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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 31, 2016

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

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**DEBRA J. BONK
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*Proceedings reported in machine shorthand. Transcript
produced by computer-aided transcription, Eclipse.*

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TELEPHONIC APPEARANCES:

FOR PLAINTIFFS:

- MR. NAVAN WARD**
- MR. KYLE BACHUS**
- MR. JUSTIN PRESNAL**

FOR BIOMET:

- MR. JOHN WINTER**
- MR. JOHN LaDUE**

(see docket for addresses.)

1 **THE COURT:** Good morning.

2 This is Judge Miller.

3 This is our Cause Number 3:12MD2391, **In Re: Biomet**
4 **M2a-Magnum Hip Implant Products Liability Litigation**, and we
5 are gathered by telephone for a check on the progress of
6 discovery.

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

9 **MR. BACHUS:** Kyle Bachus, Your Honor, on behalf of
10 the Plaintiffs.

11 **MR. WARD:** Navan Ward, Your Honor, on behalf of the
12 Plaintiffs Steering Committee.

13 **THE COURT:** Okay.

14 **MR. PRESNAL:** Justin Presnal on behalf of Plaintiffs.
15 Good morning, Your Honor.

16 **THE COURT:** Good morning.

17 Is that it for the Plaintiffs?

18 **(No response.)**

19 **THE COURT:** Okay. For the Defense?

20 **MR. LaDUE:** Judge, John LaDue for the Defendants.
21 I'm sorry, John. Go ahead.

22 **MR. WINTER:** Good morning, Your Honor.
23 John Winter for Defendants.

24 **THE COURT:** And, Mr. LaDue, good morning.

25 This is the first of our dates that we were setting

1 aside in case there were discovery issues that had to be
2 addressed on an ongoing basis, and I think we need to adjust
3 one thing that we learned this time around.

4 What I'm going to do is, as part of today's entry,
5 show that, from here on out, there needs to be 48 hours' notice
6 as to whether the hearing will be necessary and note that each
7 side is responsible for getting the appropriate people on the
8 phone. I don't mean to fault either side now. It's just
9 something we hadn't thought about, and I think things will go
10 more smoothly if we do that, and I think, probably, it's my
11 fault for not having raised it before.

12 But, in any event, we are gathered today, and the
13 request was made by the Defense, so, Mr. Winter or Mr. LaDue,
14 what can we help with today?

15 **MR. WINTER:** Your Honor, we've been working to
16 schedule depositions in the statute of limitations track, the
17 spoliation track, and the Group 1 track, and I'm happy to
18 report that, with respect to the statute of limitations, all of
19 those depositions were scheduled within the time frames set
20 forth in your order, but we had come up to what we perceived to
21 be a problem with a decent number of the spoliation and some of
22 the Group 1 depositions.

23 The process, Your Honor, is one of our colleagues
24 works with the individual law firms, and we try to come up with
25 mutually convenient dates, which we've been relatively

1 successful on, given some of the deadlines. But particularly
2 with the group in the spoliation track, we were becoming
3 concerned about scheduling the depositions because they take,
4 you know, 60 days for everyone to find the right day, and we do
5 have deadlines.

6 So we thought we had exhausted reasonable efforts to
7 get about 20-some odd of the cases scheduled, sent a list to
8 our colleagues, and we should have been more mindful of the
9 timing that you pointed out, Your Honor, because we asked them
10 to let us know, as of Tuesday, if this was going to be a
11 problem. If it was, we were going to ask to put it on the
12 agenda.

13 Not having heard, we asked to put it on the agenda
14 yesterday, but I can happily report to Your Honor that, of the
15 20-some odd cases that we had not gotten dates on or proposed
16 dates on, yesterday afternoon, I would say at least half the
17 cases, we've gotten proposals for dates for the depositions,
18 and, you know, we will schedule them in short order.

