.

We just ask that it be done sooner in this process.

On the expert deadlines, just the timing part, Judge, Your Honor, we followed, more or less, what you had put in, in the prior order, for **Daubert** leading to bellwethers. I mean, obviously, bellwethers is not part of it. So that's where we had come from in terms of the time line there.

As to the summary judgment motion, there are, approximately, 20 different states involved with the cases that remain. We went and looked, and we've told this to our colleagues. State of the art, which is part of anything in a product liability case, is in play in every one of those 20 states. Whether it's part of the Plaintiffs' affirmative burden of proof, whether it's an affirmative defense for us, whether it's an element of Plaintiffs' proof, every state has a state-of-the-art component to its product liability law. What we knew and when we knew it is, you know, a shorthand way to say state of the art.

They are going to take depositions of Biomet employees. I am reasonably confident that those types of questions will be asked of many witnesses. At the conclusion of that fact discovery or in conjunction with that fact discovery, we will develop experts, plaintiffs will develop experts as to whether or not what we did complied with the state of the art at a certain point in time, given what we knew, given what we did.

We think and we've always said, because of the way the complaints were worded, 2006 is, sort of, a line in the sand on their side. We should have known.

We think, after discovery, we're going to be in a position to say, "As of X date, with experts and facts, we think our devices comply with state of the art," and that will be subject to **Daubert** and, we think, a summary judgment motion.

And why would that be important? A ruling by Your Honor that we did or did not comply with the state of the art as of a certain point in time, A, will be pretty dispositive for any implant prior to that date. But, also, if we stick with 2006, in another case where the implant occurs in 2007, then the question becomes: Okay. Given the facts of this case, what is different that may or may not have changed the determination you made as of 2006? And, obviously, that could step year by year, depending on a particular case.

So a ruling by you, given a certain point in time, I think, is critical to how the parties managed the cases on remand on this issue, which we believe, in many states, is, actually, dispositive on, you know, is there a defect in the product.

So that's why we put that summary judgment part in there, because we think that may be where we end up. It could turn out that's, like, just not going to work, but we'll find that out along the way, and I am reasonably confident, as we go

through case management conferences here, if it turns out that I'm really off, we'll have another discussion, and you'll say to me, you know, "Mr. Winter, do you really think we all need to do this?"

THE COURT: So your request for summary judgment in whatever paragraph that is, 13, I guess, would be case-specific in a sense that it's the cases in which state of the art is in play, but would not be Plaintiff specific?

MR. WINTER: Correct. Yes.

This issue, state of the art, has nothing to do with whether or not, you know, the liner in Ms. Jones was put in upside down. This is, you know, did the device comply with the state of the art. It's a very Biomet-centric, factual inquiry, which is why we think it's one that, if it can be made right, should be resolved by you.

And I think I have, hopefully, answered the topics that Your Honor wanted me to cover and responded to any of the open issues that came up.

THE COURT: Yeah, I think you have.

MR. WINTER: Thank you.

THE COURT: I'll get a ruling out as quickly as I can, so whatever the time table is, it can start running.

I thank you for your presentations today and for the -- obviously, you've worked hard together to try to narrow down the things that I have to decide.

I know one other thing that we talked about in chambers that I didn't refer to when we came out. I was informed that there is a ripe motion to remand an M2a Taper case in **Medprice versus Biomet**, 3:14CV275, and I indicated that I would give the Plaintiffs' Steering Committee to until December 14th, a week from today, to add any two cents they want to add, and we'll get a ruling out on that, then, again, hopefully, toward the end of next week.

I think we've covered everything that was to be covered today.

Was there anything further?

Oh, I know. We've got to pick a date to resume, either in person or by phone. Let's see.

What would six weeks be?

Wow. I'm going to urge that we do this by phone, if possible. But if people need to be here, so be it. But I'm going to offer January 28th. That's a Thursday. I can do morning or afternoon. But that's, also, when we get our snows, so, recognizing most people are not walking across the street, if we can do it by phone, it might be a good idea for everybody.

Would that date work, and, if so, what time would be best?

MR. WARD: Did you say January 28th?

THE COURT: January 28th.

MS. FULMER: That's good for me.

MR. WARD: We can make that work, Your Honor.

THE COURT: Either time?

MS. FULMER: (Nods head.)

THE COURT: Or do you want to pick a particular half day, just in case you do have to come?

You said afternoon works better, right?

MR. WARD: Afternoon would be fine.

Same time for afternoon?

MR. WINTER: Afternoon will work for Defendants, Your Honor.

THE COURT: I'll set it at 1:00. Well, 1:30. And if everybody's here, and we can do a meet-in-advance, we'll do that a half hour earlier.

And, again, don't hesitate to --

MR. WARD: Your Honor, would you want us to call in a half hour earlier?

THE COURT: Let's see how -- I think we can arrange that by phone, as we get closer. Obviously, if either side feels the need to be here, we can address it that way, but let's get closer and see where we stand, because I don't know if you folks can even estimate as to whether you need to come until I get these orders out.

MR. WINTER: Very good, Your Honor.

THE COURT: Anything further for Plaintiff today?

MR. WARD: No, Your Honor.

MS. FULMER: No.

THE COURT: Boy, that light is hitting funny today. Anything further for the Defense today?

MR. WINTER: No, Your Honor.

THE COURT: Okay. Thanks, folks. Travel safely.

MR. WARD: Thank you.

LAW CLERK: All rise.

(All comply; proceedings concluded.)

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CERTIFICATE

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

DATED THIS 8th DAY OF DECEMBER, 2015.

S/S DEBRA J. BONK

DEBRA J. BONK
FEDERAL CERTIFIED REALTIME/REGISTERED MERIT REPORTER