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

IN RE: BIOMET M2a-MAGNUM CAUSE NUMBER
HIP IMPLANT PRODUCTS LIABILITY 3:12MD02391
LITIGATION

MONDAY, MARCH 14, 2016

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE ROBERT L. MILLER, JR.

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APPEARANCES:

FOR PLAINTIFFS:

- MR. NAVAN WARD
- MS. BRENDA FULMER
- MR. JASPER WARD

FOR BIOMET:

- MR. JOHN WINTER
- MS. ERIN LINDER HANIG
- MR. JOHN LADUE
- MR. BLAINE DART

(see docket for addresses.)

1 **THE COURT:** Good afternoon.

2 This is our Cause Number 3:12MD2391 and the MDL
3 Number is 2391, and we are gathered for a status conference at
4 which we have some discovery issues to address.

5 Welcome, everybody. I'm glad that Spring has made
6 one of its intermittent appearances for you.

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

9 **MR. NAVAN WARD:** Yes, Your Honor.
10 Navan Ward for the Plaintiffs Steering Committee.

11 **THE COURT:** Mr. Ward.

12 **MR. JASPER WARD:** Good afternoon, Your Honor.
13 Jasper Ward, also for the Plaintiffs Steering
14 Committee.

15 **THE COURT:** Mr. Ward.

16 **MS. FULMER:** Good afternoon.
17 Brenda Fulmer on behalf of the Plaintiffs Steering
18 Committee.

19 **THE COURT:** Ms. Fulmer.

20 **MS. HANIG:** Erin Hanig on behalf of Biomet.

21 **THE COURT:** Ms. Hanig.

22 **MR. WINTER:** Good afternoon, Your Honor.
23 John Winter for Biomet.

24 **THE COURT:** Mr. Winter.

25 **MR. LaDUE:** John LaDue for Biomet.

1 And Mr. Blaine Dart is with us here today, too, Your
2 Honor.

3 **THE COURT:** Mr. LaDue and Mr. Dart.

4 I guess we may as well just go down the order of the
5 conference, the conference agenda that you folks sent us.

6 Item 1 is the active case count, and I appreciate the
7 list of cases that you sent us and which I, apparently,
8 detached. So these are the ones that we expect to see
9 dismissals over the course of the next several weeks.

10 And did anybody count -- I'm sure somebody did -- as
11 to how many remain after that?

12 **MR. WINTER:** Your Honor, Exhibit A to the agenda, my
13 recollection is 757 cases or something like that.

14 **THE COURT:** '59, yeah.

15 **MR. WINTER:** There are, right now, 290 pending
16 cases --

17 **THE COURT:** In addition to those?

18 **MR. WINTER:** -- in addition to those.

19 We had that list of 147 cases that we provided in
20 December of 2015, cases that had resolved under the prior MSA.
21 Roughly, 60 of those have been taken care of and we would
22 expect dismissals. There's another 90 where we're waiting for
23 releases and lien resolution. So, that round number is going
24 to be the 290. There's maybe 15 or 20 cases that we still have
25 to check, like, what happened to them. Some of them were

1 agreed Group 1 settlements where a release hasn't come in. So,
2 there's a handful of cases that we still have to figure out
3 what happened to, but, really, the 290, right now, looks like
4 the MDL as it --

5 **THE COURT:** So 290, plus up to 20 ghosts that we're
6 not sure of yet?

7 **MR. WINTER:** That's correct, Your Honor.

8 **THE COURT:** Let me ask about a couple, in particular.
9 There are cases that were on the statute of
10 limitations cases. One of them, Miguel Martinez Diaz, a case
11 from the District of Puerto Rico, is not on the list of active
12 cases or the list of resolved case.

13 Would that be one of the ghosts?

14 **MR. WINTER:** Your Honor is testing my memory, and I
15 can pass this memory test.

16 **THE COURT:** Well, I mean, if you don't -- if you need
17 to look at it, that's fine.

18 **MR. WINTER:** That case, actually, was resolved once
19 we said, "This is a statute of limitation case." There are,
20 literally, five or six cases, Your Honor, that have been
21 resolved since December, which we're going to have to
22 meet-and-confer because they're subject to that six percent,
23 but that particular case has been resolved, Your Honor.

24 **THE COURT:** Okay. Thank you.

25 We also have, I think, one more that was dismissed.

1 That's the Beth Speegle case from Alabama, our 14CV359.

2 And then the Granier case, Stacy Rene Granier, out of
3 Arkansas, our Cause 13CV87, she just went pro se, I believe.

4 **MR. WINTER:** The second one went pro se.

5 The first case, they dismissed it, with prejudice,
6 without any compensation.

7 **THE COURT:** Okay. Let me ask, before we get into the
8 discovery issues. I think we talked, I guess it's getting
9 pretty close to, a year ago. Mr. Winter suggested the time had
10 come for a Lone Pine order. We're getting quite a few people
11 winding up pro se.

12 Might we have reached the time where we should find
13 out -- and some of them I've given -- at first, I didn't
14 understand exactly why I was doing this, but now I see I had a
15 reason. They were all -- once they go pro se, of course,
16 they're stayed under the Case Management Order. But some of
17 them I also explicitly stayed a period of 90 days or so so that
18 they could seek other counsel, and I would think those folks,
19 that they're still in the process of trying to find counsel, so
20 I don't think a Lone Pine order would be appropriate.

21 But for the others, the other pro se cases, are we
22 nearing the time, or did the Steering Committee's contacts with
23 -- and I understand that you may not be the people who have
24 been trying to stay in contact with the pro se people or
25 provide a clearinghouse for them, but what are your thoughts?

1 **MS. FULMER:** Your Honor, I believe that the Steering
2 Committee would need a little bit more time. We've been, kind
3 of, waiting until the dust settled to figure out what cases
4 were, actually, still pending and, with these latest filings,
5 kind of paring it down to the cases that remain.

6 What I would ask is that the Court allow us to reach
7 out to the pro se Plaintiffs. Perhaps we can assist them in
8 finding counsel. My office maintains a list of all of the
9 attorneys in the country that are actively involved in the
10 litigation, so I think that that might be the appropriate next
11 step. And, hopefully, those who have meritorious cases can
12 find a lawyer to prosecute them, and we can fix this problem in
13 a different way, as opposed to the Lone Pine approach.

