

1 THE UNITED STATES DISTRICT COURT  
 2 FOR THE NORTHERN DISTRICT OF INDIANA  
 3 SOUTH BEND DIVISION

3 IN RE: BIOMET M2a MAGNUM ) CAUSE NUMBER:  
 4 HIP IMPLANT PRODUCTS ) 3:12-md-02391-RLM  
 5 LIABILITY LITIGATION )  
 6 (MDL 2391) ) Wednesday  
 7 \_\_\_\_\_ ) October 7, 2015  
 8 )  
 9 This Document Relates to All Cases )  
 10 \_\_\_\_\_ )

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

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1 THE COURT: You may be seated.

2 Good afternoon. We are gathered for a status  
3 conference in our Cause Number 3:12md2391, *In Re: Biomet M2a*  
4 *Magnum Implant Products Liability Litigation*, also MDL Docket  
5 2391.

6 We are in a different courtroom. If we sound  
7 different to people who are on the telephone, we are using the  
8 magistrate judge's courtroom because he is using mine for a  
9 jury trial. I just passed him in the hallway coming down, he  
10 in his robe and I in mine, and we each asked each other to be  
11 kind to each other's courtrooms.

12 Let me ask you to state your appearances for the  
13 record.

14 MR. PRESNAL: Justin Presnal for the plaintiffs,  
15 Judge.

16 MR. WARD: Navan Ward for the plaintiffs, Your Honor.

17 MS. HANIG: Your Honor, Erin Hanig for Biomet.

18 MR. WINTER: John Winter for Biomet. Good afternoon,  
19 Your Honor.

20 MR. LaDue: John LaDue for Biomet.

21 THE COURT: Okay. As we ordinarily do, I met with  
22 counsel for both sides in chambers.

23 The purpose of those conferences is to let me know,  
24 generally, what's coming up so I can have a chance to think for  
25 a moment about them before I hear argument, and to let you know

1 if any problems have arisen.

2 Today, also, since about half of the agenda rests on  
3 what I'm going to do, I outlined generally for them what I  
4 intend to put on the table for discussion today with respect to  
5 the Plaintiffs' Steering Committee II's motion for common  
6 benefit fees and costs, and the parties' need for a scheduling  
7 case management order.

8 Let's start with what I gather will be the briefer of  
9 the two, and those are the parties' issues.

10 Who wants to take up topic one on the case count?

11 MR. WINTER: I'll do that, Your Honor.

12 THE COURT: Why don't I ask you to be seated, because  
13 we don't have a lectern, and the microphones will let people  
14 hear better on the phone.

15 MR. WINTER: Thank you, Your Honor.

16 Your Honor, there are, we believe, 13 cases pending in  
17 various state courts, actually down one from the last case  
18 management conference: seven in Florida, one in California,  
19 one in Missouri, and three in Indiana.

20 Right now, with respect to the cases that are  
21 currently before this Court, we are in the process of working  
22 through with PSC I and Garretson, who was sort of the payor at  
23 the end of the escrow, to come up with the firm list of cases  
24 that actually have been paid, from Biomet's perspective,  
25 because we're running into a little bit of an issue getting

1 dismissals on file, although through no fault of either PSC I  
2 or Biomet.

3           So that process is ongoing. We believe there are  
4 close to 900 cases that have been settled and paid that we  
5 don't have dismissals on file, which is why the case count is  
6 still high here. There's about 450 other cases that have just  
7 gone through a process of getting paid, so that's going to take  
8 another 30 or 60 days before they work through the course. We  
9 think at the end of that, right now there's probably about  
10 250-some-odd cases, we think, that are pending.

11           There are stragglers that -- you know, we got a  
12 release yesterday from someone. We get a phone call, you  
13 know --

14           THE COURT: When you say that are "pending," do you  
15 mean that you say is actually pending that you haven't paid  
16 anything on?

17           MR. WINTER: Correct.

18           THE COURT: Okay.

19           MR. WINTER: So whether that number is 250, 260, or  
20 275, by the next case management conference, I think that's the  
21 range, or maybe less, Your Honor.

22           THE COURT: Okay. Does the plaintiff have anything to  
23 add on that?

24           MR. WARD: Your Honor, no, we don't. We only just  
25 request that because we are in constant communication with many

1 of the remaining cases and, quite frankly, cases that haven't  
2 been settled yet, PSC II would certainly want to be a part of  
3 the process of working this out so we'll be able to properly  
4 inform the various attorneys that contact us with regard to  
5 these issues.

6 THE COURT: Okay. So you're requesting to --

7 MR. WARD: Just to be made part of the process with  
8 regard to figuring out which of those 900 or so cases, where it  
9 is in its process for settlement.

10 THE COURT: I guess I -- can you give him the list of  
11 the 900 cases?

12 MR. WARD: More specifically, Mr. Winter has suggested  
13 he's going to reach out to PSC I, and I'm just simply saying  
14 reach out to PSC I as well as PSC II.

15 THE COURT: Copy you in on it?

16 MR. WARD: Yes, to be a part of that so we'll be  
17 informed and be able to advise anyone who contacts us on those  
18 issues.

19 THE COURT: Any problem with that, to the extent you  
20 reach out to PSC I?

21 MR. WINTER: No, Your Honor. I mean, we actually have  
22 to go back to Garretson and get Garretson to confirm to us,  
23 which would be a proprietary thing between Biomet and  
24 Garretson, as to who they've paid. Once we have that list,  
25 we'll share that list with PSC I and we'll share it with PSC

1 II.

2 THE COURT: Okay.

3 MR. WINTER: Then if we don't get traction on  
4 dismissals within the next couple of weeks, at the next case  
5 management conference, we may put some type of order to show  
6 cause on the agenda to get this docket cleaned up.

