

1 **THE COURT:** Are we good to go?

2 **COURTROOM DEPUTY:** Yes.

3 **THE COURT:** Okay. This is our Cause Number
4 3:12MD2391, the MDL Number 2391, **In Re: Biomet M2a Magnum Hip**
5 **Implant Products Liability Litigation.** We are gathered for a
6 joint status conference.

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

9 **MR. WARD:** Navan Ward, for the Plaintiffs.

10 **THE COURT:** Mr. Ward.

11 **MR. DAVIS:** And Alex Davis, for the Plaintiffs, as
12 well, Your Honor.

13 **THE COURT:** I'm sorry. There was a rattling. Maybe
14 you should repeat.

15 **MR. DAVIS:** Sure.

16 Alex Davis, for the Plaintiffs, as well.

17 **THE COURT:** Mr. Davis.

18 **MS. HANIG:** Erin Hanig, for Defendants.

19 **MR. WINTER:** John Winter, for Defendants.

20 Good afternoon, Your Honor.

21 **THE COURT:** Good afternoon.

22 **MR. LaDUE:** And John LaDue, for Defendants,
23 Your Honor.

24 **THE COURT:** For those who are waiting on the phone,
25 we had a hearing on a Social Security appeal that finished

1 early, but still ran into the time, and I'm sorry to make you
2 wait.

3 I also want to apologize to you all. We had hoped to
4 have the rulings out on the current dispositive motions and
5 simply weren't able to do it. I'll try within the next two
6 weeks.

7 Write your senators. We're down forty percent on
8 this court.

9 So, with that, let me turn to the agenda that you
10 submitted.

11 We have active case count.

12 Ms. Hanig, traditionally, that's yours.

13 **MS. HANIG:** Sure, Judge.

14 So, we have --

15 **COURT REPORTER:** Ms. Hanig, the microphone, please.

16 **MS. HANIG:** Sorry.

17 So, there's currently 340 cases, by our count, that
18 are active and pending, with approximately two more that are in
19 process of transfer by the Panel.

20 **THE COURT:** So, 340 here and two likely on the way?

21 **MS. HANIG:** Correct.

22 **THE COURT:** Okay. Any disagreement with that, from
23 the Plaintiffs?

24 **MR. WARD:** No, Your Honor.

25 **THE COURT:** Okay. Discovery update, status of Groups

1 5 and 6.

2 **MS. HANIG:** So, Your Honor, things are moving
3 smoothly with both Group 5 and 6. Group 5 closes out in about
4 a month, and we should be hitting target on finishing the
5 case-specific discovery by then. We are already in the process
6 of scheduling Plaintiffs' and surgeons' depositions and sales
7 reps' for the Group 6 cases, and so those are on target to
8 finish in early 2019, as well.

9 **THE COURT:** Anything to add?

10 **MR. WARD:** Nothing from the Plaintiffs, Your Honor.

11 **THE COURT:** If I could ask you, folks. And I know
12 you probably don't have the paper necessary to answer this.
13 But we show a case, 13-cv-916 -- the Plaintiff's name is
14 Peoples, P-E-O-P-L-E-S -- and it doesn't appear, as we were
15 looking at it here, to be in Group 5 or Group 6. With this
16 number of cases, it's not surprising that things wouldn't match
17 exactly.

18 Mr. Winter, you look like you have something to say.

19 **MR. WINTER:** Your Honor, I can answer your question
20 on the **Peoples** case.

21 **THE COURT:** Okay.

22 **MR. WINTER:** There was a change of counsel on the
23 Plaintiffs's side, at one point. The case, candidly, fell
24 through the cracks on both sides. But, fortunately, it was
25 resolved last week, so that case will not have to get into any

1 group discovery.

2 **THE COURT:** So that's on the way through the release
3 and check?

4 **MR. WINTER:** Exactly, Your Honor.

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

6 Next is Jones Ward case-specific discovery requests.

7 To whom do I look here?

8 **MR. DAVIS:** I can address that, Your Honor.

9 I think we've tentatively reached an agreement or at
10 least an agreement to continue discussing this discovery
11 dispute.

12 Our firm filed a series of fairly basic requests for
13 discovery related to sales representatives about a month ago.
14 Biomet said that a lot of the information didn't exist at all.
15 And we met and conferred, and they went back and looked at some
16 of the information we had requested. About an hour ago, I
17 received, for the first time, several hundred pages of this
18 information that was responsive.