14 **THE COURT:** Well, why don't we plan to talk about it
15 at the next conference and see where you stand with that,
16 because if we've got some people who are, effectively, out of
17 the case because the -- not able or interested to proceed with
18 an attorney, I guess, we can help everybody by doing that. But
19 that's fine, if you want to start to see what they'd like to
20 do. That's preferable.

21 I have read your submissions on the discovery issues,
22 and I know we haven't put these in terms of motions to compel
23 or for protective orders or anything like that, but I gather
24 that the first set of issues that arose in Dispute 1 is sort of
25 in the nature of a motion to compel.

1 And it appears to me -- and I'm just saying this so
2 you know where I am -- after looking it -- and you can tailor
3 your thoughts accordingly -- it looks to me like there's
4 basically three categories of documents and interrogatories.
5 One is where the Steering Committee is looking for
6 supplementation. No, I'm sorry. I'm not saying that right.
7 One is where the Steering Committee is looking for
8 clarification as far as Bates numbers of documents that were
9 already turned over; another is where the Steering Committee is
10 looking for documents that Biomet had originally said they
11 would produce; and the other is documents that Biomet objected
12 to and did not say that they would be willing to produce.

13 And then, as I understand Dispute 2, we're talking
14 about how many record custodian depositions and related
15 depositions would be taken.

16 That's where I understand we are. I'll let you folks
17 go ahead and argue it. And if I've got myself in the wrong
18 place, please let me know before you get too deep into your
19 arguments.

20 Mr. Jasper Ward.

21 **MR. JASPER WARD:** Thank you, Your Honor.

22 Jasper Ward.

23 I think that's generally correct. I would say the
24 only tweak to that or addition would be what you first started
25 to say, I think, which is looking for supplementation. A

1 number of the ones where we sought either clarification or by
2 Bates number or asked for things that they said they would
3 produce was asking them to supplement their responses.

4 These were originally served in May of '13. The
5 responses were originally served in May of '13. We're coming
6 up on three years now since that. So regardless of whether
7 it's PSC 1 or PSC 2 or new discovery or a settlement, this
8 would be an appropriate time to ask for supplementation, I
9 think, of many of these requests, especially considering all
10 the changes that have happened since they were first propounded
11 and responded to.

12 **THE COURT:** As I understand it, you're not looking
13 for supplementation in the usual Rule 26 sense, though. You're
14 not talking about, you know, all this information was given,
15 and now we're getting toward trial, and let's do
16 supplementation. You want documents that were promised or
17 information that was promised and you want, let me use,
18 clarification, rather than supplementation; you gave it to us,
19 but we can't tell what you were referring to when you gave it
20 to us. Tell us the Bates numbers.

21 **MR. JASPER WARD:** That, as well as supplementation
22 under 26(e), I believe, where we say, essentially, and, since
23 then, there's been multiple years of registry reports to
24 foreign regulatory agencies, for instance, updated data,
25 updated information that they would have received as part of

1 their normal process for surveillance, and communication with
2 the FDA, so supplementation of things that we asked for last
3 time.

4 And then the second thing is absolutely true; we want
5 them to identify from the Bates ranges they've already provided
6 what they say is responsive so that we can determine what we
7 don't have or what we don't know we don't have, which is sort
8 of part of this, as well, trying to figure out, you know, what
9 they're saying they've already given us, what they're saying
10 doesn't exist, what they're saying is nonresponsive, because
11 there's documents that are relevant, that we think are relevant
12 that they may not think are relevant, that they haven't
13 produced, or there's documents that they may say, "Well, this
14 isn't relevant, but we've produced it anyway, and here it's in
15 Bates Range XXX through YYY."

16 So, those three categories, I think, are correct,
17 with the addition of general supplementation of things that
18 have happened since the original responses were served.

19 Then, I think we can get into whether, either through
20 new discovery or through a motion-to-compel process or a
21 meet-and-confer under old discovery, whether the things that
22 they haven't given us are things that we think they should, and
23 that's what we're trying to figure out is, you know, what
24 things have come out since then. We can evaluate whether that
25 includes everything we think is relevant to the cases as they

1 stand now.

2 You know, one of the big things that we're running
3 into, having lived through the settlement process, is that
4 things that were not a focus of the litigation at the time the
5 discovery responses were served were used as defenses in
6 settlement, and so those new issues that have sort of arisen,
7 we want to go back, I think, and through the -- if there are
8 documents that are responsive under old discovery, we can get
9 it through that respect, or, if not, through new discovery, and
10 I think that's a big part of the process, as well.

11 Basically, the snapshot of May of '13, of what the
12 case looked like, is different than what the case looks like
13 now, and so we want to just kind of get an updated view of
14 things and we can go from there. And I think that was kind of
15 the focus of our meet-and-confer process, was to get -- narrow
16 down things we don't need. I mean, we eliminated 140 doc
17 requests and 18, 17, 16 -- excuse me -- of the interrogatories
18 that we didn't ask for supplementation on or didn't ask for
19 them to respond to again, and so we're trying to narrow it down
20 as much as we can to keep it proportional, both under our
21 general theory of how the case should go from here with
22 case-specific discovery and case-specific trials and under the
23 new rules, to the extent that they, actually, do apply to
24 discovery at this point.

25 So, essentially, that's what we're asking for, start

1 with supplementation, and then we can go from there, arguing
2 about the substance. But we hope that through the
3 substantiation that they provide us and the clarification on
4 what they didn't give last time or what they say they've
5 already given even, we can figure out if that's something we
6 need to revisit or seek through some sort of new discovery
7 process.

8 **THE COURT:** What sort of defenses are you talking
9 about that would not have been relevant, I guess --

10 **MR. JASPER WARD:** Sure.

11 **THE COURT:** -- back in '13 but may be now?

