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

IN RE: BIOMET M2a-MAGNUM HIP IMPLANT PRODUCTS LIABILITY LITIGATION

CAUSE NUMBER 3:12MD02391

MONDAY, MARCH 9, 2020

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

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DEBRA J. BONK
FEDERAL CERTIFIED REALTIME AND REGISTERED MERIT REPORTER
UNITED STATES DISTRICT COURT
204 SOUTH MAIN STREET - ROOM 314
SOUTH BEND, INDIANA 46601
DEBRA_BONK@INND.USCOURTS.GOV
574-246-8039

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FOR PLAINTIFFS:
MS. BRENDA FULMER
MR. NAVAN WARD
MS. MICHELE STEPHAN
MR. BRIAN FRANCISKATO
MR. JOSEPH SAUNDERS
MR. PAYJES SHAW
MR. CHRISTOPHER SHAKIB
MR. TREVOR ROCKSTAD

FOR BIOMET:
MR. JOHN WINTER
MS. ERIN LINDER HANIG
MR. JOSEPH TANNER
MS. TERESA GRIFFIN
(see docket for addresses.)

THE COURT: This is our Cause Number 3:12MD2391, MDL Docket Number 2391, **In Re: Biomet M2a Magnum Hip Implant Products Liability Litigation**.

We are gathered for a status conference. Apparently we've had some miscommunication -- and I think it's the first time it's happened through all of these conferences we've had -- as far as the phone-in. And I guess we have no way to tell who is on the phone, other than to ask, so if I could ask the people who are listening on the phone if you could state your name so we have a record of who was here. You'll all have to go in an order that seems sound to you because you can't line up.

Who do we have on the phone listening in?

MR. SAUNDERS: Attorney Joe Saunders --

THE COURT: It was Joe what? I'm sorry.

MR. SAUNDERS: -- of Saunders and Walker.

THE COURT: How do you spell the last name, sir?

MR. SAUNDERS: S as in Sam -A-U-N-D-E-R-S.

THE COURT: That's the way I had written it. Thank you, sir.

MR. SAUNDERS: First name Joseph.

THE COURT: Okay.

MR. SHAW: Payjes Shaw of the Miller firm.

THE COURT: And the first name was what?

MR. SHAW: Payjes, P-A-Y-J-E-S.

THE COURT: Okay. Mr. Shaw.

MR. ROCKSTAD: Your Honor, this is Trevor Rockstad.

THE COURT: And could I ask you to spell your last name, too, please?

MR. ROCKSTAD: Yes, sir. R-O-C-K-S as in Sam -T-A-D as in David.

THE COURT: Thank you, sir.

Come on. We need Type A personalities leaping forward here to identify yourselves. Is there anybody on the line, other than Mr. Saunders, Mr. Shaw, and Mr. Rockstad?

(No response.)

THE COURT: Apparently none, okay.

MR. SHAKIB: Yes, Your Honor. Also, Christopher is the first name; last name, Shakib, S-H-A-K-I-B.

THE COURT: Thank you, Mr. Shakib.

Anybody else that I was about to cut off?

(No response.)

THE COURT: Okay. With that, we'll turn to the folks who are in the courtroom.

We have Mr. Ward and Ms. Fulmer as colead counsel from the Plaintiffs' Steering Committee, and we also have two new faces, who I understand are not on the Steering Committee now but who submitted a memorandum dealing with one of the issues we're going to talk about today. If I could ask you to state your appearances for the record, please.

MS. STEPHAN: Michele Stephan, and I'm from Maglio, Christopher, and Toale.

THE COURT: Okay. Let me ask when you speak -- and I'll turn the floor over to you when the time comes -- if you could speak from the lectern because this room is really good at swallowing sound. Thank you.

MR. FRANCISKATO: Brian Franciskato from the law firm Nash and Franciskato.

THE COURT: Okay. Thank you, sir.

And, I guess, just to keep things even, since I asked Ms. Stephan, if I could ask you, as well, to use the lectern.

We have two familiar faces from the defendant with Mr. Winter and Mrs. Hanig.

Who else have we here?

MR. TANNER: Your Honor, Joe Tanner with the Faegre Drinker firm.

THE COURT: Mr. Tanner. Good to see you again.

MR. WINTER: Teresa Griffith with Faegre Drinker.

THE COURT: And Ms. Griffith.

Why don't we start our way down through the agenda as was submitted. We should pretty quickly get to the topic that I invited people to address.

Active case count.

Ms. Hanig.

MS. HANIG: Sure.

Would you like me to use the lectern?

COURT REPORTER: (Nods head.)

MS. HANIG: Okay. So, the current count of active, unsettled cases is at 45.

THE COURT: When you say "active, unsettled," any idea how many settled but still show up on our numbers or is that something you haven't calculated?

