

1           **THE COURT:** You may be seated.

2           Good afternoon.

3           This is our Cause Number 3:12-md-2391, MDL Docket  
4           Number 2391, in re: Biomet M2A Magnum Hip Implant Products  
5           Liability Litigation.

6           We are gathered for a Joint Status Conference. I want  
7           everybody to understand I'm happy to convert these to  
8           telephonic conferences.

9           If you would state your appearances for the record,  
10          please.

11          **MS. FULMER:** Brenda Fulmer on behalf of the  
12          Plaintiffs' Steering Committee.

13          **THE COURT:** Ms. Fulmer.

14          **MR. LaDUE:** John LaDue on behalf of the defendants.

15          **THE COURT:** Mr. LaDue.

16          **MR. WINTER:** John Winter on behalf of the defendants.  
17          Good afternoon, Your Honor.

18          **THE COURT:** Mr. Winter.

19          Good afternoon.

20          Well, I have the agenda that you folks submitted, and  
21          I guess we start with the Active Case Count.

22          Who reports that in the absence of Ms. Hanig?

23          **MR. WINTER:** It is myself, Your Honor.

24          **THE COURT:** All right.

25          **MR. WINTER:** There are right now 338 active cases, one

1 case that's on its way here, and one other case where there's  
2 been an objection at the panel to the transfer of this Court.

3 THE COURT: Okay. So one or two on the way.

4 MR. WINTER: Right.

5 THE COURT: Discovery Update, Status of Groups 5 and  
6 6.

7 MR. WINTER: From the defendants' perspective,  
8 everything is moving along, Your Honor.

9 MS. FULMER: The plaintiffs agree, Your Honor.

10 THE COURT: Okay.

11 So the Proposed Remand Pretrial Order Submissions. We  
12 have that set for July 2nd.

13 Is that added because that date won't work or just to  
14 let us know that everybody knows about it?

15 MR. WINTER: I believe just so everybody knows about  
16 it, Your Honor.

17 THE COURT: Good.

18 MS. FULMER: Your Honor, actually, in reviewing the  
19 order, I noticed -- I think that there's a typographical error  
20 in it.

21 THE COURT: Oh, there might be.

22 MS. FULMER: I'm referring to --

23 THE COURT: That's what happens when I do it.  
24 What page are you on?

25 MS. FULMER: The Scheduling Order that's dated

1 April 23rd, 2018. On page 4, in two places, where it's talking  
2 about the remand groups. Under the second paragraph of Remand  
3 Group Number 2, it actually refers to Remand Group 1. And then  
4 the same thing happens at the bottom of the page. In referring  
5 to Remand Group 3, it, instead, says Group 1.

6 **THE COURT:** I should not be allowed to use  
7 block-and-copy. I will do an amended order.

8 Thank you for catching that.

9 **MS. FULMER:** Thank you.

10 **THE COURT:** I put it together. The fault is entirely  
11 mine. But somebody else will fix it.

12 Status of Upcoming Expert Depositions.

13 **MS. FULMER:** Your Honor, the plaintiffs actually have  
14 asked me to address a couple issues with the Court.

15 We are working on scheduling preservation depositions for  
16 three of our experts, Truman, Kantor, and Gannon, and the  
17 plaintiffs are to have those depositions or the preservation of  
18 the testimony take place in August.

19 One of the practical things that we wanted to address  
20 with the Court is where we take the deposition of Dr. Mari  
21 Truman. It would be our preference, if we could, to take it in  
22 this courthouse in a courtroom, if that is something that's  
23 available.

24 We had also checked with Notre Dame to use one of  
25 their courtrooms and, unfortunately, with the beginning of

1 school, it doesn't work well with the August schedule.

2 Is that something that would be available to the  
3 parties?

4 **THE COURT:** Probably. When in August are you talking  
5 about?

6 **MS. FULMER:** We have some flexibility as to the date.  
7 We kind of left it open until we could have an opportunity to  
8 speak with you, Your Honor.