19 My proposal, pending the position of the Defendants,
20 would be that we continue to meet and confer and not burden
21 this Court's resources with diving into an issue that is still
22 somewhat fluid and we're making some progress on.

23 **THE COURT:** Thank you.

24 Anything to add, from the Defense side, on that?

25 **MS. HANIG:** We're mostly in agreement on that. There

1 were requests served. Biomet objected, based on the relevance
2 and the breadth of the scope of those requests. Plaintiff was
3 able to narrow some of those. And, as Mr. Davis mentioned,
4 within the past hour, we've been talking about meeting and
5 conferring in good faith further.

6 I believe the documents that were referred to
7 Mr. Davis were actually documents that have been in the MDL
8 production all along, and we pointed to those specifically, and
9 we are looking to see if there's anything additional that we
10 can produce.

11 But, at this point, I don't think we're ripe for the
12 Court to consider. I think we just wanted it to be on your
13 radar, in case a motion could potentially be coming down the
14 pipeline.

15 **THE COURT:** Okay. Appreciate that.

16 Next on the agenda is the proposed remand pretrial
17 order submissions.

18 I would tell you, I have looked at each of the
19 proposed remand orders and been down through each pretty
20 thoroughly once. I have not had a chance to look at
21 objections. I know one set of objections came in. I assume
22 another one did, just from the timing, but I have not looked at
23 those yet. So, as you make your report, I just want to let you
24 know where I stood.

25 **MR. WARD:** Yes, Your Honor.

1 And just with regards to the objections, we just
2 received objections from the Defendants a couple days ago, so
3 Plaintiff has not had an opportunity to do objections in
4 response to those, but we'd be -- we plan on and would be more
5 than happy to get those out as soon as possible.

6 **THE COURT:** Okay. Any estimate on when as soon as
7 possible would be in this context?

8 **MR. WARD:** Next week.

9 **THE COURT:** Next week, okay.

10 I would tell you, as well, that I am going to use
11 what you folks have submitted as -- I don't want to say
12 "template," but at least a jumping off point on the remand of
13 the non-M2a cases that we talked about before.

14 I think the transferee courts -- the transferee
15 court, because I think there's only one on that, is entitled to
16 know what the case has been doing while it's been gone, and I
17 think the other folks who would simply have a 1404 transfer
18 need to know where this case came from, because they've never
19 seen it, so I plan to be using what you've submitted, even
20 before we start a fuller remand/recommendation to the Panel.

21 We've got status of upcoming expert trial
22 depositions.

23 **MR. WARD:** Yes, Your Honor.

24 Navan Ward.

25 The parties are in the process of finalizing the last

1 Plaintiffs' experts dates, and we just received, I believe,
2 yesterday, a response from Defense regarding a proposed time
3 frame in response to our suggestions, and so I suspect that,
4 possibly, after the hearing and/or the next day or so, we'll be
5 able to finalize the three expert deposition dates and provide
6 that information to the Court, if the Court so wishes.

7 Plaintiffs definitely appreciate and thank the Court
8 for allowing us to be able to utilize this courtroom for at
9 least one of those depositions that are going to occur. Once
10 we are able to finalize that, we'll be able to get in touch
11 with the appropriate courtroom staff to make sure that
12 everything goes as smoothly as can for that.

13 **THE COURT:** I am sharing the courtroom, right now,
14 with Judge Simon over in Hammond who has a full load of South
15 Bend cases, so we may not be able to give you an answer right
16 away because we'll, obviously, have to check with him. He
17 tends to have his things set in the second half of the month
18 and I have them in the first half of the month.

19 Anything to add, from the Defense standpoint?

20 **MS. HANIG:** I don't believe so, Your Honor.

21 **THE COURT:** Okay. Next is Beasley Allen open issues.

22 **MR. WARD:** Yes, Your Honor.

23 This **William Simpson** case is a case that is, from the
24 Plaintiffs' perspective, a case that's been resolved and
25 settled, and the Defendants have a different perspective of it

1 and have requested that it be in one of the Group 5 or Group 6
2 case-specific discovery.

3 We are coming to seek guidance from the Court as to
4 how the Court wants us to proceed. I would imagine that we'll
5 need to probably do some type of briefing for the Court
6 regarding this issue, in the form of possibly a motion to
7 enforce settlement. I know that there were several of those in
8 the beginning of this litigation on grounds that are different
9 from the grounds that we would be having in this particular
10 instance.