MS. HANIG: I would need to check that with the Clerk's Office, but my guess is we're probably within a 20- to 25-case swing. I think we're pretty close to what Jennifer probably shows on CM-ECF.

THE COURT: Okay. Does that sound right to the Steering Committee?

MS. FULMER: Yes, Your Honor.

I actually checked the JPML website, and I don't know how accurate those numbers are, but, as of February of 2020, there were, historical, 2,883 cases, and they show 64 remaining.

THE COURT: Okay. We'll give them a pleasant surprise. Thank you.

Discovery update?

MS. HANIG: So, for discovery, we were working through Group 8A and Group 8B. Both of those deadlines for case-specific discovery have passed. We do have a handful of cases where we are still working through logistical issues to

get surgeons lined up, so we have a handful where we're still active in discovery, nothing where we're at a point where we need the Court's help, so there are no motions pending or forthcoming that I'm aware of on any of those cases as far as discovery. But just to let you know, there's a few that are still working through the process.

THE COURT: Any difference?

MS. FULMER: No, Your Honor.

We always envisioned that there would be a Group 9 that would be activated kind of as a clean-up. So, hopefully, as all of these settlements are reflected on the Court's docket, we'll be able to identify those cases and activate everything that remains in the MDL.

THE COURT: I looked, and it looked like everything that we had, at least at the time -- and I can't find it here, but I think virtually all of them were either in 8A, 8B, or earlier groups that we were waiting for settlement to wrap up.

MS. HANIG: Correct.

THE COURT: Remaining remands, who's on that?

MS. HANIG: I think that's a whole new topic, so I'm going to turn it over to Mr. Winter.

THE COURT: Okay. Thank you.

MR. WINTER: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. WINTER: Your Honor, we -- we're supposed to work

by order not theory -- have submitted something last week on remands. And, Your Honor is aware that, earlier, in February, we filed a motion with the panel. The panel quickly dispensed with that motion.

THE COURT: Oh, they did?

MR. WINTER: Yes. They denied it.

THE COURT: Oh. I would have thought I would have known.

MR. WINTER: Thereafter, we wrote to you. You looked at things, and you issued an order directing us to provide specific answers to two questions, and we answered those two questions. And in the context of answering those two questions, I think, a dispute has crystalized. And, at the end of today, we're going to make an ask as to what we would like to do.

But, for the context, Your Honor, we were working through remanded cases, and what we hit is an issue that we believed you had addressed explicitly, and that was the common-issue discovery in this MDL having, to use your words, been completed, done, and finished. And we litigated for the better part of 2018 on the permutations of what that meant, and we believed your order was clear.

What happened, Your Honor, as cases got remanded, that order got blurred, to put it kindly, and what then occurred is, we would say, we started to get whipsawed between

state courts and remand courts, and lawyers saying discovery was complete actually didn't mean that. So what we provided to you was 32 examples of that problem that we confronted and why we think, when we're near the finish line of this MDL, to finish it efficiently, we actually need your supervision to get this done. And we made our submission.

On Tuesday of last week, we had a meet-and-confer with Ms. Fulmer, and one of the things that we said is -- Ms. Fulmer asked for some information. We provided it a little later than we had hoped to, but we provided the information. And one of the things we said is: Ms. Fulmer, we litigated what was common discovery and that it was over and we believed that Judge Miller was very clear not that it was cut off but it had been complete.

And one of our asks was that the leadership of the PSC has a responsibility both to their clients and to this Court. And we can look at the complex manual. The PSC leadership has an obligation to implement, I think the word in the manual was, a litigation plan. And there clearly was a litigation plan in this MDL.

And we had hoped, we said to Ms. Fulmer, that leadership would say common discovery was complete; case-specific discovery, fair game for the remand courts; and, you said, there could be an instance where there might be some other discovery that, for good cause, it would be up to the

remand court. That was, I think, your order in August of 2019.

So, we have this meet-and-confer with Ms. Fulmer on Tuesday of last week, and I think our problem is best crystallized by something that happened on March 6th, on Friday.

One of the cases that's on the list that we provided to you is the **Harbison** case, and that's a case that Mr. Ward is -- his case. And what happened in **Harbison** is, we had provided discovery responses that said, "Common-issue discovery to the specific questions, common discovery, is complete. Judge Miller has ruled on that. These requests are common-issue discovery. Therefore, we're not going to answer them."

THE COURT: Now, is that contained -- I'm looking at Tab 2, which is the **Harbison** stuff.

MR. WINTER: Yes.

THE COURT: And I know there was a line in here that said that the MDL court said discovery was done.

Did you file anything separate for that, from that, or is this the paper you filed?

MR. WINTER: No, that was filed, but what I'm telling Your Honor is something happened Friday, March 6th.

THE COURT: No, I understand that. I'm just trying to get up to that.

MR. WINTER: Yeah. Yeah. Yeah.

THE COURT: Okay.