19 So I think scheduling this conference had a salutary
20 effect, but I have -- I'm counting, Your Honor. One, two,
21 three, four, five, six -- seven cases where we've still not had
22 a response on depositions, and four of those cases are in the
23 spoliation track, so maybe what we would hope for is a little
24 guidance as to, you know, what our next step could be, and we
25 would think it might be something along the lines where people

1 are given X days to propose a date for a deposition in the
2 spoliation track. Otherwise, we'll, you know, make some type
3 of motion, and you can rule, because you've already put the
4 potential for Rule 37 in your order.

5 I don't think the Group 1 depositions would fall into
6 that category, given the much longer time frame in your order
7 for scheduling depositions.

8 **THE COURT:** Okay. Which of the spoliation cases that
9 are -- you haven't gotten responses in?

10 **MR. WINTER:** Crouse, Frasier.

11 **THE COURT:** Hold on. Let me keep up with you here.
12 What was the first one?

13 **MR. WINTER:** Michael Crouse.

14 **THE COURT:** Oh, Crouse. Michael Crouse, okay.

15 **MR. WINTER:** Linda Frasier.

16 **THE COURT:** I don't show her on my list.

17 **MR. WINTER:** Hold on. I may have --

18 **LAW CLERK:** She's Group 1, Your Honor.

19 **THE COURT:** Oh, that's Group 1.

20 **MR. WINTER:** I'm sorry. I missed one.

21 The next one is Jacquelyn Jones.

22 **THE COURT:** Okay.

23 **MR. WINTER:** And Darlene Parr, and the one I forgot
24 was Mary Stewart.

25 **THE COURT:** All right.

1 **MR. WINTER:** Those are the ones where they're in the
2 spoliation track and, as of yesterday afternoon, we had not
3 gotten a proposed date.

4 **THE COURT:** Okay. I thank you.

5 Mr. Ward or Mr. Presnal, what are your thoughts? And
6 I understand this may not be squarely on you folks, but what
7 thoughts do you have?

8 **MR. BACHUS:** Your Honor, Your Honor, this is Kyle
9 Bachus, if I could be heard, only because --

10 **THE COURT:** Oh, Mr. Bachus. I'm sorry. I didn't
11 show you.

12 Kyle Bachus is, also, here for the Plaintiffs and the
13 Steering Committee.

14 I'm sorry. Go ahead, sir.

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

16 I only speak up because two of those, at least, are
17 my cases, and we did give dates for two of those cases, Parr --
18 what's the other one? Frasier, Crouse, Parr, we gave dates for
19 those.

20 And I would also point out to the Court that, just so
21 that you understand, this is kind of a dynamic situation, in
22 that, as I understand, the order is kind of a bilateral
23 requirement, but the only penalty that's proposed is against
24 us. We weren't even contacted by Defense about dates for these
25 cases until the 21st of March.

1 **THE COURT:** Okay. So, Mr. Bachus, you have proposed
2 dates on -- and I'm just looking at the spoliation ones now --
3 Crouse and Parr?

4 **MR. BACHUS:** Yes, Your Honor.

5 **THE COURT:** Okay.

6 **MR. BACHUS:** We proposed dates in June, to occur in
7 June.

8 **THE COURT:** Okay. Well, I'm assuming something fell
9 through the cracks. And given the number we have, that makes
10 sense, and I'm glad you were on the call today.

11 Mr. Ward or Mr. Presnal?

12 **MR. WARD:** Yes, Your Honor. Yes, Your Honor, I can
13 take it.

14 And so that Your Honor understands, per your order,
15 the Plaintiffs Steering Committee was assigned to, for the
16 Exhibit A and Exhibit B cases, reach out to the Plaintiffs and
17 do their best to secure dates and provide those dates for the
18 individual Plaintiffs in Group -- excuse me -- Exhibit A and
19 Exhibit B. And as I think my colleague, Mr. Winter, pointed
20 out, the Plaintiffs Steering Committee was successful in being
21 able to get most all of the dates from the statute of
22 limitations, alleged cases in Group A.

23 We've done the same process with regard to reaching
24 out to all of the members or attorneys on Group B, and we've
25 gotten a significant amount of attorneys that have provided

1 dates. Those dates have been provided to the Defendants.
2 There have been some attorneys that we've not heard from. And
3 of the ones we've not heard from, we've not been able to submit
4 dates.