12 **MR. JASPER WARD:** The biggest one, I think, is
13 loosening. I believe that the search term "loosening" as a
14 reason for failure of a hip product, I think that was something
15 that was used as a defense in the settlement process that I do
16 not think was included in the original search terms and in the
17 original document seek. I could be wrong about that, but my
18 memory is that, on the search term list, something about
19 loosening.

20 I think "alval" is also another, which is -- "alval,"
21 A-L-V-A-L, which is related to metallosis, from our
22 perspective, and something that we think is related to
23 failures, was not something that was included but was something
24 that was -- Mr. Winter and I personally discussed on one of
25 our cases, whether that was a sign of metallosis or whether

1 that was a sign of failure, so those sort of specific things.

2 And I think we're probably getting a little too far
3 into the details to talk about -- for the old requests today,
4 whether those things should be responsive or not to our old
5 requests or new requests, but those are just examples of
6 things, that the case is a little bit different now than it was
7 in 2013.

8 **THE COURT:** Okay. Thank you.

9 **MR. JASPER WARD:** I think that covers the main points
10 on the old discovery. If there's any other questions, I'm
11 happy to answer them.

12 **THE COURT:** I think I understand.

13 **MR. JASPER WARD:** Thank you.

14 **THE COURT:** Let me go ahead and hear both issues from
15 Plaintiff and both issues from Defense.

16 Navan Ward.

17 I don't, usually, use first names on these, but I
18 think I have to.

19 **MR. NAVAN WARD:** Yes, Your Honor. Since Jasper Ward
20 is here, I guess it is necessary to distinguish between Cousin
21 Jasper and myself.

22 As to the Court's or Your's Honor interpretation of
23 Dispute Number 2, you are correct to the extent that what
24 Discovery Dispute Number 2 deals with is receiving and being
25 able to receive custodial files for -- approximately 102

1 custodial files of deponents that the PSC had submitted to the
2 Defendants back in January 29 of 2010 (sic) in regards to the
3 Court's order under Paragraph 5 and 6. That production is
4 extremely necessary, Your Honor, for multiple reasons.

5 We all know that, in order for -- the Plaintiffs who
6 have filed cases in this particular MDL, they're going to be
7 relying on general discovery, as well as depositions that have
8 been taken during this process in order to prosecute their
9 cases in their local jurisdictions once those cases come up for
10 trial.

11 And so the original 67 documents that the Defendants
12 produced prior to the time that PSC 2 was appointed or what we
13 currently have to go off of in the litigation -- and PSC 2 has
14 spent a tremendous amount of time and effort in going back
15 through those 67 custodial files in order to identify -- and to
16 date, we've identified 39 of those deponents that are -- of the
17 67 that were originally produced, 39 deponents that we are
18 looking to potentially depose.

19 PSC 2 has, also, gone a step further and identified
20 an additional 63 deponents that we feel that will be necessary
21 in order to prove our case, prove the cases of the 290 or 300
22 cases that are in this MDL currently.

23 Now, we are not looking, obviously, to be able to
24 take the depositions of each of those, 102 to 104 depositions.
25 What we are looking for are the custodial files. We have the

1 original 67. Out of that 67, we've identified 39, plus the
2 additional 63 deponents that we intend on being able to look at
3 to be able to identify the total number of depositions that we
4 would want to go forward with.

5 Because of the amount of manpower and the resources
6 that PSC 2 has, there's no way that we'll be able to take 104
7 depositions, and so that underscores the reason for us needing,
8 at least to date, the total number of custodial files for us to
9 be able to identify which specific people we need to depose
10 throughout this time frame so we will --

11 **THE COURT:** Let me just get a clarification here.
12 So, I gather you're not trying to take the depositions now;
13 you're trying to get information to help you decide which of
14 the 102 or whatever it is?

15 **MR. NAVAN WARD:** Well, we want to -- if -- we would
16 like to be able to get -- for Biomet to have responded to our
17 initial request, this initial request, January 29 request in
18 response to this scheduling order, coupled with a second set of
19 discovery requests that we've also provided them which was due
20 this past week, and I'm not sure if we received a response on
21 that yet. But the combination of those two would provide us
22 custodial files, enough custodial files to be able to go
23 through and eliminate duplicative witnesses.

24 There would be three or four witnesses -- excuse
25 me -- one witness, that we would be able to see their custodial

1 files and say, "Hey, we can take this one witness that would
2 cover three or four witnesses' testimony," and we would be able
3 to more efficiently and effectively take the necessary
4 depositions in that instance, because, quite frankly, the way
5 Plaintiffs Steering Committee 2 is set up, we can't afford to
6 be able to take multiple depositions, that some of them may not
7 necessarily be as productive for us as certain others.

8 And so we want to start taking depositions as soon as
9 possible, but the need to be able to get the entire list, so
10 far, of deponents, custodial files, in order to evaluate them,
11 analyze them, and determine the true number that we can
12 actually take. Who knows how many that may be?

13 **THE COURT:** Let me ask you this: The numbers I wrote
14 down add up to 102, and 104 may be more accurate. I don't
15 know. The numbers I've got here, there are 63 people who are
16 basically new, that you've come up with their names through
17 some other method, and 39 that you got from the records of the
18 67 who have been -- boy, this isn't working very well.

19 Let's say the red team is 67 people whose depositions
20 had been taken and these files you have.

21 No, they're not taken?

22 **MR. NAVAN WARD:** No, 67 custodians --

23 **THE COURT:** Yeah.

24 **MR. NAVAN WARD:** -- have been -- of individual
25 Biomet, either current or former, employees have been provided

1 to the Plaintiffs Steering Committee or at least provided to
2 the PSC, the former PSC --

3 **THE COURT:** Right.

4 **MR. NAVAN WARD:** -- before PSC 2 was involved, so
5 those are 67 individuals.

6 Now, Biomet --

7 **THE COURT:** They haven't all been deposed?

8 **MR. NAVAN WARD:** None of them have been deposed.

9 There have been 30(b)(6) depositions on some of those people in
10 there, but those were for the specific topics on that 30(b)(6)
11 topic. It wasn't for that particular -- questions weren't
12 asked regarding that particular person's personal knowledge
13 and/or things in their custodial files.

14 So for all intents and purposes --

15 **THE COURT:** Okay. So you've got the files of 67
16 people or records of custodians?