MR. WINTER: So, what happened is, on Monday of last week, Mr. Ward says, "I want a meet-and-confer because I have a motion to compel I want to file."

So he files that motion to compel four hours after he says, "Let's have a meet-and-confer," and, Friday, Judge Self, I think, is the judge in Macon, Georgia, had a telephonic conference on the motion, just to move forward. He actually denied the motion because he thought your order was clear.

But what creates the problem -- and I have a transcript and I'll definitely provide it to the Court and anyone else who needs it. But, in the course of the discussion -- and I'm looking at Page 9 without my glasses -- I'm going to say the judge asked a very specific question of Mr. Ward: "Didn't Judge Miller say common discovery was over?"

Mr. Ward, Line 7, on Page 9: Well, Judge Miller's order -- or we're calling it an order, but it was more so a suggestion to the local courts actually handling this to make the final decision on these issues.

And that has happened repeatedly, Your Honor. So, we've had discovery dispute after discovery dispute. We have -- I mean, contrary to what someone submitted, that we've not engaged in motion practice on this issue, we have. We have in **Harbison**. We have in **Fitzsimmons**. So, there comes a point in time when you're having a dispute, and sometimes people work it out. We need something. You need something. Okay. That's

the way cases work. But this is a consistent pattern of, we frankly believe, ignoring your orders.

And for someone on the PSC to say your orders were merely suggestions, I think it speaks volumes to the problem that we have, because when we went through all this, Your Honor, we all understood there would be cases that would be remanded and how they would be packaged for remand and how they would be efficiently handled on remand. And a huge issue was how the common-issue discovery -- when was it going to be complete, what would it consist of, so that we wouldn't be fighting these types of issues on remand. You'd have expert discovery, case-specific discovery, and then you'd have your motion practice.

I mean, we asked you to make lots of rulings on dispositive state law issues. And we thought, if we had that, it would make the remands go faster or better or more efficient or have everyone have a better idea of where they stood on cases where people didn't want to settle. You very clearly said that was not what you were going to do.

So we can't go to a federal court judge in, you know, the Middle District of Florida and say, "Judge Miller really decided that the plaintiffs' design defect theories were no good. He didn't issue an order, but he really" -- "he suggested that."

I mean, for us to have done that is like that's --

you can't do that, but that's what they're doing now and have been doing on the common-issue discovery.

So, we, very much, want to put a stop to remands, at this point, till we solve this issue for the remaining cases.

We've told Ms. Fulmer that there were 28 cases filed after the cutoff for being sent to this MDL. Nineteen of them are still pending. We've resolved, you know, a group of them, and we may resolve a group of these other ones. But we want to come up and very -- procedurally, today, I can't tell you how to do that, but, in very short order, we'd like to make a submission as to how we get those cases into this court.

We have 140 remanded cases still pending. A good percentage of those are going to be settled, are in the process of settling. But there's a core group, could be a hundred, could be 80, that we want to have come up with a mechanism by which we go to you by motion or figure out how we go to the panel. But we very much --

THE COURT: These are remanded cases you're talking about?

MR. WINTER: Yeah.

THE COURT: Okay.

MR. WINTER: And we're the first to admit we're in slightly unchartered waters, Your Honor, without question.

THE COURT: Uh-huh.

MR. WINTER: But, I think, as the MDL process takes

over the docket of the federal judiciary, these are important issues because things are going to occur. And I think this is the type of situation where, at the front end, we're a model, this MDL, in terms of efficiently resolving a large number of cases quickly, working through the remaining cases. But we've hit a roadblock, and we want to undo that roadblock.

Herding cats on 200 cases, at this point. We never thought, when we went through this whole remand process, that's where we would be. We thought it would be an efficient process.

When you said "common benefit for PSC2," there was some trepidation on our part as to, like, you know, do we have a stake in it. I think the answer is yes because common benefit is not just one side; it's both sides.

But if we saw this, we would have said, "Okay. Once a case is remanded, there's no common-benefit assessment because, if you, Mr. Ward, are going to say Judge Miller's orders were suggestions and not orders, then why should you get the benefit of that six percent?"

I mean, these are very important issues, Your Honor, because we need to have control here. And it's not like we control, but we need this to be addressed in a uniform way, rather than this death by a thousand cuts or some variation on that, and that's why we -- we know we have to submit an order to you on Friday as to a proposal, but we'd like to put that on

hold, maybe in 10 days make a submission to you as to why we think the cases filed after August can be brought here through the panel, remanded cases back through the panel, and come up with some way to have coordination between you and these state court judges. That worked very well before the remand process started.

And, very candidly, you can say shame on me, Mr. Winter, for not coming to you sooner on this, and that would be a fair criticism, Your Honor, but we're at a point where we do need -- we need to put a pause here and we need to have rulings from you, informed by all sorts of submissions done very quickly, so that we can get all this litigation done very efficiently.