7 THE COURT: Okay.

8 All right. Amended explant preservation order.

9 It sounds like I have to turn to Biomet on that one  
10 first.

11 MR. WINTER: Yes, Your Honor.

12 The parties have gone through a meet-and-confer  
13 process. Everyone knows FDA sent Biomet a letter following up  
14 on its 5-22 order, which Your Honor was made aware of, and the  
15 protocol FDA has required Biomet to follow in terms of  
16 evaluating explanted devices.

17 FDA wrote to Biomet saying, in substance: You may  
18 have explanted devices that are part of litigation. We want  
19 you, Biomet, to affirmatively go out and get those explanted  
20 devices and get them evaluated pursuant to the protocol.

21 We worked through with PSC I a process by which if a  
22 case was resolved, there was a request, send it to Biomet;  
23 they'll pay the Federal Express.

24 We then talked to PSC II about making that part of the  
25 amended explant preservation order. We had a consensus on the

1 form of the order in terms of it applying to a case after it  
2 was, quote-unquote, resolved here. When we went back and forth  
3 on the last bit of verbiage, we, meaning Biomet, felt that FDA  
4 was telling us we needed to get them back. So they should come  
5 back.

6 I think the back and forth now is that we do have a  
7 consensus on the verbiage of a paragraph which will go into an  
8 amended explant order, which had to be amended anyway to  
9 reflect PSC II's involvement. So, hopefully, we'll have  
10 another back and forth, but we'd submit some agreed upon order  
11 to you for the amended explant order.

12 THE COURT: Anything to add for the plaintiff?

13 MR. PRESNAL: No, Judge. Mr. Winter has correctly  
14 stated the history here, and we appreciate him working with us  
15 on which ones he's seeking access to and which ones he  
16 recognizes we need to continue to protect and preserve, so I  
17 appreciate that.

18 THE COURT: Okay. It's a short agenda for today.

19 The other two items are the discovery schedule and  
20 case management order and the PSC II's motion for a common  
21 benefit fees and costs order.

22 As I told counsel -- and will tell everybody on the  
23 phone now -- this is purely tentative, and it's based only upon  
24 having read the submissions that both sides made, and I'm  
25 certainly open to objections or suggestions as to how not to do

1 it or how to do it better, but let me run through what I'm  
2 proposing.

3 I'll start with the common benefit fund because it  
4 kind of affects the second one.

5 The issue that we have here, of course, is that the  
6 first Plaintiffs' Steering Committee performed considerable  
7 work for the benefit of all the cases in the docket, and they  
8 have been compensated for that. And the current steering  
9 committee is a few steps down the road, but I gather not too  
10 far down the road, simply because of what all has had to be  
11 done so far, at doing work that ultimately will provide benefit  
12 to all of the remaining cases.

13 And the problem that we all face is: Where do we draw  
14 the line between what the first steering committee did and what  
15 the second steering committee will do, short of having  
16 individual fact-finding on each case that resolves between now  
17 and then?

18 And the second Plaintiffs' Steering Committee proposed  
19 something of a bright line as to how to resolve that, but it  
20 was a bright line that looked backwards. So there would have  
21 been, I think, 12 cases that settled since that bright line,  
22 but would be subject to a holdback, as the Plaintiffs' Steering  
23 Committee saw it, with that bright line. And, again, we need  
24 to draw the line somewhere.

25 In Biomet's response and objection, Biomet noted that



1 they are still getting phone calls from attorneys who either  
2 did not go -- did not resolve their cases through the  
3 settlement provisions of the Master Settlement Agreement or who  
4 were not eligible for it; but, regardless of those two, are  
5 calling to see if the door is still open to discussions, I  
6 guess, in the shadow of the Master Settlement Agreement rather  
7 than under the agreement.

8           And since the common benefit fund idea is based on  
9 unjust enrichment, it seems to me that anybody who does settle,  
10 say, tomorrow without having -- based on the general outline of  
11 the original settlement agreement, a holdback would not be  
12 equitable under those circumstances. On the other hand, we do  
13 need a bright line so that the current steering committee can  
14 know when they are working for anybody.

15           Accordingly, what I proposed to counsel would be to  
16 pick a date, three or four weeks down the road, by which time  
17 if anybody settles with Biomet, they would file a notice of  
18 settlement. It doesn't require that any checks be cut or  
19 cashed or releases signed or dismissals filed, but simply a  
20 notice that the case has been settled on concrete terms.

21           If between that notice and some later date the terms  
22 of the agreement are modified somehow, my order would require  
23 that the parties tell me that and we can figure out what to do  
24 about it. But, basically, there would be three, four, maybe  
25 more, maybe less, I don't know -- that's why I'm looking

1 forward to counsels' comments -- weeks within which everybody  
2 could make those last calls to Biomet, who's interested in  
3 making the last calls to Biomet, and get their notice of  
4 settlement on file.

5           Whatever this deadline would be, we would look at the  
6 docket the next day; and if there's a case pending that does  
7 not have a notice of settlement on the docket sheet, then that  
8 case would be subject to the holdback provisions for the second  
9 steering committee's common benefit fund.

10           That's the general outline.

11           The issue also arose with respect to the plaintiffs'  
12 attorneys in the state cases. And while I don't have the  
13 language in front of me -- I think I'd have to go back and look  
14 to see what other judges have done -- my proposal to the  
15 attorneys was that it should depend on whether the attorney in  
16 a particular state case sought the benefit from the steering  
17 committee of the steering committee's work. And if that  
18 attorney used any part of what the second steering committee  
19 has done, then they would be on the hook for the holdback. If,  
20 on the other hand, counsel in a state case wishes to go without  
21 the work of the steering committee, they would also go without  
22 the holdback obligation.

23           After I outlined that for the attorneys, the question  
24 arose about pro se litigants, and I have no proposal on that at  
25 this point because it is difficult.

1           The second steering committee, as I understand it, has  
2 done what I asked, which is try to keep in close touch with the  
3 pro se litigants, because it seems to be a growing population.  
4 And at some point it would be difficult to figure out exactly  
5 what work a pro se who received funds -- whether through  
6 settlement or verdict -- what work they benefited from.