17 **MR. NAVAN WARD:** We have the files of 67 people, plus
18 the general files, the design history file, several other
19 general files.

20 **THE COURT:** Okay.

21 **MR. NAVAN WARD:** And so --

22 **THE COURT:** Now, out of that -- I gather, out of
23 that, somehow, those 67 custodian files produced 39 other names
24 whose files you want?

25 **MR. NAVAN WARD:** No, Your Honor.

1 Out of that 67, so far, the Plaintiffs have
2 identified 39 custodians that we're interested in potentially
3 taking depositions of, out of that 67.

4 **THE COURT:** Okay. Okay. So 39 out of the 67.

5 And then you've got 63 whose files you don't have?

6 **MR. NAVAN WARD:** And then we have 63, based on our
7 review of all of the 67, plus the general custodial files, the
8 design history file, or the marketing file, the corrective
9 actions file. Based on all of the production, to date, PSC 2
10 has additionally gone in and identified another, approximately,
11 63 witnesses that we feel are going to be necessary. Now,
12 we've identified them through, you know, various records, but
13 we don't have their custodial files to see the breadth of their
14 involvement, to see the entire realm of what they would bring
15 to the table.

16 **THE COURT:** But these people are all records
17 custodians?

18 **MR. NAVAN WARD:** Yes, those are all records
19 custodians that Biomet has and that, in our second set of
20 discovery requests, as well as our January 29th, 2016 letter to
21 them, letting them know that these are the group of people that
22 we are seeking to have for the 39, a complete set of their
23 discovery -- a complete set of their custodial files, and for
24 the additional 63, their custodial files, in general, since we
25 don't have those already.

1 **THE COURT:** Okay.

2 **MR. NAVAN WARD:** And based off of that number, once
3 we're able to get it, we're able to identify however many
4 depositions that we may need to take, whether it's 10, 20, 40,
5 60. I don't think it's going to be that high, but we don't
6 know at this point in time. But once we're able to identify
7 them, then we can also identify what order we can take them in
8 or should take them in without -- obviously, being able to
9 avoid any duplications.

10 Now, your scheduling order that you provided to the
11 parties back in December of last year, that clearly set out the
12 deadlines for the deponents -- for the Plaintiffs to provide
13 the Defendants the deponents that we are interested in. It set
14 out a deadline of PSC 2 providing Biomet with a list of the
15 initial people that we would like by January 30th, 2016. It
16 also allowed us to provide -- to set out a deadline to provide
17 Defendants a supplemental list of additional people that we
18 would need by May 29th, 2016.

19 Because, again, the Plaintiffs Steering Committee has
20 really spent a lot of time and effort in being able to identify
21 as many people as we can. We have -- and the order allows for
22 us to be able to provide, at least to date, the full number of
23 people that we're looking for. Because, again, because the
24 deadline says, "by," for the initial list, "January 30th," and,
25 "by," for the supplemental list, "May 29th," it allows us to be

1 able to, at any point in time prior to those deadlines, prior
2 to those deadlines, provide the Defendants the people that we
3 need.

4 Now, in this instance, we provided them this
5 information early to give them a heads up. We used our
6 resources, our time, because we knew that we could not take
7 duplicative depositions, so we wanted to provide this
8 information as early as possible. And under Paragraph 6 and --
9 5 and 6 and the deadlines that you've set out, there are
10 absolutely no restrictions for the Plaintiffs to be able to
11 provide this list earlier than May 25th -- May 29th, whether
12 it's a week earlier, a month earlier, four months earlier, in
13 this instance, and that is where we were, which would allow us
14 to provide them the total list of the deponents, at least the
15 deponents that we want custodial files for.

16 Now, this is consistent with, Your Honor, what we
17 have -- the Plaintiffs Steering Committee has relayed to both
18 the Defendants, as well as the Court.

19 In the exhibits, one of the exhibits attached to our
20 motion, we attached the December 7, 2015 case management
21 conference transcript leading up to Your Honor giving the
22 order, the scheduling order, where, you know, we explicitly --
23 this is on one occasion where we explicitly said that we intend
24 on taking new discovery, we intend on being able to go forward
25 with supplementing old discovery, as well as being able to

1 identify deponents who are outside of that 67, the 67 custodial
2 files that Biomet had previously produced, because -- I think
3 Mr. Ward, Jasper Ward, appropriately said it earlier when he
4 was here -- the snapshot of what was going on in the litigation
5 in 2013 is very different from the snapshot of what's going on
6 now, and so the additional custodians that we have been able to
7 identify, in our estimation, would be essential for us being
8 able to prove and prosecute our cases for the remaining 300
9 plus cases here.

10 **THE COURT:** So from the standpoint of the records
11 custodians who need to be examined, how are things different
12 now than they were in '13?

13 **MR. NAVAN WARD:** Well, the issues, the issues that we
14 will be seeking to address. Again, some of the issues that --
15 as Mr. Jasper Ward mentioned earlier, the fact that -- some of
16 the reasons for settlements being rejected, such as loosening,
17 which were not part of the original discovery requests.

18 Additionally, since 2013, there have been several
19 major differences or major things that have occurred that were
20 not present in 2013.

21 For instance, Zimmer buying out Biomet, that
22 introduces potentially other witnesses that we would need.

23 **THE COURT:** As records custodian?

24 **MR. NAVAN WARD:** Well, depending on what type of
25 communication and what type of information they had in regards

1 to Biomet before that time frame. Again, of course, we don't
2 know.

3 Another issue is, there was an Australian recall that
4 has occurred since 2013, and people around and involving that
5 particular recall, these are people that the old PSC, the
6 former PSC did not, of course, know about.

7 Those are just two examples of several occurrences
8 and things that makes the litigation today different from the
9 litigation in 2013 and it's the PSC's responsibility to be able
10 to take the necessary depositions in the time frame that we
11 have.

12 I think both -- discovery deadline for both of those
13 deponents or general discovery to be over with is December of
14 this year. Being able to get the accurate number that we feel
15 will help us determine who we need and the order in which they
16 need, sooner than later, will help us be able to take those few
17 depositions in the necessary time that we need. And, of
18 course, if we are able to identify additional people who we
19 would need to take depositions on, we surely would have that
20 opportunity by May 29th by giving an updated supplemental list.