If you have a specific question about any one of those 30 cases we have, I'm more than happy to address them. I'm more than happy to respond as to why all the discovery that we highlighted for you is a variation on the theme: Well, I served the discovery in a specific case; therefore, it's case-specific discovery.

THE COURT: I understand that. Let me ask you a couple of questions here.

First of all, as I understand it, the problems are arising in -- as I understand it, there's three basic stages. And I don't mean temporal, more of drama stages.

One is what's happening in the federal courts that

are getting the cases that are either remanded or transferred. And as I understand it from your submission last week, there are a number of federal cases in which plaintiffs' counsel have asked for, among other things, all the discovery you've given anybody.

There's also the state cases in which -- and it looked to me like the court across the street may be one of them -- but where state courts are applying different discovery rules, so it's not necessarily in conflict -- might be but I don't know -- is saying, "Give them everything you've given anybody in other cases."

And then you also have cases -- I'm sure I will hear more of this from Mr. Franciskato because it's in his memorandum -- where you agreed to produce certain information and subject to a protective order.

Those are the three, basically, stages of -- arenas of action that we're talking about; is that right?

MR. WINTER: In essence, yes, Your Honor.

A caveat to the last bucket you identified?

THE COURT: Uh-huh.

MR. WINTER: So, in certain individual cases, in a give and take, we want to take an extra deposition, and someone says, "Well, I want X."

THE COURT: Sure.

MR. WINTER: That happens, and we would be -- we

would be doing a disservice if we didn't try to come to reasonable accommodations.

The problem became and is that we make an agreement, an accommodation, in Case A, and then we get 19 cross notices for the same discovery, sometimes with the caption of this proceeding in the cross notice for additional discovery.

You dealt with what comes out of other state courts and what was produced there, went into the MDL and went out pursuant to protective orders, in August of 2019. So you took care of that issue, the way we look at it, and that should have ended the discussion for a federal court case.

We recognize that, in a state court proceeding, a state court judge could or could not do whatever he or she thinks is appropriate, given their local law, local rules. But our point would be, when that was coordinated with your oversight, there was a uniformity and consistency and efficiency to it.

THE COURT: Let me cut in just because that first was just really for me to be able to phrase the second question that I had. I think I understand your position.

But what I can't tell from this -- and I'm only looking for a seat-of-the-pants estimate from you because there would have been no reason to check this out -- how many cases are there in which state courts have ordered discovery beyond what was produced in the MDL where that's been ordered and it's

not subject to a protective order either entered by the court or agreed to by Biomet. How many of those are we talking about? I'm trying to figure out how many of these have protective orders, how many don't.

MR. WINTER: Not produced pursuant to a protective order, Your Honor?

THE COURT: Yes.

MR. WINTER: I can't think of one.

THE COURT: So, from your recollection --

MR. WINTER: Pardon me?

THE COURT: The state courts have been ordering some of these. When the state courts order them, are they putting protective orders with them?

MR. WINTER: No.

Your Honor, it's not the confidentiality part of this. It is what is the scope of the common discovery that will be permitted in one of these federal court cases?

THE COURT: That's your question.

My question: If they're asking for everything that's been disclosed in, it looks like about 17 or 19 other cases, what I'm trying to sort out is what is at issue here. What is there that both sides agreed would be subject to a protective order? What is there that the state court just said, "You've got to give it to them," and didn't put any limit on it from there? I'm trying to figure out just exactly where the area is

agreed, because last time around, in August, when I ruled -- I know it was a lot earlier when you made the arguments -- one of the things you raised is that I would be knocking down protective orders that had been imposed by other courts and agreed to by parties. Now I'm trying to find out how much is that and how much is just that Judge so and so, in the state of such and such, said, "Produce all this."

MR. WINTER: If I'm going to say this correctly, Your Honor, it is the latter, not the former. In other words, discovery has been produced pursuant to confidentiality or protective orders. That is not the rub of the dispute. The rub of the dispute is what is permitted in a case in federal court pursuant to your order.

When we're talking about --

THE COURT: Let me tell you what I just heard and tell me if I heard it right.

What you're talking about, then, is not what you have to produce; it's the time and expense of defending against requests for discovery?

MR. WINTER: Well, in essence, yes, Your Honor, but it is also the time and expense of having to go through a process to reproduce a significant amount of information, but it's also the time and expense of defending against stuff, to use a very complex legal term.

THE COURT: Okay. Have you, has Biomet, in any of

these cases, simply filed a protective order saying that, "The MDL court said"-- a motion for protective order saying, "The MDL court said that discovery ended, common discovery ended, in December of 2016 and, under the law of this circuit", enter citation, "it's the law of the case"?

MR. WINTER: We have filed those motions, Your Honor, and, for example, the **Harbison** one was granted on late Friday.