5 Now, there has been --

6 **THE COURT:** Let me ask, just real quick, Mr. Ward, is
7 that the case with the attorneys on Jones and Stewart, that you
8 haven't heard from them?

9 **MR. WARD:** No. That's what I was about to get to.

10 **THE COURT:** Okay. I'm sorry. Go ahead.

11 **MR. WARD:** There are a small sliver of cases where
12 Plaintiffs' counsel has provided the Plaintiffs Steering
13 Committee -- and, specifically, Ahmed Diab has been the point
14 person for receiving cases from the various different
15 Plaintiffs and submitting them to the Defendants. There have
16 been a small sliver of cases that have been submitted --
17 fortunately -- fortunately and somewhat unfortunately, Mr. Diab
18 just had a child. That's the fortunate part. There were some
19 complications a week or two beforehand. And since then, he's
20 not been in, he's not been in the office -- and so some of
21 those cases where counsel has submitted to him may have fallen
22 through the cracks.

23 Plaintiffs Steering Committee, the rest of us, over
24 the last day or so, we've been in contact with Mr. Diab's
25 office to obtain as many dates as we could that have come in,

1 but not submitted to the Defense, and that's where, as of
2 yesterday, we were able to gather up as many dates as possible.
3 Some of those were even my cases that were submitted to the
4 point person but, because of life circumstances, weren't
5 delivered to the Defendants in Exhibit B. And if I'm not
6 mistaken, that would have included Mr. Bachus' cases, as well.

7 We, again, attempted to gather as many of the dates
8 from Mr. Diab's office yesterday that weren't submitted. There
9 still may be a couple more Plaintiffs that have not submitted
10 those dates, and I was hoping to get a better idea of exactly
11 which ones the Defendants don't have. To the extent they still
12 don't have Mr. Bachus', I'm sure they have -- Mr. Bachus has
13 the dates today, right now, that they could possibly give to
14 them or after the call that they could give to them.

15 But outside of those cases, I think that's the group
16 of cases that Mr. Winter is seeking guidance on, because that
17 group of cases, the one that PSC has reached out to for Exhibit
18 A and Exhibit B, you know, we've -- Mr. Diab, he's made calls,
19 as well as sent e-mails to everyone on both Exhibit A and
20 Exhibit B. And to the extent we haven't had an opportunity or
21 have not had a response back, then, you know, we've done all
22 that we can do on those particular cases.

23 Now, when it comes to the Group 1 cases -- you know,
24 that's something that, I think, Your Honor alluded to -- the
25 PSC has no control over what dates or what responsiveness

1 individual attorneys have with the Defendants.

2 And coupled with that, the time frame for dates being
3 secured in whatever capacity with regards to the various
4 depositions that can be taken in Group 1, those time frames are
5 just now coming about as far as activation of Group 1. I think
6 today or yesterday was the deadline for medical authorizations
7 to be provided, so we're very early in the Group 1 process.
8 And so to the Plaintiffs -- individual Plaintiffs' defense,
9 even though, again, we have -- the PSC has no control over
10 them, it's very early in the process with regards to providing
11 any dates that the Defendants may have requested.

12 **THE COURT:** Okay. So what I think I'm getting from
13 what you said, with respect to the two that are still out
14 there -- recognizing, Mr. Bachus, you folks can exchange dates
15 on this call, for all I care. We may as well use our line --
16 but with respect to Jacquelyn Jones and Mary Stewart, you do
17 not know -- because of Mr. Diab's absence from the office, you
18 don't know whether they've responded at all; is that accurate?
19 You have no indication that they have, but you can't say they
20 haven't?

21 **MR. WARD:** Yes, we have no indication that they have,
22 and we cannot say that they haven't. But knowing the two,
23 knowing these two, Jacquelyn Jones and Stewart, if those are
24 the correct two, then we can certainly --

25 **(Discussion held off record.)**

1 **THE COURT:** I'm sorry. Mr. Ward. Mr. Ward.
2 Mr. Ward.