21 And so the 104 is what we were able to provide on
22 this initial list because, again, the order simply allows for
23 that because we can provide that information before, any time
24 before the supplemental time frame of May 29.

25 Now, as I've already talked about or discussed,

1 Biomet's refusal to provide Plaintiffs Steering Committee the
2 additional 63 custodians has hindered our ability to be able to
3 identify who we actually want to take and when we'll need to be
4 able to take them.

5 And during the meet-and-confer, during that
6 particular process, as well as with our original letter, with
7 regards to priority, or when these depositions should be taken,
8 we offered the ability to notify the Defendants in enough time,
9 in a satisfactory amount of time in order to start rolling out
10 the deponents that we actually intend on proposing.

11 Their position is that we have to wait until
12 May 29th or more before we were able to select any others, and
13 I just don't read that in this order. I just don't see them
14 having the ability to do that. And if they take that position,
15 that hinders our ability to avoid duplication on who we want to
16 be able to take, as well as be able to let them, as well as the
17 Court know the prioritization of when we would be able to take
18 them.

19 And so, bottom line, Your Honor, Plaintiffs Steering
20 Committee Number 2, we have and we should have the right to be
21 able to continue prosecuting these cases through discovery and
22 continue to work up these cases through general discovery, as
23 well as the depositions that we will need, in order to meet the
24 burdens that we have with the issues that are currently
25 present. And in doing that, we've provided, in proper amount

1 of time, a list that we have currently of people who we would
2 need, deponents, custodial files for.

3 And Biomet's reluctance and/or refusal to provide
4 that to us is not proper before this order, before the Court's
5 order, and so we would request that the Court would require
6 Biomet to start producing those 63 additional files in order
7 for us to be able to go forward with taking the depositions and
8 providing them the time frame those depositions would need to
9 be taken.

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

11 Mr. LaDue.

12 **MR. LaDUE:** Judge, I'm going to take the first one on
13 written discovery. Mr. Winter will address the depositions.

14 Biomet read the Plaintiffs' request to supplement
15 different than the Court did. We read it, much the way
16 Mr. Jasper Ward described, as a general request for
17 supplementing, and I can explain why we read it that way,
18 Judge.

19 **THE COURT:** Okay.

20 **MR. LaDUE:** This is the request that Biomet most
21 strenuously objects to.

22 The Court's most recent scheduling order, which was
23 issued December 21, 2015, authorized limited written discovery
24 in three very specific areas.

25 First, in the statute of limitation and spoliation

1 cases, the Court's scheduling order authorized Biomet to serve
2 three specific interrogatory requests, which were consistent
3 with related questions in the Plaintiff's Fact Sheet. They're,
4 essentially, questions on spoliation. In the record or on the
5 docket, that authority is found in the Court's scheduling
6 order, Document Number 3047, at Paragraphs 3Ci and 4Ci.

7 The second area where the Court authorized discovery
8 was also in the statute of limitations and spoliation cases.
9 There, the Court's scheduling order authorized Biomet to serve
10 two document requests. This is, basically, for the Plaintiffs'
11 medical records. Again, these requests are consistent with the
12 questions that were included in their original Plaintiff's Fact
13 Sheet. That's in Paragraphs 3Cii and 4Cii of the Court's
14 December 15 scheduling order.

15 And then the third area where the Court authorized
16 written discovery was in the Group 1 and Group 2 cases where
17 the Court authorized the party to serve limited case-specific
18 interrogatories and requests for production and requests for
19 admissions. That's in Paragraph 8 and 10 of the Court's
20 December 2015 scheduling order.

21 Judge, the December 2015 scheduling order did not
22 mention, and Biomet believes did not authorize, another full
23 round of general discovery, nor did it mention or authorize or
24 require Biomet to do wholesale supplementation of all of its
25 previous discovery requests, but that's exactly what the

1 Plaintiffs are asking for.

2 In their January 2016 letter, which Biomet received
3 shortly after January 25th, the Plaintiffs asked Biomet to,
4 "Revisit its initial discovery responses in light of the
5 Court's scheduling order of December 21, 2015," and then
6 stated, "Plaintiffs hereby renew all of their interrogatories
7 and requests for production of documents through the date of
8 this request," and then asked Biomet to supplement its
9 responses.

10 That January 2016 letter, Judge, is at Document
11 Number 3066-1. I was referring to quotes from Pages 2 and 3.

12 The Plaintiffs' January letter then went on to list
13 five interrogatories and 44 document requests and asked Biomet
14 to specifically supplement those for various reasons.

15 Biomet believes that the Plaintiffs' request that
16 Biomet supplement all of its previous interrogatory responses,
17 and even the Plaintiffs' request that Biomet supplement the 49
18 specific requests in the January letter, are improper for two
19 reasons: First, those requests for supplementation conflict
20 with the Court's orders regarding discovery, including the most
21 recent scheduling order from December 2015; and, second, those
22 requests conflict with the proportionality requirements under
23 the December 2015 amendments to Federal Rule 26.

24 And, Your Honor, to better understand Biomet's
25 position, I think it's helpful to go back and look at the

1 Court's orders as they apply to written discovery and some of
2 the history of the written discovery in this case.

3 Your Honor, I've prepared a time line that walks us
4 through that.

5 May I approach?

6 **THE COURT:** Sure.

7 Would it be easier to use the ELMO?

8 **MR. LaDUE:** I think it would be easier if I just
9 handed it to you, Judge.

10 **THE COURT:** Oh, I see. I'm sorry.

11 **MR. LaDUE:** For the record, Plaintiffs' counsel
12 already has a copy.

13 Your Honor, I'm not going to walk through this entire
14 thing with you, but just try to hit some of the highlights that
15 are applicable to our discussion today, and that will be a lot
16 of the first page and then just portions of the remainder.

17 The Plaintiffs first served interrogatory requests in
18 February 2013.

19 I'm sorry. Document requests were first served in
20 February 2013. That's the first entry there. There were 184
21 requests covering 18 categories of documents.