We have motions pending in, off the top of my head, the **Fitzsimmons** case, which has just been fully submitted, where that issue is square and in front of the judge with that case.

THE COURT: Okay. Now, what I've seen looking through these, I see that argument kind of in the third sentence of one responsive paragraph. So out of these -- and, again, I'm just asking for estimates. I can't hold you to it -- out of these, in how many cases -- you said **Harbison**, so that's one -- how many cases do you think you filed just that straight-up motion, not with all the rest of the boilerplate and --

MR. WINTER: The only one that comes to mind, off the top of my head, Your Honor, is **Fitzsimmons**, which is like Number 30-something in the submission.

THE COURT: Okay. I think I had one other question.

One of the pieces of boilerplate that I noticed as I went through here -- and it's on Page 2 in **Harbison**. It's in

response to -- well, I guess it's just general. Never mind. It won't -- it would apply to all of them -- that Biomet hasn't completed its investigation, has not completed discovery.

I gather you're talking about case-specific discovery?

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

THE COURT: Okay. Thank you, sir.

MR. WINTER: Thank you, Your Honor.

THE COURT: Let me invite, first, to speak, then, Mr. Ward -- we'll use the debate theory since he was named by the last speaker -- at least to talk about the **Harbison** case. And I don't know who all is going to talk after that, but let me invite Mr. Ward. If you could, head on up, unless I'm fouling up your -- were you going to cover it, only differently? That's okay. I don't mean to foul anybody up.

MS. FULMER: I might be able to clarify the issues if I speak, first, and then --

THE COURT: Okay. That's fine.

It didn't work all that well with the debate.

MS. FULMER: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MS. FULMER: I think that we need to be really crystal clear.

It's my understanding -- and Biomet, I think, contends in its papers now -- that not a single court has

compelled the production of documents that are common discovery, not a single one, and we're talking about different types of discovery, and I think that's really important.

First of all, I think we need to limit our discussion, first, to federal court cases, because state court cases are a very different animal, and this Court's jurisdiction. And, honestly, this Court did exactly what Biomet asked years ago in reaching out to the state courts. You can't control other jurisdictions, and you've been very, very careful in not overstepping any boundaries as far as -- just like you wouldn't want anyone else to overstep boundaries with respect to the authority of this Court.

But there's a couple of particular types of documents, and I think it's important if we break them out. If we talk about common discovery and kind of mix it all together, I think it tends to confuse things in a way that's not helpful, so let's talk about the discovery.

There was -- the MDL discovery was pretty much closed by 2015, 2016. That discovery emanated, started, in 2012, 2013, 67 custodians. This Court -- we understand, you know, that you've ruled that that discovery was complete, but we believe that there were some gaps in that discovery, and, thankfully, there was some state court litigation, robust state court litigation, going on at the same time.

I believe you've been told in the past that basically

the MDL received the vast majority of the discovery that was received in the state courts. If you look at the filing that Biomet made before the JPML, though, they've identified what I certainly would not concede is a vast majority of the documents. There are millions and millions of pages of documents that were produced in the Florida litigation, in Montana, in Washington state, and in other jurisdictions.

Basically, this litigation has become a story of the haves and the have nots. The state court litigants have had far more discovery available to them. They've taken, what, 42 additional depositions, millions and millions of pages of documents that were not produced in the MDL.

There were some documents that were supplemented in the MDL. I think a lot of that, in large part, stems from the fact that a state court judge in Florida went through privilege logs, and a lot of documents were no longer protected by privilege and were reproduced.

But, ultimately, what happened is we have a huge collection of discovery materials from the state courts. For lawyers such as Mr. Franciskato and Ms. Stephan that have cases in this Court, as well as in state courts, their clients, their plaintiffs, even though they're a part of this MDL, have complete access to those materials, and I think that they represent, right now, about a third of the cases that remain in the MDL.

Mr. Ward sought those cases in his case. I think it's the **Harbison** case in Georgia. And in that case, a motion to compel was never heard by the court. By agreement, Biomet gave him access to those materials.

Joe Saunders is also on the phone. Joe Saunders also sought the same materials because he felt that they were relevant and essential in his individual case. And in that instance, Biomet, again, gave him permission to access those materials.

No one is interfering with anybody's protective orders. Joe is still traveling under the same protective order that you issued, but he's been given a private e-mail by Biomet's counsel saying, "You can go to the group in Florida in state court and you can access their materials."

So what we have here is a disconnect where some of the plaintiffs in this MDL have access to the materials and some of them do not, and, honestly, it appears to be a matter of timing. If your case on remand is going quick enough and you have a judge that can give you the time or you file your motion to compel, you get access to these materials.

We never asked that there be any interference. We don't want to duplicate discovery that's already been done. What we asked is for all of the litigants in this litigation to be on an equal playing field, and that means having current discovery.