7           In any event, I'm interested in hearing your comments.

8           Then I'll go ahead and toss out what I was proposing  
9 with respect to the case management order, and I started with  
10 the common benefit fund issues because this would basically  
11 require the Plaintiffs' Steering Committee, the second steering  
12 committee, to sort of hold up for a period of weeks, whatever  
13 that new bright line would be, but then we'd want a scheduling  
14 order in place to begin at that point.

15           The parties, at my request, both sides, submitted  
16 proposed case management orders, and each of them are sort of  
17 heading into a different direction; so they were kind of like  
18 ships passing in the night, but, understandably, because  
19 everybody was looking at this a little differently.

20           Biomet's proposal did not include a lot more general  
21 discovery, but was looking toward resolution of some -- not  
22 fully docket-wide issues, but issues that would affect a good  
23 chunk of the docket, and ultimately working their way to  
24 bellwether trials, which is what we had originally set up.

25           The Plaintiffs' Steering Committee submitted a

1 proposed scheduling order that would build in time addressing  
2 document discovery, which, again, was not identified in  
3 Biomet's proposal, but which then would work toward sort of  
4 rolling remands, I think is the best way to put it, of the  
5 cases that are here, with case specific discovery being done  
6 with respect to a certain group of cases, and then those cases  
7 remanded, and then we'd start case specific discovery in  
8 another group, and then they would be remanded.

9           And I outlined for the attorneys in chambers -- and  
10 specifically asked them to don't argue this yet because I want  
11 to wait until we get out there. But, first of all, at this  
12 point -- and Biomet can certainly convince me to the  
13 contrary -- it seems to me that with a docket of this size --  
14 understanding we're going to be down plus or minus 250 cases  
15 once we work through the things Mr. Winter talked about  
16 earlier -- it's a far different situation than the 2,500 cases  
17 we were working toward at the time of the original case  
18 management order; and understanding the expense involved in  
19 bellwether trials, I'm not sure they're worth the candle at  
20 this point in the development of the docket.

21           Generally, bellwether trials, although they can be  
22 helpful in evaluating the effectiveness of a witness or a  
23 theory, generally they serve the purpose of helping the parties  
24 figure out a settlement value, what a case might be worth. And  
25 I think we've already got that in place here, in the sense that

1 the Master Settlement Agreement resulted in the resolution of  
2 about 90 percent of the cases, and, perhaps, that's 90 percent  
3 so far, depending on how many people call Biomet within the  
4 next X weeks, but I think we've got a pretty good feel for the  
5 heartland value of the cases. We have cases remaining where  
6 one side or another thought the case was outside the heartland,  
7 either above or below, but I don't think we really need  
8 bellwether trials to let us know what an anchor is to work  
9 from. So I would propose not to order bellwether trials.

10 Turning to the plaintiffs' proposal, I would also  
11 propose not to include in our scheduling order case specific  
12 discovery, in the sense that I think it would be more  
13 effectively done by the filing counsel, or whoever is going to  
14 try the case in the transferor court, rather than having 200 --  
15 if we work on a 25-case increment, which I think is what was  
16 proposed -- rather than having 225 cases waiting for remand  
17 while we work up 25 that are going to go back for trial, I  
18 think we're better served to just go back for trial with  
19 completing discovery there.

20 And I assumed that the case specific discovery was  
21 proposed with the understanding that is generally true, that  
22 what my job is as a transferee judge is to get the cases either  
23 resolved, if they can be resolved here, or remanded in a trial  
24 ready condition. And in this docket, I'm not sure that trial  
25 ready would really conform with the purpose behind the

1 centralization. It's supposed to be for a just and efficient  
2 handling of the case, and I think there are some things from a  
3 justice standpoint and an efficiency standpoint that might have  
4 to be left to the transferor courts, in the event there are  
5 remands, such as matters that turn on a particular state's law  
6 or discovery that would be useful in that particular case but  
7 not in anybody else's.

8           So I also outlined for counsel that I'm happy to send  
9 things back -- if we get to the point of remand, I'm happy to  
10 remand with an explanation to the transferor judge: We did all  
11 of these things, and these things were left because it would  
12 not have been a just and efficient handling of the case for us  
13 to do it here as opposed to doing it there.

14           Understanding we need to do as much here as we can,  
15 but just that we can't do all of that.

16           So then wrapping all of that up, what I asked is -- or  
17 proposed to ask -- and, again, I'm more than happy to be talked  
18 out of it -- to ask the attorneys to get their heads together  
19 again after this conference with respect to a case schedule. I  
20 can't tell from the plaintiffs' submission whether they know  
21 they need to do more document and custodian discovery or  
22 whether they were trying to preserve it in case their review of  
23 the records indicated they need it.

24           And I can't tell from Biomet's submission what sorts  
25 of issues there might be that we can resolve here that would be

1 generally applicable or applicable to a large segment of the  
2 cases, more than one or two.

3           So what I would be asking counsel to do, as we finish,  
4 is to -- first, for Biomet, to put together a list of common  
5 issues that Biomet thinks could be handled at this level,  
6 rather than better handled at a post-remand level, and the  
7 cases that would be involved in those.

8           And, then, to the extent the Plaintiffs' Steering  
9 Committee disagrees, they can tell me why they don't think it  
10 could be handled here or why more could be handled here,  
11 whatever, and ask counsel to sit down and figure out the timing  
12 that they would prefer. If they can't agree, obviously I can  
13 select times, but I'd prefer to let them take the first crack  
14 at it.

15           Is there anything I threw out to you folks in chambers  
16 that I haven't covered?

17           Mr. Winters is shaking his head.

18           MR. PRESNAL: I don't see anything in my notes, Judge.

19           THE COURT: Okay. Let me start with the plaintiff and  
20 invite you to address my proposal and what it needs or what it  
21 shouldn't have, et cetera.

22           MR. WARD: Your Honor, with regard to the common  
23 benefit order, we have no objection whatsoever to your  
24 recommendation.