22 Also, in February '13, this Court issued Case
23 Management Order Number 1, and, in it, the Court authorized the
24 Plaintiffs Steering Committee to serve a master set of requests
25 for production and a master set of interrogatories. And in the

1 Court's Case Management -- first Case Management Order, the
2 Court said as follows, "Absent court approval, no request for
3 production, interrogatories, or requests for admission may be
4 propounded to the plaintiffs' lead counsel or [the] defendant's
5 lead counsel other than the Master Written Discovery described
6 in this paragraph." That's at Document Number 242, and I
7 referred there to Paragraph VII F.

8 In March of 2013, the Plaintiff then served their
9 first set of interrogatories.

10 March, Biomet responded to the Plaintiffs' first
11 request for production of documents.

12 And as you'll remember, Your Honor, in April of 2013,
13 we had a dispute about the manner, the process that Biomet used
14 to identify, collect, and produce documents in ESI responsive
15 to Plaintiffs' requests.

16 By the way, Your Honor, during that process, the
17 terms "alval" and "loosening" were used as search terms. Those
18 are not new concepts or new issues in this case. Those have
19 been issues from the outset. I think if we look back at the
20 science day presentations, there was ample mention of both of
21 those ideas.

22 The Court, after reviewing briefs, eventually issued
23 an order April 18th, 2013, holding that Biomet's process for
24 identifying, collecting, and producing documents in ESI
25 complied with Biomet's obligations under the Federal Rules.

1 In May of '13, Biomet served its responses to the
2 Plaintiffs' interrogatories.

3 The parties then had a dispute. I'm moving on now to
4 Page 2, Your Honor. During July and August of 2013, we had
5 some substantial back and forth. You can see that in the
6 parties' submissions. There were an exchange of letters,
7 several meet-and-confers, and, ultimately, the parties reached
8 an agreement on how Biomet should supplement its interrogatory
9 responses. And then, at the end of August, 2013, Biomet served
10 supplemental interrogatory responses, consistent with the
11 parties' agreement.

12 After August of 2013, Your Honor, the focus was on
13 completing the document production and producing files from 67
14 Biomet custodians that the parties agreed on.

15 What happened there, Your Honor, Biomet originally
16 suggested, with some back and forth with the PSC, 28 original
17 custodians. And then the PSC asked for a larger group, and we
18 ultimately agreed upon an additional 39, and that's where the
19 67 came from. And so it was producing, collecting, and
20 reviewing and producing those files that was the focus of
21 Biomet's work after August of 2013.

22 And if you will move with me to Page 3, Your Honor,
23 as we came to the end of 2013, the Court issued its scheduling
24 order, and the focus on producing custodian files is reflected
25 in that order.

1 The Court's order from December 2013 directed Biomet
2 to certify production of its initial 28 custodian files by
3 January 3rd, 2014, and directed Biomet to certify its
4 production of the additional 39 custodian files and complete
5 all of its document production by March of 2014. The
6 scheduling order, like the current scheduling order, did not
7 authorize any additional written discovery or require Biomet to
8 supplement its discovery requests.

9 Biomet complied with the first part of that order,
10 Your Honor. In January 2014, Biomet certified that it
11 completed the initial production of the initial 28 custodian
12 files, and then that's when we started with the settlement,
13 Your Honor.

14 In February of '14, this Court issued an order
15 vacating the scheduling order based on the parties' tender of
16 the Master Settlement Agreement.

17 Nonetheless, Biomet continued to work on completing
18 its document production. In July of 2014, Biomet completed
19 production of the additional 39 custodian files and completed
20 production of its privilege logs, so Biomet believes that, as
21 of July 2014, its document production was complete.

22 If we move ahead towards more recent history onto
23 Page 4, Your Honor, there's an entry there dated 9/3/15. I
24 point that one out because, during a conference we had here,
25 Judge, you asked a specific question of the PSC regarding

1 further written discovery. On behalf of the PSC, Mr. Presnal
2 answered, I won't read the whole thing, but the last part of it
3 was: I don't think we're talking about going back to square
4 one or sending a bunch of new requests that haven't been out
5 there for some time. He indicated the PSC was more focusing on
6 looking back and making sure they had everything.

7 Jump ahead to December 15. After soliciting input
8 from the parties and hearing argument, the Court then issued
9 the current scheduling order December 21, 2015, which
10 authorized only the limited written discovery that I described
11 earlier.

12 Onto the last page, Your Honor. I mentioned the
13 January 25 letter from the PSC where they ask us to revisit all
14 of our initial discovery responses and supplement them.

15 And then, in February, just this past month, the
16 Plaintiffs Steering Committee served on Biomet's lead counsel a
17 second set of general interrogatories propounding 12 new
18 interrogatories, some with multiple subparts, and they also
19 served Plaintiffs' second set of requests for production of
20 documents to the Defendants containing 18 new requests for
21 production, many with multiple subparts.

22 Your Honor, Biomet believes this history indicates
23 that the Court never intended that, after 2013, Biomet would be
24 required to supplement all of its previous discovery requests
25 or to answer another full round of general discovery in this

1 case. None of the Court's orders required Biomet to provide
2 wholesale supplementation or authorized the Plaintiffs to serve
3 another round of general discovery, at least not without,
4 first, seeking leave of Court, and I'm not aware that that
5 request has ever been made in the course of these proceedings.
6 Biomet's already supplemented its interrogatory responses once,
7 and that was done after meet-and-confer with the PSC and
8 consistent with the parties' agreement based on that
9 meet-and-confer. And the Plaintiffs' request now that Biomet
10 go back and supplement a particular document request or 44
11 particular document requests really doesn't make much practical
12 sense, Your Honor.

13 **THE COURT:** When was that supplementation? You said
14 that Biomet already supplemented its interrogatory answers.

15 **MR. LaDUE:** Sure.

16 **THE COURT:** When was that?

17 **MR. LaDUE:** It was August 30th, 2013.

18 Your Honor, that supplement is included in the record
19 at Document Number 3083-1, and it's also -- reference to it is
20 included in that time line, along with the back and forth
21 between Plaintiffs' counsel and Biomet's counsel.