It's 2020. I have clients that are still undergoing surgeries. I have depositions that I'm having to defend where they're asking for information that has happened since 2015, 2016. Those materials are not available in this MDL. The state court materials are far more robust.

And so we've created this situation. It's an easily-solved issue. It does not require that you interfere with any protective orders. Like I said, Biomet has already done this by agreement.

So if you take the Franciskato/Maglio cases and you take Navan's cases and Joe Saunders' cases, that's a substantial percentage of the MDL plaintiffs who already have access to these materials by agreement. There was no burden.

And in your order for today's hearing, you asked that Biomet specifically tell you how many times they had turned these over, where they had been ordered over opposition to turn them over, and the answer is: Zero. They have consensually given this information and this critical discovery materials to certain plaintiffs, so I want to just make certain that that's really clear.

As far as the costs, we would love to be able to work with our friends in state court. There's virtually no cost. I mean, Biomet has already produced these documents. If they would just make a copy of what they produced before, that would be sufficient to satisfy the plaintiffs.

All of the documents that go into the MDL repository travel under a protective order. In other cases, when Biomet has turned these documents over, they've either traveled under the same order or they've requested that a new protective order that was consented to by the parties be signed and entered in that case. The same thing could apply here. So there's a very easy way to solve this issue. It does not involve stopping remands from this MDL and it certainly does not involve stopping trials.

We have 80 cases now. There are 80 cases that remain that have been remanded. You have remanded several hundred. The remand process is working. These plaintiffs whose cases have been pending since as early as 2012 finally have an opportunity for their day in court. Not a single case has gone to trial. The cases are resolving and they're resolving because of the pressure of trials.

If you take that away and bring those cases back to this Court, then how many more years will these plaintiffs have to wait?

And if general discovery is not reopened, then my case that I have right now that is a 2020 trial where I have discovery that's already four or five years old and incomplete because I don't have access to the state court materials, is it going to be a few more years?

The $40,000 that I've spent to just get that case to

the point where my expert is serving his report, do I get to spend that again to get that case ready for trial in another year or two?

What they're proposing here, there's not a lot of support for it. There's no support because it's absolutely unprecedented.

This MDL, I mean, in some respects, the request that's being made here -- I mean, I'm not even responding to a motion at this point -- but the request that's being made here is a request for reconsideration of the decisions that were made by this Court, sound decisions that were made in late 2015 when you refused to have additional -- or schedule any bellwether cases in this MDL, and the reasons why that was the right choice at the time when you had 500 cases pending are even more compelling now when you have, what, 40, 45 cases.

And the cases that they're most concerned about, you've already given them jurisdiction of those cases. You did your work on those cases. The case-specific discovery that you ordered was taken care of.

There are still issues that remain. As soon as those cases come back, we get a request from Biomet to take every treating physician in the case.

We are still getting supplemental plaintiff fact sheets, fact sheets that have hundreds and hundreds of pages that weren't produced while those cases were pending here in

the MDL.

THE COURT: You mean defendant fact sheets?

MS. FULMER: I'm sorry?

THE COURT: You're getting defendant fact sheets? I think you said --

MS. FULMER: Supplemental defendant fact sheets.

Basically, Alex -- I wish Alex Davis were here today or on the phone. He's overseas right now. He e-mailed me earlier this week that he received a supplemental fact sheet on the last day of discovery in a remanded case, supplemental, and I've had similar experiences where the fact sheets that were produced during the course of the MDL were inadequate.

There was a reference before about, you know, sometimes we give up these materials because it's just the give and take that's a part of the compromise process.

I think it's really important. I know that I was allowed to have that give and take with defense counsel, but it was for a very good reason. I had cases where they failed -- Biomet, for whatever reason, chose not to take the implanting and the explanting doctors' depositions while the cases were pending in the MDL. The cases were then remanded, we had a trial date, and suddenly they came forward and said, "Hey, we'd really like to take those doctors' depos."

I said, "Well, you should have done that when Judge Miller told you to do it."

And so there was a give and take and there were negotiations that were had. And, basically, in exchange for them being allowed to, you know, very late, take those depositions, we were allowed to pursue additional discovery, as well.

And so I think it's really, really clear. These are not plaintiffs gone wild on remand that are seeking things. They're seeking either what's necessary and relevant to their case, they're seeking the state court materials that would level the playing field, and then they are also seeking things that are truly case specific.

I'm on the list. I think I'm Number 3 for the **Moore** case. The **Moore** case involves a very unique issue. My client's device was cold-welded, and a cold-welded device is where the modular components become --

(Court reporter interruption for clarification.)

MS. FULMER: My client's Biomet hip implant was cold-welded, and what that essentially means is that the modular components became fused together. It's a very unique set of circumstances. There are other cold-welded cases that have been a part of this litigation, but it's not something that -- it's probably a smaller number of cold-welded devices than even we had with the ReCap and the Taper, which were the kind of odd-ball types of products that were immediately remanded and not subject to all of the general discovery and

the traditional remand process.