25           After the last hearing, we had an opportunity to reach

1 out to those plaintiffs and/or counsel who were in that gray  
2 area. We were able to gather more information from them, which  
3 helped us to be able to more properly place them in the proper  
4 bucket, so to speak, of where their case settled and belonged.  
5 More importantly, with the defendant's response to our  
6 petition, it gave us actual names as well as other identifying  
7 information to allow us to understand what cases would be  
8 appropriate or fit into that gray area.

9 In our reaching out to the plaintiffs' counsel, there  
10 were certainly some that were willing to be part of the case  
11 assessment and then there were certainly some that, based on  
12 their facts, we understood that it would not be proper.

13 So with their recommendation, we have no problem  
14 whatsoever with picking a three, four-week timeframe for that,  
15 quote-unquote, bright line or demarcation date, so to speak,  
16 for it to be the official deadline for the cases that would fit  
17 in going forward or fit into the current settlement as it is.

18 THE COURT: Let me back up to a point that I forgot  
19 when we were in chambers and then forgot again just now.

20 Obviously the people who are most impacted by this are  
21 the attorneys who are not on the Plaintiffs' Steering Committee  
22 and whatever state court attorneys -- plaintiffs' attorneys  
23 there are who are not here, and so I guess, before entering  
24 anything, they should have a right to be heard, a right to  
25 object.



1           The motion that is currently before me doesn't propose  
2 what I just proposed, and I guess I wonder if it would be  
3 helpful for the plaintiffs for me to deny that, understanding  
4 there would be a follow-up motion, where you would make a  
5 motion asking for what we just talked about -- again, I'm  
6 waiting to hear from the defense, so I'm getting the cart  
7 before the horse a little bit -- and then allowing a two-week  
8 period or something for the more directly affected people, at  
9 least who would be affected by the holdback, to have an  
10 opportunity to object.

11           Would that be cleaner, do you think?

12           MR. WARD: Well, you're speaking specifically with  
13 regard to the common benefit issue?

14           THE COURT: Yes.

15           MR. WARD: Well, from our communications with the  
16 other counsel, I think this is, obviously, from the PSC II  
17 standpoint, a compromise that should -- we don't see other  
18 plaintiffs or, for that matter, defense counsel objecting to  
19 it. It just makes it a non-issue with regards to cases that  
20 are still pending. And the four-week timeframe that you've  
21 outlined would certainly be more than ample for any remaining  
22 issues to be wrapped up in order to give a clearer deadline.

23           And so it's clearly Your Honor's preference as to how  
24 he wants to move forward with it. I think the four weeks that  
25 you've given and the proposal that you've given, that we have

1 no objection to, should make this issue a moot issue. And I  
2 don't see -- and I could be wrong -- but I don't see where  
3 someone would object to wanting to be on the side of a holdback  
4 situation when they, if they're in that gray area, have the  
5 opportunity to finish their case and not be subject to a  
6 holdback.

7 MR. PRESNAL: And I think that's particularly true,  
8 Judge, in light of the fact that you sort of had a carveout  
9 provision for state court cases that aren't directly a part of  
10 this MDL. In other words, you've indicated that if they ask  
11 for assistance from us, then they'll be subject to a holdback.  
12 But if they don't and want to go it alone, then they probably  
13 wouldn't be.

14 So I don't know that it's necessary to do it that way,  
15 but if you would prefer that we submit a new proposed order  
16 that reflects what you've proposed today, we would be happy to  
17 do that.

18 THE COURT: Thank you, sir.

19 Do you want to address the case management order  
20 proposed -- well, why don't we go ahead and do these one at a  
21 time.

22 Mr. Winter, as far as the common benefit fund?

23 MR. WINTER: Your Honor, I think, as provided that  
24 every lawyer knows as of today or tomorrow, that come this date  
25 certain their case will be subject to a 6 percent assessment,

1     however that's done, should be done.

2             Just on the four-week thing, I start a trial --  
3     because ultimately I'm the person that has to do this --

4             THE COURT:    Yes.

5             MR. WINTER:   -- to the extent people call, and I start  
6     a trial October 22nd, which is going to go to, like,  
7     November 9th or 10th, so if we could just pick that Friday of  
8     that week.

9             THE COURT:    The Friday before October 22nd?

10            MR. WINTER:   No.

11            THE COURT:    Oh, the one when you get back?

12            MR. WINTER:   Like, I start a trial October 22nd, and  
13     it will finish probably November 11th, which is a Wednesday.  
14     So whatever that Friday is, which sounds like November 13th, if  
15     we'd pick that day, that's fine, Your Honor, because that just  
16     gives me a little bit of time, to the extent people --

17            THE COURT:    That would be about five weeks and two  
18     days, which, under the circumstances, sounds like probably the  
19     best we can do.

20            MR. WINTER:   And, finally, Your Honor, on the pro se  
21     litigants, to the extent someone hires a lawyer -- who is now  
22     pro se and hires a lawyer, that's not an issue.  Our experience  
23     in other MDLs, where there have been significant numbers of pro  
24     se litigants -- I mean, I've done them where they end up with a  
25     hundred of them -- it is a difficult thing for a pro se

1 litigant to get a communication from the PSC totally, "Here's  
2 your cases; thank you very much." I then resolve the case,  
3 which generally is going to be on stingy terms, to use a  
4 euphemism, Your Honor, and then the person finds out that they  
5 have to pay 6 percent.

6 THE COURT: To a lawyer they didn't know they hired.

7 MR. WINTER: Right. I mean, it's one thing for a  
8 lawyer to interact with a lawyer and everyone -- you know,  
9 caveat emptor applies, but I've seen this happen. So whatever  
10 we're going to do, we have to build something in for that, for  
11 a true pro se litigant.

12 THE COURT: Okay. I guess what I would propose to do,  
13 then, is -- let me ask that you do submit an amended motion, so  
14 that everybody knows what they're looking at, and we'll give  
15 everybody two weeks, then, to look at it. Maybe nobody is  
16 going to object, but if they do, then we'll still have that  
17 November 13th date out there that we can keep, because that  
18 will be on down the road.