11 I don't know if the Court wants to hear our positions
12 at this point.

13 **THE COURT:** Obviously, some steps have been completed
14 to lead you to believe there's a settlement, and I assume some
15 steps not completed that makes Biomet think there isn't, so
16 where is the process with respect to Mr. Simpson?

17 **MR. WARD:** So, Mr. Simpson, unfortunately, passed
18 away. Biomet made an offer. And once we found out that
19 particular client had passed away, we made steps to get a legal
20 representative appointed. Once we got that legal
21 representative appointed, we -- that legal representative
22 accepted the offer by sending in a release for that particular
23 settlement.

24 When we, the Plaintiff, my firm, was doing our
25 standard follow-ups a few months ago with regards to the case

1 being funded, like several of the other cases that had resolved
2 in that same time frame and inquired upon the reasons for that,
3 Defense counsel had to do some checking. And when they got
4 back with us, they indicated that, since Mr. Simpson had passed
5 away, that they -- that that was a material, for them, issue
6 with regards to the settlement offer and, therefore, would be
7 considering revoking the particular offer.

8 And, again, I don't want to misstate the Defendant's
9 position.

10 And so, again, it was our position that our client's
11 unfortunate death certainly was not a material fact, since the
12 death had nothing to do with the issue.

13 **THE COURT:** So, as I understand it, we have an offer
14 made to Plaintiff; Plaintiff dies; legal representative accepts
15 the offer; sends in the release?

16 **MR. WARD:** Plaintiff had died, at some point in time.
17 Once we found out --

18 **THE COURT:** Oh, so you're not sure whether he died
19 before the offer was made?

20 **MR. WARD:** If I'm not mistaken, he had died after --
21 died before the offer was made.

22 **THE COURT:** Okay.

23 **COURT REPORTER:** I'm sorry. Would you repeat that?

24 He died --

25 **MR. WARD:** After the offer was made.

1 **COURT REPORTER:** Thank you.

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

3 **MR. WINTER:** Your Honor, this is actually a very
4 serious issue.

5 Mr. Simpson died in July of 2016, unfortunately, of
6 lung cancer, which we now know from his death certificate.

7 You had suggested, and the parties were trying to
8 work through, a round of settlements in the summer of 2016.

9 An offer was made on the **Simpson** case in September of
10 2016. When we sent the offer, no one told us that Mr. Simpson
11 was dead.

12 **THE COURT:** So your understanding of the dates is
13 that he died before the offer?

14 **MR. WINTER:** He definitely died before the offer.
15 The death certificate is dated July 3rd of 2016. The e-mail
16 about the offer is either September 6th or September 8th of
17 2016.

18 **THE COURT:** Okay.

19 **MR. WINTER:** We get -- we were notified, in May of
20 2017, that Mr. Simpson had accepted, not that Mr. Simpson was
21 dead, but Mr. Simpson accepted.

22 At, like, late October or November of 2017, the
23 release came in, and the person who first looks at the releases
24 saw that Mr. Simpson didn't sign it, which pushes a release to
25 a different area to be reviewed. It sat there, Your Honor,

1 candidly, for a period of months.

2 Mr. Ward's firm reached out to us in April or May of
3 2018. "Where's the Simpson money?"

4 So, when I look, I realize that we made an offer to
5 some one who was dead and we were not so informed.

6 We can look at ABA ethic opinions. We can look at
7 Virginia Bar ethic opinions, because Mr. Simpson comes from
8 Virginia. A lawyer has an ethical obligation, when there is
9 settlement discussions going on, to let the other side know
10 that a client has passed away, and it is, by definition,
11 material that a client is no longer alive, for many obvious
12 reasons.

13 And Your Honor may recall that, when we did the
14 Master Settlement Agreement, there actually was a category
15 that, if the plaintiff had passed away, it was an automatic
16 \$20,000 case. Now, the MSA doesn't apply anymore, but that
17 framework informs a lot of different matters.

18 So, as soon as I found that out, I said to Mr. Ward,
19 "That's a material fact that was not disclosed."

20 So, if he wants to make a motion to enforce that
21 settlement, we're going to oppose it, and Your Honor knows why.

22 **THE COURT:** I'm trying to figure out -- thank you,
23 Mr. Winter.