3 **(Discussion held off record.)**

4 **THE COURT:** Oh, it's me that she couldn't hear. I'm
5 sorry.

6 **COURT REPORTER:** No, it was him. I couldn't tell who
7 was speaking.

8 **THE COURT:** Okay. If you could start over, Mr. Ward.
9 I'm sorry.

10 My question, to put us back where we were, I had
11 asked whether -- my understanding, from what you've said, is
12 that you don't know that Mary Stewart or Jacquelyn Jones have
13 responded to Mr. Diab's solicitation for dates; but because
14 Mr. Diab's been absent from the office, you can't say for sure
15 they haven't responded; is that accurate?

16 **MR. WARD:** That is accurate, Your Honor.

17 **THE COURT:** Okay. Sorry for cutting you off, but we
18 lost audibility there for a minute.

19 Oh, I guess let's -- Mr. Bachus, do you have the
20 dates you proposed or are those with Mr. Diab?

21 **MR. BACHUS:** I can get them momentarily. In fact, in
22 anticipation of that, I just sent a paralegal to go grab the
23 dates that we had proposed.

24 **THE COURT:** Okay.

25 **MR. BACHUS:** So we can do that offline, but I do have

1 those dates.

2 **THE COURT:** Okay.

3 **MR. BACHUS:** We can do that, you know, if you want to
4 do that now. As soon as she re-enters the room, I'll let you
5 know.

6 **THE COURT:** Okay. Well, yeah. I think, when I say,
7 "Goodbye," you're off the federal phone line, so you'd have to
8 place another call, but that doesn't seem terrible.

9 Mr. Winter, the right to close.

10 **MR. WINTER:** I'm sorry, Your Honor?

11 **THE COURT:** You have the right to close since you
12 were the one asking for some help here.

13 **MR. WINTER:** Your Honor, I think, understanding
14 better some of, like, the miscommunications that occurred here,
15 and it seems to be, you know, one of those things that happens
16 in life, fortunately, in a good way here for Ahmed, if we get
17 the two dates from Mr. Bachus, I think what we would ask,
18 Your Honor, is that -- by next Friday, just because it's like
19 close to ten days, that either we get the two dates, the dates
20 for those two remaining spoliation cases, and it's not been --
21 you know, we'd like to make some motion to get this taken care
22 of on these two cases.

23 **THE COURT:** Off the top of my head -- and, obviously,
24 I haven't done any research -- it seems like, before I could do
25 a Rule 37 remedy of any sort, wouldn't it be necessary for you

1 to notice a deposition and have a Plaintiff not appear? And I
2 appreciate your working with the other side. I don't mean to
3 suggest that -- that's the way to do things, normally, is to
4 just pick a date and see who shows up. But before I could
5 enter any Rule 37 sanctions, wouldn't the Plaintiff have to
6 fail to attend a deposition?

7 **MR. WINTER:** Well, I think, Your Honor, if there was
8 an order that was entered after this hearing that says:
9 Plaintiffs in these cases to provide dates for depositions on
10 or before, you know, X day, being next Friday, and that not
11 happening, I would think then we could make a Rule 37 motion
12 for failure to comply with your order.

13 **THE COURT:** I see. Okay.

14 **MR. WINTER:** Alternatively, we could send a
15 deposition notice out and then wait the period of time. You
16 know, we could do it either way, but I think the way -- the
17 first way, probably, would be proper and appropriate.

18 **THE COURT:** I think you're right. I think that would
19 work, as well.

20 I want to give them past --

21 **MR. WARD:** Your Honor --

22 **THE COURT:** I'm sorry. Mr. Ward? Who was that?

23 **MR. WARD:** Yes, Your Honor. This is Navan Ward,
24 Your Honor.

25 **THE COURT:** Okay.

1 **MR. WARD:** I would say, again, not knowing the issues
2 involved with these two cases, but just knowing the issues
3 involved in general with regards to sometimes contacting
4 clients, in some instances, it may be difficult because of
5 their schedules, them being out of town, them, you know, just
6 generally not being available, and so, in many instances, it
7 may not necessarily be the attorney that's the delay. It may
8 just be getting in contact with the client.