9 **THE COURT:** I will be gone the last week of August,  
10 from the 28th to the 31st. The problem is that Judge Simon and  
11 I -- since he now has a full South Bend caseload, he and I are  
12 sharing the courtroom, and that would be his week. Right now  
13 he has nothing scheduled. The odds of all the courtrooms in  
14 the courthouse being full seem pretty slim, so I would think we  
15 we'd able to accommodate it. It would be more easily  
16 accommodated on a Friday because I try not to be here on  
17 Fridays. But if after you compare calendars with the deponent  
18 and everybody who would be involved, let us know and we may be  
19 able to block out a day even if it's not a Friday.

20 **MS. FULMER:** All right. Thank you, Your Honor.

21 The other issue that the plaintiffs wanted to address  
22 with the Court is I know that in your order previously you  
23 indicated that you didn't intend to get involved in making any  
24 rulings as far as the admissibility of testimony under 702.  
25 What we're concerned about, though, is that the preservation of

1 this testimony go forward in a very streamlined fashion so that  
2 it could easily be edited in the future. And our concern is a  
3 lot of objections to the form of questions that are used.

4 So the plaintiffs are wondering whether the Court  
5 would be open to at least presiding over any objections that  
6 might be raised with respect to form of questions so that we  
7 could eliminate that; and then, perhaps, have a general  
8 stipulation as far as preservation of other objections so that  
9 the testimony can come in in a much smoother fashion.

10 **THE COURT:** I have checked with other MDL judges to  
11 see if they think that -- and I know some judges think it's  
12 fine to preside over trial depositions. It seems to me that  
13 deciding whether a question is leading is a classic trial  
14 function and that it would not be within my role. I may be  
15 able to find more judges who disagree with me than agree, but  
16 that's just the way I look at it.

17 So I'm sympathetic; I understand it's a lot cleaner if  
18 you only have to clean out the stuff that has to do with other  
19 states, but I just don't think I dare do that.

20 **MS. FULMER:** All right. Thank you, Your Honor.

21 And I think you've already answered my other question,  
22 which is the plaintiffs wanted to know your general  
23 availability if we had any issues that cropped up during  
24 those -- the preservations, you know, where we might need to  
25 reach out to the Court. So it sounds like other than the last

1 few days of August, you should generally be available?

2 THE COURT: Even then, I'll have my phone.

3 MS. FULMER: Thank you, Your Honor.

4 THE COURT: You won't have a record, but I'll have my  
5 phone.

6 Anything more on that topic from the defense?

7 MR. WINTER: No, Your Honor.

8 THE COURT: Okay.

9 I know we have the pending Statute of Repose Motions.  
10 As I understand it, we've got responses due -- is that next  
11 week? I guess that is almost -- yeah, that is next week -- and  
12 then the reply is due after that.

13 Is there anything I should know about those pending  
14 responses and replies?

15 MR. WINTER: No, Your Honor. It's just a placeholder.

16 THE COURT: Okay.

17 The Suggestions of Remand. I recognize that those are  
18 ripe. Of all things to get in the way, we've actually had some  
19 trials lately. You just can't plan for that anymore, so we'll  
20 get the rulings out as soon as possible, but it probably won't  
21 be before the latter part of next week.

22 Then we have the Pending Motions to Vacate the  
23 Co-Defendant Dismissal Orders. And, again, there, we haven't  
24 quite reached the point of responses or replies.

25 Do you intend to respond?

1           **MR. WINTER:** We do, Your Honor.

2           **THE COURT:** All right. Then I will watch for it.

3           And then Resolved Cases Without Release Documentation  
4 Having Been Provided. I assume this is a defendants' topic?

5           **MR. WINTER:** Your Honor, as we've looked at the docket  
6 as it exists in this Court and gone back to reconcile why some  
7 older cases are still there, there was an agreed-upon master  
8 settlement as part of, for want of a better term, the  
9 settlement you approved.

10          **THE COURT:** Right.

11          **MR. WINTER:** And releases went out, but things fell  
12 through the cracks and releases didn't come back.

13          **THE COURT:** Right.