24 I'm trying to figure out the best way to tee it up
25 for ruling. I think, probably, a motion to enforce the

1 settlement would be the cleanest and fastest way to do it. I
2 was trying to think of some way this might be able to boil down
3 to letter briefs, but I don't think it should, given where we
4 stand. I don't think I need to put a time limit on the motion.
5 Well, I guess I should.

6 Three weeks, would that do it?

7 **MR. WARD:** Yes, Your Honor.

8 **THE COURT:** Okay. I don't know what three weeks from
9 now is. Give me just a moment. The 19th and 21st get too
10 complicated.

11 So that would be August 9th, and I guess that would
12 just be Plaintiff will file -- Plaintiff Simpson or his
13 representative will file a motion to enforce settlement by
14 August 9th, okay.

15 **MR. WARD:** That works, Your Honor.

16 **THE COURT:** Then, Karen Hamilton.

17 **MR. WARD:** Yes, Your Honor.

18 Karen Hamilton, actually, that issue can be taken off
19 of the status agenda.

20 **THE COURT:** Okay.

21 **MR. WARD:** Just to give you a quick summary of what's
22 going on with that particular case, it is in the spoliation
23 track. However, the hospital where Ms. Hamilton had her
24 revision surgery was holding the device and continues to hold
25 the device and has not released the device, without some type

1 of order from the Court, essentially, instructing it to release
2 the device.

3 My office has been in touch with Biomet, and they
4 have no objections to an order to compel, more specifically, an
5 order to show cause why John Hopkins shouldn't be held in
6 contempt, which is, from our research, the type of motion that
7 they or their legal department would need to release this
8 particular device. Again, Biomet has no objection to it, as,
9 obviously, both parties have an interest in receiving that.

10 And so because we've been able to get in touch with
11 John Hopkins and work out this potential situation, we would, I
12 guess, notify the Court that that order to show cause would
13 be -- or motion for an order to show cause will be coming
14 forward very quickly.

15 **THE COURT:** I'll leave it to you to do the
16 submission, since you've talked to Hopkins and know what they
17 need in the way of an order.

18 Anything to add to that record?

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

20 **THE COURT:** Okay. Next, we have the pro se cases.
21 I've got -- with **Rice** -- let me go through and let
22 you folks add to anything I have.

23 The **Rice** case, 14-cv-133, I believe I stayed that
24 until August 1st, when the attorney withdrew, so it would not
25 be ripe for any action yet.

1 Anybody had a different understanding?

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

3 **MR. WARD:** No, Your Honor.

4 **THE COURT:** **Nicholson**, 17-cv-345, appears to be in
5 Group 6.

6 Is that --

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

8 **THE COURT:** So discovery is proceeding?

9 **MR. WINTER:** No, Your Honor. It's a problem, in
10 terms of the Plaintiff participating in discovery.

11 **THE COURT:** Has he failed to respond?

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

13 **THE COURT:** So, do you anticipate a sanctions motion,
14 eventually?

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

16 **THE COURT:** Okay. **Pendlebury**, shows it being in
17 Group 6.

18 Is that the same?

19 **MR. WINTER:** Same situation, Your Honor, and we're
20 going to file a motion.

21 **THE COURT:** Okay. **Hamm**. The order went out on
22 August 9th, the variation we had on the Lone Pine. I don't
23 know whether Hamm contacted -- I don't know whether it's Mr. or
24 Ms. Hamm -- contacted the Plaintiffs' Steering Committee.

25 Do you know?

1 **MR. WARD:** Your Honor, there has been some contact
2 with us, but I've not been able to get a clear understanding as
3 to what posture the Plaintiff is with regards to his pro se
4 status --

5 **THE COURT:** Okay.

6 **MR. WARD:** -- at this time.

7 **THE COURT:** But, as far as you know, he hasn't
8 retained counsel yet?

9 **MR. WARD:** Yes, that is our understanding.

10 **THE COURT:** Okay.

11 **MR. WINTER:** Your Honor, he did not retain counsel,
12 and, fortunately, Mr. Hamm sent us a release, last week, so his
13 case is going to get taken care of.

14 **THE COURT:** Okay. On the track out, also?

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

16 **THE COURT:** I would add one, **Soustek**, S-O-U-S-T-E-K,
17 15-cv-358.

18 As best we can tell from what we've got, after
19 discovery closed in Group 3, was in Group 3, the attorney
20 withdrew, so the variation on the Lone Pine order that we were
21 using was inappropriate.