9 **THE COURT:** Sure.

10 **MR. WARD:** And as the Plaintiffs Steering Committee
11 discussed this issue, we agree that they should be given, but
12 we also agree with your initial thought, and the fact of the
13 most appropriate way to be able to handle that, to have a
14 deposition notice. Typically, that would, you know, give
15 extra, if there's any need for it, motivation for the Plaintiff
16 to be able to, you know, provide additional dates. And to the
17 extent that date works and it gives additional time for the
18 Plaintiff to get back to town or whatever the case might be,
19 you know, that deposition notice date could potentially,
20 actually, work to solve the problems with regards to actually
21 having the deposition taken. And, of course, if not, then we
22 think that that would be the most appropriate time for any type
23 of sanctions to occur.

24 **THE COURT:** What I'm going to do, because I think
25 both sides have good points, but there has been a period of

1 time for the counsel in those two cases to provide dates --
2 maybe they've been unavailable, maybe their clients have been
3 unavailable, but I think we need to hear from them, so I think
4 -- and I think that the way Mr. Winter described it probably
5 would bring the issues to the floor a little more quickly and
6 more efficiently than setting random deposition dates.

7 What I'm going to do, though, is to order that they
8 respond by the 15th of April, instead of the 1st. I know that,
9 here at least, it's spring break in the schools next week. It
10 probably is other places, as well, although not everywhere.
11 And I do want to be sure that the people are in a position --
12 the attorneys are in a position to be informed that they do
13 have to come forward and, also, have a reasonable chance of
14 getting hold of their clients. And if an attorney isn't able
15 to get hold of their client and that's why they can't offer
16 dates, they can respond to whatever motion Biomet files to
17 explain that. And depending on how long they've been trying,
18 they could possibly get more time.

19 So what I will do is that in -- I'll direct that in
20 our Cause Numbers 13CV1008 -- that's the Jacquelyn Jones
21 case -- and 14CV1482 -- that's the Mary Stewart case -- that
22 counsel of record is directed to produce to Biomet, through the
23 Plaintiffs Steering Committee, possible dates for deposition of
24 the Plaintiff and to do so by April 15th, and, if that is not
25 done, that Biomet is free to move for a remedy under Rule 37.

1 So, obviously, I agree with Mr. Ward. I don't want
2 to have anybody lose out because they've been out of town on a
3 vacation or for a trial, but, by the same token, we've at least
4 got to get something.

5 And if I could ask that the Plaintiffs Steering
6 Committee be sure that the counsel of record in those two cases
7 gets notice. This may be one of those things where just being
8 on the website and having an order come in, the same as we get
9 with the attorneys withdrawing or appearing, might be less than
10 what we're looking for. So if Mr. Diab can do it, that's fine.
11 If not, I'd ask somebody else on the Steering Committee to at
12 least be sure that this order is made known to those attorneys.

13 **MR. PRESNAL:** Judge, Miller, I was going to say, if I
14 may, this has been, as you can imagine, a bit of a cat-herding
15 operation to try and get these dates together.

16 **THE COURT:** Okay. Who am I talking to here for the
17 moment?

18 **MR. PRESNAL:** This is Justin. This is Justin
19 Presnal. I'm sorry.

20 **THE COURT:** Okay. Go okay.

21 **MR. PRESNAL:** We have, through the course of this,
22 ever since your order came out, engaged in a series of, sort
23 of, escalated requests for these dates. And, as you can
24 imagine, most people have been responsive, but there are some
25 that have been less than responsive. And what I was going to

1 say is, even in addition to your order, we will specifically
2 reach out to these folks and let them know that this is coming,
3 they need to be on the lookout for it, and they need to be
4 responsive to it, to try and just escalate and get a response
5 as quickly as possible on those dates.

6 **THE COURT:** Okay. Yeah, I know Mr. Diab has a
7 challenging job. And if he's been attending to family needs,
8 that makes it even more challenging for everybody else.