But I sought discovery in the **Moore** case over the cold-welded device. That's a relevant issue for me to be able to prove the defect in the product. It's relevant to the information given to the surgeons. That is not a term that I can see was included in the discovery that was done back in 2012 and 2013, so I think that that is a case-specific issue, and I believe that it's fair game.

I have never --

THE COURT: The **Moore** case bears a 2019 docket number, which, of course, it would since it was remanded. When did the -- was that case filed before it was brought here, do you know, off the top of your head?

MS. FULMER: Oh, gosh. I would have to go back and look. I think it was Remand Group Number 6, is my best -- 5 or 6, so I would say it was probably around 2017, Your Honor.

But, basically, you know, a lot of the issues that happened in that case were long after this issue. But, like I said, that's a critical issue. It's an issue. There's been a lot of literature written. I believe that there's a tool that's been developed by Biomet to deal with cold-welded devices, and that's relatively new information.

(Discussion held out of stenographer's hearing.)

THE COURT: Ms. Potts said the original docket number was 18cv258, our docket number, which still doesn't get us back

to the original docket number.

MS. FULMER: All right. So it's an even later case than I thought it was.

THE COURT: It moves us along a little bit.

Okay. Thank you.

MS. FULMER: Right.

So, I think I've -- you know, the other issues that are a part of the list of cases that they've selected to talk to you about, many of which are actually settled cases, but there are other things that I believe this Court specifically indicated should be done after remand.

The issues with respect to the admissibility of documents, you know, whether something is part of a business record exception or not, those are types of issues that you could not deal with on a generic basis.

We had multiple products involved in this MDL, different issues. Different state law might apply. And that's something Mr. Franciskato --

THE COURT: I should defer to him.

But the request for admissions that I saw had to do with whether these papers were business records. That could have been -- I'm not saying it had to be, but it could have been done as a class of cases, couldn't it?

MS. FULMER: Theoretically, it could have been done. Although, it would have been very hard to do it across, you

know, an MDL that spanned nearly 3,000 cases, with different types of devices, but it's something -- I can tell you that, on remand, the way that it is being done is they're uniform requests for multiple cases, and they could very easily and efficiently be batched, if Biomet were so inclined to have those types of issues batched for those purposes, but that's not what has happened.

Some of the other things that are listed on here: Specifically, they have called out the Terrell Hogan firm and Christopher Shakib, who is on the phone, for a case that involves it's either a Taper or a ReCap, and that is a case that you specifically remanded from this MDL at the request of the Steering Committee because that particular device was beyond the scope of the generic discovery that could even be done in this MDL, so that is not an appropriate case where he's out doing something that is not right.

And as far as the PSC, that we should have done a better job of policing this, the first time I even heard that request was at a meet-and-confer on Tuesday, getting prepared -- last Tuesday, getting prepared for this hearing.

And, I mean, if someone were clearly violating this Court's orders, I'd be the first one on the phone to deal with it. But when people are seeking discovery to which they, absolutely, should be entitled, case-specific discovery, unique, discreet issues in their case and things that they need

in order to try their cases, I don't think that that's a failure of the Steering Committee or a failure of anyone else. That's what it takes to prepare this many cases for trial.

And the other thing, Judge, is Biomet is actually asking you to reach out to 80 trial courts that have spent gosh knows how many hours and so much time preparing for these trials and to stop those trials. We have trials going in a few weeks, in a few months. We have so much work that's been done by all sides to prepare to that, and they want to come to a screeching halt, and they have given you absolutely no basis for why that should happen.

And, honestly, now, for the fist time, they're saying, "Well, maybe we need to bring all these cases back to South Bend so we can deal with the state court document issue."

I suggest to you, Judge, that they've already dealt with the state court document issue in a very simple way. They've stipulated to allow those documents to be used in the cases where they were pushed on that issue on remand.

And, so, there's a very easy way that we can deal with this, and it doesn't involve, you know, inconveniencing 80 trial courts out there that have these cases on their dockets or will be on their trial dockets shortly and that are preparing for trial, not to mention the tremendous expense that has gone into getting those cases ready.

I think that's about all I have, unless --

THE COURT: Not quite.

MS. FULMER: Yeah.

THE COURT: You said there's an easy way to deal with this. I think I know what you're indicating. But when we went through part of this last year, I had to ask for clarification, so let me ask. When you say there's an easy way to do this, what is it? What are you asking me to do?

MS. FULMER: My suggestion would be twofold. I would suggest that this Court expand or reopen, briefly reopen, generic discovery in the MDL cases that are still spending before this Court and require that the production that has already been voluntarily shared with a good portion of the MDL be actually produced into the MDL documents. That, then, levels the playing field. Every plaintiff in the MDL is allowed to utilize those documents in their case, both pending before this Court, as well as after remand. All those cases are covered by a protective order that is under -- it is your protective order.