22 And ignoring the pro se status, he should be on the
23 list of cases for the first round of remand, as I understand
24 it, but I don't know what's happened. That's why I throw it
25 out here.

1 **MR. WINTER:** Your Honor, can we be given the
2 opportunity to sort of, on our side, parse it out and then
3 report back to the Court?

4 **THE COURT:** Sure. That's fine.

5 Do you know whether you folks have heard from Mr. or
6 Ms. Soustek?

7 **MR. WARD:** I personally do not, Your Honor, but if
8 Plaintiffs' Steering Committee could have an opportunity to
9 meet amongst ourselves to find out, many times a lot of either
10 the attorneys and/or pro se litigants contact various members
11 of the Committee, and so that's something that we would be able
12 to get together and report back to the Court on that.

13 **THE COURT:** Let me ask that you report, first, to
14 Biomet so they can put that in their report on the case and I
15 only have to deal with one report.

16 **MR. WARD:** Yes, Your Honor.

17 **THE COURT:** Okay.

18 **MR. WARD:** And I apologize. Can you give me the
19 name?

20 **THE COURT:** Yeah. It's **Soustek**, S-O-U-S-T-E-K, and
21 it's 15-cv-358.

22 **MR. WARD:** Thank you, Your Honor.

23 **THE COURT:** I don't know if anybody has anything to
24 tell me on the pending motions, other than I can tell you that
25 I think that's right. I hope to have a ruling out as soon as I

1 can, but you place some interesting issues here.

2 Did anybody have anything to add to the list?

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

4 **MR. WARD:** If the Defendants don't, we don't either.

5 **THE COURT:** Okay. And I truly hope to have
6 everything -- all those ruled on by the next time we meet,
7 because I am now beginning to be the obstacle here.

8 Anything else to raise?

9 Anything for the Steering Committee?

10 **MR. WARD:** Not from the Steering Committee,
11 Your Honor.

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

13 **MR. WINTER:** Nothing, Your Honor, other than, I
14 think, the four corners of the remand order, for want of a
15 better term, does have some important implications; and when we
16 next meet, hopefully, with direction from Your Honor, we can
17 have a robust discussion.

18 **THE COURT:** Okay. Sure. Yeah. It looked to me like
19 you folks wanted to talk about it.

20 I'm looking for a date for our next conference. I
21 am -- six weeks from now is what we've been doing. I'm going
22 to be at a Federal Judicial Conference workshop, and I think we
23 ought to bring it this way, rather than set it further out.

24 How would you look for -- well, let's build -- make
25 it possible to hash out the order. How about 11:00, if that

1 time works for you -- I don't know what your flight would be --
2 on August 23rd? If you can't get here by that time, I'll be
3 happy to go back to 1:15.

4 **MR. WARD:** Either one, we would make work. 1:30 is,
5 typically, a little easier for us to fly in.

6 **THE COURT:** We can do 1:30 then.

7 Oh, wait. I'm sorry. I have to cross that date. I
8 have a colonoscopy that date, so I would not be much help. I'm
9 sorry.

10 How about 1:30 on August 16th?

11 **MR. WINTER:** Right now, Your Honor, I think that is a
12 proposed date for one of the expert depositions.

13 **THE COURT:** Oh, okay.

14 **MR. WARD:** And, Your Honor, that's the one that would
15 be here, so --

16 **(Discussion held out of stenographer's hearing.)**

17 **MR. WARD:** That's an expert deposition that would be
18 here at this particular court, so the parties will be here.

19 **THE COURT:** We will not have staff here. That's a
20 staff recognition date.

21 **MR. WARD:** I don't know if the day before would work.

22 **THE COURT:** Yeah, this is getting interesting. I've
23 got a three-day trial set that looks like it's going to go on
24 the 13th. And if it doesn't, I have a four-day bench trial
25 behind it that looks like it will go. Let me look a little

1 further down the road.

2 How about the 27th of August at 1:30?

3 **MR. WARD:** That works for Plaintiffs.

4 **MR. WINTER:** Works for our team.

5 **THE COURT:** Okay. So let's jump on that one.

6 Okay. You should hear from me on several items
7 between now and then, if all works as planned. Probably not on
8 the 23rd of August, though.

9 Okay. Thank you, folks. I will see you, then, next
10 month.

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

12 **MR. WARD:** Thank you, Your Honor.

13 **LAW CLERK:** All rise.

14 **(All comply; proceedings concluded.)**

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