9 Anything else for Biomet today?

10 **MR. BACHUS:** Your Honor, yes, Your Honor.

11 Your Honor, this is Kyle Bachus.

12 I do have the dates we gave. Here they are:

13 June 1, 7, 8, 10, or 14 through 16.

14 So, Mr. Winter, if you wanted to notice those cases
15 for any of those dates, we're available on those dates of June.

16 **MR. WINTER:** Those are for both cases?

17 **MR. BACHUS:** Yes, for -- there's, actually, three
18 cases that we were asked about, and for the three cases,
19 although only two were addressed by the Court today. There's
20 another case that we haven't seen a notice on.

21 And your office had proposed a date of July 11th for
22 one of these, and we are also available on that date, should
23 you guys elect to notice on July 11th, but our dates we gave --
24 we said June, and these are the dates in June: 1, 7, 8, 10, 14
25 though 16.

1 **MR. WINTER:** Very good. Thank you.

2 **MR. BACHUS:** You're welcome.

3 **THE COURT:** All right. Anything else for Biomet
4 today?

5 **MR. BACHUS:** Your Honor, this is Kyle Bachus.
6 I just wanted to advise the Court --

7 **THE COURT:** Hold on, Mr. Bachus. Let me do it one at
8 a time. I'll come back to the Plaintiffs.

9 But anything further for Biomet, Mr. Winter?

10 **MR. WINTER:** No, Your Honor. Thank you.

11 **THE COURT:** Okay. Now, anything further for the
12 Plaintiffs?

13 And, Mr. Bachus, go ahead.

14 **MR. BACHUS:** Yes, Your Honor.

15 And we could put this on the schedule maybe for the
16 next hearing, but we have two third-party subpoenas that were
17 sent out, one of which we've received objection to, and the
18 other just asked for additional time, and we may need to talk
19 about the objection, and I just wanted to make sure that that
20 would be something appropriate to set for a discovery -- one of
21 these discovery hearings.

22 Or is there another way to get that third-party
23 subpoena issue before you?

24 **THE COURT:** The objections, I gather, are from the
25 third party and not from Biomet?

1 **MR. BACHUS:** Yes, Your Honor.

2 **THE COURT:** Okay. If you can, file with us a notice
3 that that has happened so that I can look over the objections
4 and figure out when we can set something.

5 The next discovery get-together we've got is, at this
6 point, devoted to pending interrogatories and requests for
7 production, and I'd hate to try and throw anything else in
8 there on top of that because there's quite a few of those, so
9 we may want to do something separately.

10 But, if you could, file a notice that I can act on
11 then and take a look at what's involved and get a feel for how
12 long we'd need, and, obviously, that would let us know who the
13 attorney is that's objecting. So if you could go that way,
14 that would be helpful.

15 **MR. BACHUS:** Yes, Your Honor, will do. Thank you.

16 **THE COURT:** Okay. Anything else for Plaintiffs?

17 **MR. PRESNAL:** Judge, this is Justin Presnal, again.

18 The only thing that I wanted to alert you to -- it's
19 not ripe for your consideration, but I wanted to make sure you
20 were at least aware of it -- PSC 2 has some issues with the
21 privilege logs that Biomet has provided. We have begun the
22 process of addressing that with them. We had an initial
23 meet-and-confer. There are some other steps that we need to go
24 through in order to see whether that can be resolved, which we
25 will endeavor to do, but I just wanted to at least let you know

1 that that's out there. Hopefully, it's something that we can
2 resolve, but it may need to be addressed at some point in the
3 not too distant future.

4 **THE COURT:** Okay. I thank you, sir.

5 I will -- I don't know. I haven't looked to see when
6 we get together again, but I'll see you soon.

7 Thank you.

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

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

10 **(Proceedings concluded.)**

11 *******

12 **CERTIFICATE**

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

16 **DATED THIS 31st DAY OF MARCH, 2016.**

17 **S/S DEBRA J. BONK**

18 **DEBRA J. BONK**
19 **FEDERAL CERTIFIED REALTIME REPORTER**

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