19 I simply, at this point, have no proposal on the pro  
20 se litigants. Let me try to look it up, what other judges have  
21 done, and --

22 Do you have a suggestion, Mr. Presnal?

23 MR. PRESNAL: I have a comment.

24 We're obviously trying to predict things and  
25 eventualities that may come down the road. I don't have a

1 basic disagreement with Mr. Winter that if a pro se litigant  
2 that really doesn't benefit directly from any of our work and  
3 settles their case, I don't particularly have a problem with  
4 that person not paying an assessment. It is possible, however,  
5 that there could be someone out there who insists on trying his  
6 or her case and wants the depositions that we've taken and goes  
7 and puts on a pro se trial. That person probably should be.

8           So it may make sense to sort of kick the can down the  
9 road and say that we will handle those on a case-by-case basis,  
10 since I think we're probably only going to be dealing with a  
11 handful of them anyway. Knowing right now that we would not  
12 object to someone that really doesn't benefit from the work not  
13 having to pay an assessment.

14           THE COURT: Okay. Let me see if I can come up with  
15 some language. It might be the cleanest way, because I think  
16 Mr. Presnal is correct, that we probably aren't going to have a  
17 lot to deal with, but I guess I would propose -- I'm not ready  
18 to propose yet, but let me see if I can come up with language  
19 that would require Biomet to notify the Plaintiffs' Steering  
20 Committee of any settlement with a pro se plaintiff, and then  
21 give the Plaintiffs' Steering Committee, say, two weeks to  
22 request application of the holdback order because they had the  
23 following communication, and attach it, to the extent it can be  
24 attached.

25           MR. PRESNAL: And I think our default provision would

1 probably be that they aren't, but there could be extenuating  
2 circumstances, so that's all I want to preserve.

3 THE COURT: Okay. If you want to try your hand at the  
4 language as part of the modified -- the new motion, the amended  
5 motion, that's fine.

6 MR. PRESNAL: Okay.

7 THE COURT: If I think I can improve on it, I will.

8 MR. PRESNAL: Okay. Thank you, Judge.

9 THE COURT: Okay. Proposals on the scheduling order.  
10 Plaintiff?

11 MR. PRESNAL: Judge, first of all, I appreciate your  
12 comments and your outline of how you see the case. As you know  
13 from our submission, we, as PSC II, do see the case in a  
14 different posture than it was before the Master Settlement  
15 Agreement went into effect.

16 We certainly agree with the idea that the primary  
17 purpose of bellwethers is to sort of establish the market value  
18 of cases; and as you noted, we've sort of done that here, and  
19 we're left with what's left over. So, particularly, when you  
20 consider the cost benefit aspect of going forward with the  
21 bellwether process, it just isn't warranted under these  
22 circumstances.

23 We would prefer, and we proposed in our submission to  
24 you, that we, as PSC II, really focus on core discovery and  
25 putting together, what we call on our side of the docket, "a

1 trial in a box," a trial package to allow those lawyers across  
2 the country that have these cases to move forward and handle  
3 their cases. That's what we wanted to focus our resources and  
4 effort on, because that's what we see as the primary purpose of  
5 this MDL at this point in time.

6 We have no objection to, essentially, delaying case  
7 specific discovery to the transferor court. Frankly, we think  
8 that makes a lot of sense, especially in light of the fact  
9 specific issues that would go there that, frankly, would take  
10 up a lot of your time, that would be probably not the best use  
11 of that. There will be state law issues that will impact a lot  
12 of that.

13 So judges have done it both ways. Some have overseen  
14 case specific discovery in the MDL and handed the case ready to  
15 go to a transferor court. Others have handled core discovery  
16 and left it up to the transferor court. We certainly believe  
17 that case specific things like *Daubert* issues and all of those  
18 should be handled by the transferor court. That's really an  
19 evidentiary admissibility issue.

20 THE COURT: You think *Daubert* should be handled by the  
21 transferor court?

22 MR. PRESNAL: I'm sorry?

23 THE COURT: *Daubert* should be handled by the  
24 transferor court?

25 MR. PRESNAL: The case specific *Daubert* issues, Judge,

1 and we sort of put those into two categories. We envision  
2 having general liability experts that would talk without regard  
3 to one particular plaintiff's case, but, in general -- why do  
4 we think the product is defective, what the product generally  
5 does in the human body -- without reference to a particular  
6 client or a particular patient's case. Now, that is something  
7 that I think would be appropriate for you to examine under a  
8 *Daubert* analysis, but any particular case specific discovery  
9 issue --

10 THE COURT: Let me be sure I understand the line  
11 you're drawing, and correct me if I'm wrong. It sounds like  
12 you're talking about whether this product can cause, say,  
13 metallosis in the human body and tends to do so, that would be  
14 here. Whether it did so in the body of a particular plaintiff  
15 would be back with the transferor court?

16 MR. PRESNAL: That's correct.

17 MR. WARD: That's correct, Your Honor, and just to  
18 further clarify, regardless of which way you decide, that is a  
19 package that this PSC is providing and would be available, if  
20 necessary, whether it's handled here or at a local court. And  
21 we have over the last few months and continue to make sure that  
22 our local -- or the rest of the attorneys have been up to speed  
23 on all the work product that we have been able to assemble to  
24 date, and moving forward, and that would be one of those pieces  
25 to complete the puzzle, so to speak; that the other attorneys



1 would be equipped with, that we would be able to provide them,  
2 whether those issues are handled either here or locally.

3 THE COURT: So you would be providing the -- let me  
4 just say "filing attorneys," understanding that all may change  
5 as we go along -- but you would be providing the attorneys who  
6 filed the cases work product both on the "this product tends to  
7 cause metallosis in the human body" and, also, "this product  
8 caused metallosis in this plaintiff"?