22 By the way, that meet-and-confer process is included
23 in the record, as well, at Document Number 3083-3, Pages 11
24 through 14.

25 I was saying, Your Honor, that asking Biomet to

1 supplement a response to a particular document request or 44
2 particular document requests really doesn't make much sense
3 practically, the way Biomet ultimately built the database that
4 contains responsive documents. As you'll remember, Your Honor,
5 we started with Biomet's entire universe of documents. We
6 applied search terms to cull that to something that made sense
7 related to our case, and then we engaged a computer-assisted
8 technology or predictive coding to identify relevant documents
9 and reject documents that were not relevant, and what that
10 created was a searchable database, one that any one of us can
11 use word terms to search to find relevant information, but it
12 was not segregated by or developed in response to any
13 particular document request.

14 So saying we should supplement Request Number 44 or
15 44 separate requests doesn't really make any practical sense.

16 And asking Biomet to go back now and do a whole other
17 round of collection is basically asking for a total do-over of
18 our document production here, and I think the time and expense
19 to do that, at this stage of the proceedings, is certainly
20 unduly burdensome and not reasonably proportionate to what is
21 left here.

22 **THE COURT:** Let me ask you. You said that the
23 database was created in 2013 with two rounds, first the key
24 word and then the predictive coding.

25 Has that database been supplemented by documents that

1 have been created since the database was originally --

2 **MR. LaDUE:** It is current up through July of 2013.

3 **THE COURT:** Okay. And --

4 **MR. LaDUE:** I'm sorry. 2014.

5 **THE COURT:** Okay. Who can access that? Is that only
6 Biomet or can the Plaintiffs access it, as well?

7 **MR. LaDUE:** Everybody can access it.

8 **THE COURT:** All right. So, at this point then,
9 you're about 20 months behind as far as updating the database
10 from July '14 until now?

11 I'm not saying that's good or bad. I'm just trying
12 to see where we are.

13 **MR. LaDUE:** If updates are reasonable, yes,
14 Your Honor.

15 **THE COURT:** Okay.

16 **MR. LaDUE:** Biomet doesn't -- for the record, Biomet
17 doesn't think it should have to update its database at this
18 stage.

19 **THE COURT:** I didn't want you to concede that point
20 when I was asking, just clarifying the status of the database.

21 **MR. LaDUE:** Understood, Your Honor.

22 **THE COURT:** Now, I understood your objections to the
23 general renew everything, answer everything again.

24 What do I do with the ones where Biomet's initial
25 response was, after the standard objections, we get down to,

1 "But we'll produce it"? What do I do with those?

2 **MR. LaDUE:** Biomet believes it's done that.

3 So, we get a document request that was initially
4 served on us, and we objected to it, but then we created a
5 database that was intended to capture all relevant documents,
6 so the responses should be in there, and either party can come
7 up with its own search terms to find the information.

8 **THE COURT:** Okay. So, you're saying you complied
9 with it by putting into this database that was accessible by
10 both sides?

11 **MR. LaDUE:** Yes. Yes, your Honor.

12 **THE COURT:** Okay. So, on each of those that are
13 cited in the Plaintiffs' most current -- I'm trying to find a
14 noun that doesn't carry a legal meaning -- I'll say request,
15 understanding I don't mean a document request, for each of
16 those where Biomet said, "We object, but we'll give it to you
17 anyway," Biomet's position is that's all been put in the
18 database?

19 **MR. LaDUE:** We did that, yes, Your Honor. When we
20 completed our document production in July 2014, we believed
21 that we had provided the entire universe of relevant documents.

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

23 Mr. Winter.

24 **MR. WINTER:** Good afternoon.

25 As to the custodians, we take your orders to be

1 meaningful, and we know that your orders are the product of
2 your considered review of the record, and you explicitly
3 ordered the parties, in December of 2015, to start taking
4 depositions -- and based on representations made in open court,
5 we believed a subset of the 67 -- starting sometime after
6 January 29 of 2016, based on an order of priority provided by
7 Plaintiffs. Paragraph 5 of your December 21 order is express
8 and explicit.

9 We begged the other side to start that process. We
10 told the other side that Paragraph 6 of your order deals with
11 maybe there are more custodians.

12 And my good colleagues keep telling you that, for
13 some reason, they now think they need something different than
14 the 67.

15 Your Honor, if you were to look at Document 2975,
16 which was PSC 2, proposal for the Case Management Order that
17 you entered in December of 2015, and you were to look at
18 Paragraph 6 of their proposal and Paragraph 7 of their
19 proposal, PSC 2, five months ago, after all these settlements
20 were over, after they knew about our alleged strategy that no
21 one knew about before, they expressly say, "By January 15,
22 2016, PSC shall provide an initial list of requested deponents
23 from the 67 custodians in order of priority," nothing more,
24 "from the 67."

25 Paragraph 7 was, as of the date in May of 2016, from

1 the same 67, they provide a supplemental list.

2 Yes, Your Honor, in December of 2015, one of my
3 colleagues stood up and said, "Judge, we may want to take more
4 custodians."

5 And we said, "We'll have a meet-and-confer on that."

6 And your order was express as to that possibility,
7 when it could occur, Paragraph 6.

8 But we are baffled, Your Honor, by the conduct of PSC
9 2, both as to the first issue that my good colleague,
10 Mr. LaDue, addressed and as to this issue.

11 Your Honor, we never ever anticipated that PSC 2
12 would be appointed and make representations to you about
13 wanting to streamline discovery, not reinvent the wheel, take
14 focused discovery, and then have you enter an order. And then,
15 within, roughly, 30 days of that order being entered, they say
16 they can ignore it.

17 If I make an argument to you, Your Honor, in
18 December, and you issue an order on December 21st, and you
19 don't buy my argument, you issue an order, I can't turn around
20 and say, "Well, I argued to Judge Miller before the order that
21 I would be allowed to do whatever I want. Judge Miller's order
22 said I have to do X."