14          **MR. WINTER:** So we started a process of contacting  
15 plaintiffs' firms where we could look at the joint lists from  
16 the old PSC and Biomet to say: This case was settled for  
17 \$20,000; both sides agreed, but we don't have a release.

18                 Earlier this year, we started writing letters to the  
19 specific law firms and saying, you know, either you give us a  
20 release, or we're going to have to go to the Court saying we  
21 need to enforce the settlement or dismiss this case.

22                 I think we sent nine letters, and we have one of those  
23 cases where the plaintiff's law firm has withdrawn, so we now  
24 have a pro se litigant. We have four where we actually either  
25 have a promise to get a release or, in fact, have received a

1 release, but we haven't heard from three of the plaintiffs.

2 And as we go through the rest of the sort of "misfit  
3 toys," to call them that, of the cases, it may be clear that  
4 there's a settlement. It may be an email from a plaintiff's  
5 lawyer saying, yes, my client has agreed, but it's not yet on  
6 that master list.

7 What we would like to do is tell the Plaintiffs'  
8 Steering Committee: Here are nine cases, ten cases, seven  
9 cases. Can you please ask the plaintiff's firm to respond to  
10 the very simple question: Do you still have contact with your  
11 client? And is the client going to adhere to a deal that you  
12 struck?

13 Because I don't want to start having us file motions  
14 and then someone's moved to withdraw because they can't find  
15 their client in four years.

16 **THE COURT:** So I guess this would be a step, then,  
17 that would be preparatory for an Order to Show Cause or a  
18 Confirmation of Settlement, if they've already received the  
19 money?

20 **MR. WINTER:** Yes.

21 I'm just going to ask -- I'll send the list, but that  
22 would be a step to clean up some of the cases that are still on  
23 the docket.

24 **THE COURT:** Ms. Fulmer, would the PSC be willing to do  
25 that, or is that outside of your bailiwick at this point?



1           **MS. FULMER:** No. Absolutely, I would be willing to do  
2 it. I've done it in the past. And if they'll provide us with  
3 a list of names, we'll do the best we can to try to engage and  
4 get this resolved.

5           **THE COURT:** Okay.

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

7           **THE COURT:** That is helpful.

8           Anything further for the plaintiff?

9           **MS. FULMER:** I'm sorry, Your Honor?

10          **THE COURT:** Anything further for the plaintiffs?

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

12          **THE COURT:** Or for the defense?

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

14          **THE COURT:** Let's try to pick a time -- and, again, I  
15 am happy to convert these to telephonic conferences.

16                 How about 1:15 on July 9th? Would that work for you?  
17 That's a Monday. I know we're hitting times where people may  
18 have travel plans, and I will happily honor those.

19          **MS. FULMER:** Unfortunately, neither Navan Ward or  
20 myself can be present on that date.

21          **THE COURT:** Okay.

22          **MS. FULMER:** Is there another date, perhaps?

23          **THE COURT:** Would later in the week work or is that  
24 week bad?

25          **MS. FULMER:** After Wednesday, so the end of that week

1 would work.

2 THE COURT: Okay. Let's look at the next week.

3 How about the 18th at 1:30?

4 MS. FULMER: The 18th works. Thank you.

5 MR. WINTER: Works for the defendant, Your Honor.

6 THE COURT: Okay. Let's go ahead and set it.

7 MR. WINTER: Your Honor, if I may suggest? My  
8 recollection is we will have submitted to you proposals on the  
9 remand --

10 THE COURT: Right.

11 MR. WINTER: -- and maybe that actually is a better  
12 thing to do in person if we're going to have a --

13 THE COURT: Yeah, that's probably right.

14 Okay. So I'll show that at 1:30, 3:12-md-2391.

15 Thank you very much. At least you got here on a nice  
16 day. That hasn't always been the case.

17 I will see you all in a couple of months.

18 MR. WINTER: Thank you, Your Honor.

19 MS. FULMER: Thank you.

20 (Proceedings adjourned at 1:11 p.m.)

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