9 MR. WARD: Well, with regard to the general, the  
10 portion -- I was just making clarification to --

11 THE COURT: -- to the first part.

12 MR. WARD: -- the first part, the general information.

13 THE COURT: Okay. I got it.

14 MR. PRESNAL: And just to address a couple of other  
15 issues that you raised, Judge.

16 One thing that I want to acknowledge is that you've  
17 asked us to meet and confer with Biomet on a proposed timeline  
18 now that we understand sort of where you are and how that may  
19 affect that.

20 Our proposed -- our submission supposed that we would  
21 be doing sort of dual track case specific discovery and core  
22 discovery. We may be able to sit down and streamline that  
23 somewhat, since we now, under your proposal, would not be  
24 having to devote resources to case specific discovery. That  
25 may allow us to do that more expeditiously, and we certainly

1 will try to do so.

2 We also will work with Biomet to see and help identify  
3 matters which we think can be resolved here in your court that  
4 further streamline the docket or make it easier for transferor  
5 courts to handle the cases. We probably won't agree on  
6 everything, but we certainly will try to do what we can to make  
7 that process simpler for you.

8 THE COURT: Okay.

9 Biomet.

10 MR. WINTER: Thank you, Your Honor.

11 It is hard to argue with success in terms of setting  
12 heartland values for 90 percent of the cases, Judge. So, upon  
13 reflection, your point is well-taken about bellwethers.

14 But with respect to what we do in this MDL, several  
15 comments. One, we don't think it's fair to Biomet to  
16 let whether it's 250 or 200 cases sit here for whether it's a  
17 year or 15 months or 18 months, to not let us learn stuff about  
18 the underlying facts before they are disbursed around the  
19 country. So the notion that we don't do any case specific  
20 discovery, I think, violates the just and efficient parts of  
21 why MDLs are created.

22 So how we do that, we'll meet and confer, but we don't  
23 think it is right to just do a Biomet discovery MDL, then  
24 remand cases, you know, in 2017, or whenever, and then say,  
25 okay, start doing plaintiff depositions.

1           So that's just as a general perspective on this case  
2 specific/non-case specific.

3           As to things that we believe you should handle, there  
4 are right now 48 cases -- I checked our submission to you --  
5 48 cases where the device was implanted before 2006. And if  
6 you look at any complaint that's been filed, the notice -- like  
7 notice provision in a complaint in terms of assertion is  
8 something in 2006, which is why we picked that point,  
9 Your Honor.

10           So we think state of the art and the adequacy of our  
11 warnings as of that point in time has general applicability to,  
12 right now, 20 percent of the cases, and that's something you  
13 clearly could handle.

14           Now, in the context of doing that, Your Honor, that's  
15 going to involve some testimony from surgeons in those cases  
16 for you to assess state of the art, because learned  
17 intermediary is part of this. It's not some abstract concept.

18           So even when we do that issue, there has to be some  
19 specific cases worked up to some degree so that you can make an  
20 informed judgment on that.

21           I think design defect, again, is one that's going to  
22 go across the board for many different reasons, and we think  
23 that, too, is something you can look at. Again, we're going to  
24 need some case specific discovery. Because, yes, we understand  
25 general causation and case specific causation, but general

1 causation in these types of product liability cases actually is  
2 never really done in the abstract. It has to be done in the  
3 context of a particular case.

4 Spoliation. We can give our colleagues a list of at  
5 least 50 cases that are pending here, where, according to the  
6 fact sheet, the device is no longer available, and the device  
7 was explanted after your first -- I think it was a pretrial  
8 order, pretrial order number one, where everyone was on notice  
9 to preserve relevant information.

10 So how someone could think their explanted device was  
11 not relevant to one of these cases, I think that's clearly an  
12 issue in your wheelhouse because it's your order. Now, what  
13 the implications of your order might be as to whether it's  
14 dismissal for intentional spoliation under a certain state law  
15 or it's negligent spoliation, that issue could ultimately be  
16 worked out, but you should be able to decide this and come up  
17 with a ruling that people would understand when it got to  
18 another -- on a remand, what you meant.

19 The other issue is statute of limitations. I think  
20 there are 23 cases that we believe are statute of limitation  
21 cases, but, as I said, Your Honor, I think two or three of  
22 those may be pro se litigants. Now, they may turn out to be  
23 non-pro se litigants at some point in time.

24 But those three buckets, Judge, are half the MDL.

25 THE COURT: I've got four buckets: state of the art,

1 design defects, spoliation, statute of limitations.

2 MR. WINTER: Design defect would be like -- it would  
3 go to almost everything, so spoliation, statute of --

4 THE COURT: It's a big bucket.

5 MR. WINTER: -- of limitations, those three buckets  
6 are 50 percent of the cases, round number.

7 THE COURT: Okay.

8 MR. WINTER: To go back, when we submitted our  
9 proposed order, we assumed that everything would be going in  
10 parallel. So we didn't build in, like, extra time for company  
11 discovery and more document discovery. We thought we would be  
12 just churning along with everything, which is what we would  
13 hope to do with the new order.

14 THE COURT: Okay. As I understand it, then -- and I  
15 appreciate the identification of the issues that I might have  
16 to deal with -- you started with the idea that it's unfair to  
17 make cases stay here without Biomet able to do case specific  
18 discovery. To what extent would you want to proceed with  
19 cases, with all the cases open to it or --

20 MR. WINTER: Well, over 18 months -- I mean, I, quite  
21 frankly, need to reflect on this, Your Honor.

22 THE COURT: Okay.

23 MR. WINTER: Because I think a fair number of the  
24 cases should have basic core discovery done; you know,  
25 plaintiffs deposed, surgeon deposed, if the sales rep wants to

1 be deposited, if there's another surgeon, a discrete number of  
2 people, whether it's four or five per case. We should have the  
3 ability to do that. Now, whether it's for all of the cases or  
4 half of the cases or a third of the cases, I need to go back  
5 and think, Your Honor. But it's got to be, from our  
6 perspective, some percentage of that. You know, we laid out in  
7 our proposed order what we thought the discovery would be.