23 The fact that I said, "Judge, I want to do whatever I
24 want," is not how we have to work, and this is causing us great
25 consternation because we all agreed to a relatively tight

1 discovery here, both as to Biomet discovery and case-specific
2 discovery.

3 And, quite candidly, Your Honor, we've lost two
4 months on the track to depose people from Biomet, and it's not
5 for us not offering.

6 They could have said, "We want these seven people out
7 of the 67. We want these 12 people out of the 67."

8 They hadn't passed the 15 threshold that they
9 represented to you back in September. But even if they said,
10 "We want 25," we would have started the process to get as many
11 of them scheduled and maybe have a meet-and-confer as to: Do
12 you really need 25?

13 And when we said to them, "We need to do that," the
14 response is, "No, we're not. We don't care. We have these
15 other 60-some odd custodians that we want you to collect from."

16 And they're not -- for the record, Your Honor, some
17 of those people have nothing to do with Biomet hips at all.
18 We've started to look at them. Twenty-some of them are either
19 in Japan, Korea, the Netherlands, you know, X U.S. Some of
20 them, like one or two of them, are not Biomet employees.

21 So to say that we have to go, like, find these
22 people, come May, if that's what they say, the additional
23 people they want to depose, and we have to meet-and-confer
24 about those custodians, we'll do that. We'll tell them, next
25 week, how many of those extra people are not either Biomet

1 employees or X U.S. employees. Because, under proportionality,
2 I can't see how in the world we would ever have to produce
3 someone who works in Japan for one of these cases.

4 Your order from December of 2013, when you look at
5 the record, was very clear as to what you wanted in terms of
6 custodial file productions, which then creates a database of
7 more than eight million or nine million pages of information,
8 which is the responsive yield of documents, which they've had
9 access to since sometime in 2015, because our good friends,
10 Mr. Lanier and Mr. Anapol, promised you that they would give
11 PSC 2 full access to the database, so they've had nine million
12 pages of information to look at.

13 If they want to go run a search for "alval" in those
14 nine million pages, they'll find every document that mentions
15 "alval," "loosening," pick a word. That's the way this is set
16 up, that's the way it was created, that's the way you ordered
17 it be created after two different motions, after back and
18 forth, coming up with a universe of custodians.

19 And as of September of this year, with PSC 2 around,
20 that was the universe of custodians, 67.

21 You enter your order in December. I don't know why
22 there was this change of heart. And I will never impute
23 motives, but I can think of a couple, very quickly, Your Honor,
24 as to why they would do the reversal that they did. And we've
25 been prejudiced by that, and, you know, we've laid out what we

1 think our remedies are.

2 Thank you, Your Honor.

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

4 I know we're on a tight timetable so I'll try to
5 get -- I don't want to try to rule from the bench on this.
6 I've been trying to do that when I can, but I don't think this
7 is one where I can. But, on the other hand, I will do my best
8 to get a ruling out this week, after next Monday, at the
9 latest.

10 Turning to the agenda, I think the only other things
11 you folks had were the -- now I've lost it. There it is --
12 updates to CMO, and, as I understand it, those were pretty
13 minor, just changes in names of entities.

14 **MR. WINTER:** Both sides consent to it, Your Honor.

15 **MS. FULMER:** Just very minor changes, change of an
16 e-mail address for services of doc sheets.

17 **THE COURT:** Okay. And then the pending motions.
18 We're moving. It's shorter, but it's still there, so we'll try
19 to gain on that, too.

20 I think -- as far as scheduling, I know we're into
21 the discovery season here. I think we might do well, in
22 addition to setting another status conference four to six weeks
23 down the line, to at least schedule telephonic arguments if
24 discovery issues do come up so we don't have to wait for the
25 next conference. And if we come and there's nothing to talk

1 about, we just won't place the call.

2 So let's start with the next status conference. If
3 this is the 21st of March, why don't I offer you the 25th, at
4 1:00, if that will work. That's five weeks from today. We may
5 not be able to use this courtroom because Judge Simon has a
6 trial set here, but we can meet just about anyplace.

7 Does that work?

8 **MR. WINTER:** April 25, Your Honor?

9 **THE COURT:** Yeah.

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

11 **MR. NAVAN WARD:** It works for the PSC, as well.

12 **MS. FULMER:** It works for us, as well.

13 **THE COURT:** Okay. Let's do that for a -- and, again,
14 we can do this by telephone if everything is going along
15 smoothly, but let's tentatively plan this to be in court.

16 **MR. NAVAN WARD:** And, Your Honor, do you want to be
17 able to have the, I guess, 30-minutes-prior-to-in-chambers
18 conference to kind of give you a heads-up?

19 **THE COURT:** Yeah, I guess we'll set it for 1:30 and
20 do the conference at 1:00. I'm sorry. Yes, please. I was
21 thinking when we would meet.

22 Okay. How about if we set 9:00 on -- and these would
23 be telephonic, to be canceled if there's no discovery issues --
24 9:00 on March 31st and April 14th, if that works for you? I
25 don't expect to see any faces here in court those days. Does

1 that work?

2 **MS. FULMER:** That works fine for the Plaintiffs,
3 Your Honor.

4 **THE COURT:** Okay. So we'll pencil those in. And,
5 again, if there's nothing to do, let us know, and we'll be
6 happy to do something else. And I'll show those as telephonic
7 conferences.

8 **MR. NAVAN WARD:** And those are 9:00 a.m.?

9 **THE COURT:** Yes, in whatever Time Zone we're in now.
10 We changed the clocks, again.

11 That's everything on the agenda and everything that I
12 wanted to raise.

13 Is there anything further for the Plaintiffs today?

14 **MS. FULMER:** No.

15 **MR. NAVAN WARD:** Nothing, Your Honor.

16 **THE COURT:** Anything further for the --

17 **MR. WINTER:** Nothing for the Defendants, Your Honor.

18 **THE COURT:** Okay. Thanks, folks. Talk to you in a
19 few weeks and see you in even more weeks.

20 **LAW CLERK:** All rise.

21 **(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 16th DAY OF MARCH, 2016.

S/S DEBRA J. BONK

DEBRA J. BONK
FEDERAL CERTIFIED REALTIME/REGISTERED MERIT REPORTER