8 THE COURT: Right, but that was for bellwether trials.

9 MR. WINTER: Right. It was working up 50 cases to  
10 come up with a list of bellwethers. The discovery that we  
11 proposed for the bell would be what we would propose as the  
12 core case specific discovery.

13 The number, I would have to go back and think it  
14 through. I mean, what I would do is back out what we think are  
15 the spoliation cases, back out the statute of limitations, see  
16 what's left, and then think what would be, in a meet and  
17 confer, half, if that's like a reasonable number, or a third,  
18 if that's a reasonable number.

19 THE COURT: All right. Understanding that Biomet  
20 wants to think about that, do you folks have any -- for the  
21 sake of those not here, I'm turning to the Plaintiffs' Steering  
22 Committee.

23 Do you have any thoughts you want to share as far as  
24 case specific core discovery?

25 MR. WARD: Sure, Your Honor.

1           When the plaintiffs provided their petition, we  
2 anticipated that, to the extent this case would continue in the  
3 MDL, that there would be some necessary discovery needed. The  
4 discovery that we anticipated would be plaintiff discovery with  
5 regards to plaintiff depositions, certainly plaintiff fact  
6 sheets, interrogatories, requests for production. We did not  
7 anticipate it being much more than that, if anything, besides  
8 the general -- the general expert issues that you discussed.

9           However, having these cases remanded -- and it's a  
10 small amount of cases that are left here. Having these cases  
11 remanded would put the defendant in no different of a position  
12 than they would have been. And, quite frankly, because of  
13 everything that's gone on to date, and the product that would  
14 be available for both the plaintiffs and the information that  
15 Biomet has learned to date with regard to this case, in  
16 general, and how to defend it, there would be no different --  
17 and, actually, they're in a better position than it would be  
18 but for this MDL.

19           This MDL has provided a very good service to both  
20 parties, and at some point in time we'll be talking about case  
21 specific here, case specific there, that those are resources  
22 that will have to go forward, and it doesn't really matter  
23 whether it goes forward here or there. It's what they  
24 would have -- both parties would have to do.

25           And by your suggestion and by your recommendation of

1 sending it back, it would allow more people to be involved in  
2 that process in order to get it done more effectively, again,  
3 with the wealth of information that everyone would have  
4 benefited from this MDL up to this point.

5           You are also correct, we agree with you  
6 wholeheartedly, that there are a plethora of issues that, quite  
7 frankly, it would be unfair for this Court to have to research  
8 the 50 state's laws on the various issues for those particular  
9 issues, when the local state court, federal courts hear on a  
10 daily basis and would be able to more efficiently and easily  
11 deal with those types of issues, such as statute of limitations  
12 issues.

13           So from our papers and from our perception of the  
14 direction that this Court wants to go, it appears that this  
15 would be a very fair way of being able to move these cases  
16 back; and, depending on how fast you want to remand them, would  
17 certainly address some of their issues.

18           THE COURT: First of all, I'm not worried about the  
19 unfairness of my having to decide them; I'm worried about my  
20 odds of getting all 50 state laws right. The more I have to  
21 do, the more likely I'm going to make an error.

22           MR. PRESNAL: If I could add briefly, Judge?

23           Biomet does know a lot about the cases that have been  
24 filed, and particularly ones that went through the Master  
25 Settlement Agreement process. They've had a chance to evaluate



1    them and in many cases dispute on very specific grounds why a  
2    plaintiff claimed they were categorized to receive one amount  
3    of compensation, and they objected and proposed something very  
4    different. They went through mediations in a number of those  
5    cases. So they're not operating in a vacuum. They've got a  
6    detailed plaintiff's fact sheet. There's a supplemental fact  
7    sheet that they've been provided with. So it's not really  
8    accurate to say they really don't know anything about the  
9    cases.

10           That said, there may be a middle ground where some  
11    case specific discovery can be done, perhaps plaintiff  
12    depositions, which require minimal resources. But where you  
13    get into a problem is when you start deposing surgeons all over  
14    the country. They're expensive. They're hard to schedule.  
15    There's a lot at stake. And, frankly, we wouldn't be doing our  
16    job as the PSC if we didn't have time to help educate the folks  
17    that we're working on behalf of on how to deal with those  
18    things. But presenting plaintiffs for depositions and allowing  
19    Biomet to evaluate them personally, that's probably something  
20    that could be done without being too taxing on the resources  
21    here.

22           Then, one other point, Judge, just so you understand  
23    the issue before it gets -- before we get the cart too far out  
24    of the barn here. On the spoliation issue, most of the calls  
25    that I get are from someone who had a revision a month ago, two

1 months ago, and they've since learned that there's a problem  
2 with the implant that they had, and they're wanting to hire a  
3 lawyer. Now, when that happens, there's not a whole lot I can  
4 do. We try. Every time, we try. If we know about it ahead of  
5 time, we do everything we can to preserve the device. But one  
6 of the most common revision techniques is to use another Biomet  
7 product that allows the patient to retain the acetabular cup,  
8 and they use a different articulating surface, which actually  
9 works pretty well in a lot of people. But if that happens, the  
10 one person who definitely is in the room when the surgery  
11 occurs and the revision occurs is a representative of Biomet.

12           So before we get too far down the road on spoliation,  
13 I just wanted you to understand the parameters of what we're  
14 talking about there. And to impose an order that you signed in  
15 2012 on a patient laying in an operating room, who doesn't even  
16 know they have a claim at that point in time, is a little bit  
17 unfair.

18           THE COURT: It may well be that they can't all be  
19 resolved, but it is at least an issue that we can discuss, and  
20 that's the kind of thing that I would like you folks to discuss  
21 in what would be necessary to respond to a motion for Biomet.

22           As I'm listening to you, it makes sense to me that  
23 Biomet shouldn't have to wait another 12, 15, 18 months. We've  
24 got some people who had implants ten years ago, and memories  
25 don't improve during that period of time. On the other hand,

1 if we take five depositions for core discovery and multiply  
2 them by \$250, we're going to have people doing a lot of  
3 individual casework that could be done more economically, I  
4 think, back home or wherever the case came from. So I'm kind  
5 of on the fence.

6 Let me ask you, as you folks try to work out this  
7 scheduling order, see what discovery you think might be  
8 appropriate, case specific discovery. To the extent you can  
9 agree on it, fine, and I don't have any huge objection to it.  
10 But to the extent you don't agree to it, then I'll have to  
11 rule.

12 MR. WINTER: Your Honor, if we have a case that's  
13 pending here that comes from West Virginia, the surgeon in  
14 West Virginia is going to be deposed in West Virginia,  
15 represented by the lawyer who filed that case. The cost of  
16 that deposition is no different three months from now as  
17 opposed to 18 months from now. And if we are going to  
18 remand -- I'm going to make up a number -- 175 cases, that  
19 would be chaos, because I'm going to have transferee judges  
20 saying, You've got to complete all of your discovery in 120  
21 days.

22 So it's not more expensive to do some of this  
23 discovery. We're not making people travel here to be deposed.  
24 We're not asking people who don't have the case to defend the  
25 deposition in their own case.

1           So the notion of it's more efficient to kick the can  
2 down the road, I will have a robust meet and confer with my  
3 colleagues, but I'm having a hard time --

4           THE COURT: I like the way you put that.

5           MR. WINTER: I'm having a hard time understanding why  
6 it doesn't make sense to do some discovery now, or then just  
7 say, okay, have a free-for-all.

8           THE COURT: You might be right. Again, I see  
9 strengths on both sides.

10           So basically what Biomet would want would be for me to  
11 lift the discovery stay, at least to the extent of the core  
12 discovery you listed, in at least some of the cases?

13           MR. WINTER: That's correct, Your Honor.

14           THE COURT: I think that might be appropriate.

15           If counsel who filed the case are of record in this  
16 case, then, I guess, if the steering committee got the video of  
17 the deposition, the steering committee members wouldn't have to  
18 be there, so they might not even need the video.

19           Anyway, again, see what you folks can agree on, and  
20 let me think about it because, again, I do see arguments on  
21 both sides.

22           MR. PRESNAL: And we don't have the benefit of all of  
23 our group being here to confer with. What I would say is that  
24 I think there are some aspects of plaintiffs' specific  
25 discovery that could certainly go forward without really

1 requiring too much coordination and effort and all of that.  
2 But we think that when you start talking about surgeons,  
3 that's -- that, in a lot of cases, is the whole ball game.  
4 Candidly, that's why Biomet wants to take them and, candidly,  
5 that's why we would rather wait until we've had the benefit of  
6 some core discovery before doing those.

7 THE COURT: I'm never pleased hearing one side tell me  
8 what the other side really wants, so I'll let -- Biomet can  
9 speak for itself.

10 Let's see. For the next conference -- well, I should  
11 ask first: Anything else you want to talk about today?

12 MR. WINTER: No, Your Honor.

13 MR. WARD: No, Your Honor.

14 THE COURT: Okay. I guess, logically, we should be  
15 looking at sometime the week of November 16th -- maybe not.  
16 The following week is Thanksgiving week, and I don't relish  
17 trying to get everybody in here for that, and I want to let all  
18 of the dust settle on everything else here, and let me get my  
19 order out -- orders out.

20 I'm looking at the week of November 30th. I've got  
21 some jury trials set then that at least now might go.

22 How about December 7th? That's a Monday. I have to  
23 be gone on judicial business from the 8th through 11th, which  
24 is why I'm offering you only the Monday of that week. Would  
25 that work for you? I could do it morning or afternoon,

1 depending on what works for you folks.

2 MR. WINTER: Works for Biomet, Your Honor.

3 MR. WARD: Works for plaintiffs, Your Honor.

4 THE COURT: Any preference between morning or  
5 afternoon? I haven't flown in here on a Sunday before.

6 MR. WARD: Afternoon would be best for us.

7 MR. WINTER: That works for us, Your Honor.

8 THE COURT: Okay. So I'll set it for 1:30 on  
9 December 7th, and, again, at 1:00, we'll do our conference, the  
10 warn-me-about-what's-coming-up meeting.

11 MR. WARD: Thank you, Your Honor.

12 MR. WINTER: Thank you, Your Honor.

13 THE COURT: Thank you, folks.

14 I will look, then, for the amended motion from the  
15 plaintiff and will, by separate order, give everybody two weeks  
16 in which to object.

17 How soon do you folks think you can -- well, how soon  
18 do you folks think you can do the meet and confer and get in a  
19 proposed or, at least, jointly or partly jointly scheduling?

20 MR. WARD: We certainly will work with Biomet's  
21 schedule, being that Mr. Winter has an upcoming trial.

22 MR. WINTER: Your Honor, we'll talk. Maybe next week  
23 we'll have, like, the first conversation, and then figure out  
24 how we would go from there.

25 THE COURT: Okay. I won't put a date on it then. I

1 will just watch for it and act when I get it.

2 Thank you, folks.

3 MR. PRESNAL: Thank you, Your Honor.

4 MR. WARD: Thank you, Your Honor.

5 MR. WINTER: Thank you, Your Honor.

6 (Proceedings adjourned at 2:30 p.m.)

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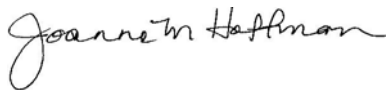
*CERTIFICATION*

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9 I, JOANNE M. HOFFMAN, Federal Certified Realtime  
10 Reporter, certify that the foregoing is a correct transcript  
11 from the record of proceedings in the above-entitled matter.

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October 8, 2015

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Certified Realtime Reporter  
United States District Court  
Northern District of Indiana  
South Bend Division

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