THE COURT: When you say reopen discovery, that's simply to allow it to go from this table to that table, not for any new depositions or interrogatories or requests for production?

MS. FULMER: Precisely, Your Honor.

In addition to that, on remand, if necessary, like I said, Biomet has already shown that it can stipulate, privately

stipulate, and turn these documents over to plaintiffs, because they've avoided several motion to compel hearings, and so I suggest that they can do the same thing and not spend money preparing for motion to compel hearings or we can figure out some other way to make it happen.

But, honestly, Judge, most people out there, if they have access to the documents in the MDL, they're going to have access to those documents, anyway, so you're not disturbing any protective order that's already out there.

And, like I said, maybe I'm not thinking this through completely, but they have a form protective order that they have been using on remand when they produce additional documents, and so we've signed those, to the extent necessary, so I just -- I'm not having --

THE COURT: I have to turn the courtroom over to another judge --

MS. FULMER: Yeah.

THE COURT: -- actually 20 minutes ago --

MS. FULMER: Sorry.

THE COURT: -- so let me go back to the question.

You said you had two things you wanted to propose. One was to reopen discovery and have Biomet -- and I'll use shorthand just because of the time -- turn over to the Steering Committee everything they've given to anybody else. What's Point 2?

MS. FULMER: Well, Point 2 is basically either the plaintiffs whose cases have already been remanded, number one, that they not lose their trial dates or the progress that they've made in the local courts and that they either get access to those documents by virtue of their access to the MDL documents which came with them when their cases were remanded or that those judges be told, you know, that the MDL discovery has been expanded so that those documents could also be exchanged upon remand.

THE COURT: Thank you, Ms. Fulmer.

MS. FULMER: Thank you.

THE COURT: Mr. Ward.

MR. WARD: Your Honor, I'll be quick, as I understand that there is another hearing here, but thank you for allowing me to address some of the issues that my colleague on the other side, Mr. Winter, brought up.

First, there's not much left to be discussed from what Ms. Fulmer had mentioned regarding the whole issue.

But with regards to some of what I feel are mischaracterizations regarding the **Harbison** case, I wanted to make sure that it's very clear, Your Honor, that what happened last Friday was a motion to compel that did not include or did not have anything to do with the access to materials, discovery materials, that's at issue here. That was a -- that particular issue was something that the parties agreed to several months

-- at least two, three months -- ago, to which both parties agreed to a protective order in that particular case that was very similar to, if not the same, as what's here in the MDL. So there was not a court -- or Judge Self did not have to do anything regarding making a protective order and/or ruling on that particular issue. It was already handled by the parties. And, again, having access, which was necessary for us to be able to move forward in this particular case, was, again, agreed to by both parties. And when we look at the other issues involved in that particular case, the motion to compel was dealing with other case-specific issues involving that particular case.

Now, there was some mention of the discovery that was produced and --

THE COURT: How did that come up? I'm having a tough time understanding how that would have arisen.

MR. WARD: Well, sure, Your Honor, because one of the things that -- because what Ms. Fulmer had mentioned. I'm involved in a state court litigation and so therefore I have access to a lot of the documents that I expected to come in. The production that was provided was provided in a way that has taken a very voluminous amount of time to download. That information also likely would answer a lot of the successive requests for production and interrogatories that were outstanding, and so the subject were those subsequent

interrogatories and requests for admission that were outstanding because we had not had the ability to download the production from the 17 different states or 17 different jurisdictions that we agreed to. And the judge had a hard time understanding why it took so long. I also had a hard time understanding why it was taking so long, because part of that production includes depositions and exhibits that were already -- again, transcripts and exhibits were already provided to the defendants.

The defendants in our agreement requested that we not go and physically get it from the state courts or the other jurisdictions that I may very well have been in myself, but for them to produce it, and the way they chose to produce it is not just to forward those exhibits and deposition transcripts. It was for them to have to, for whatever reason, review the same depositions and exhibits before they decided to produce it, and then they produced it in a way and in a manner that we were not able to, again, access it for a lengthy amount of time and, then, once we are able to access it, not be able to access it in the same way as we could if it came from the court reporter themselves, and so that had an impact on the subsequent materials that we were seeking.

And, so, again, I'm perplexed as to why that is one of the cases they're using to support their --

THE COURT: I think it's because Mr. Winter indicated

you described a suggestion or order. I don't want to pick the word, at this point, but tell me how you came up with that.

MR. WARD: Well, Your Honor, clearly, you know, what was done in the court, in the MDL court, goes with the remand courts, the voluminous amount of work that we did regarding the general experts, regarding both side's general experts, and regarding the discovery that had occurred up to the point of December of '15/'16 time frame.

And in your order, you had, I think, on Page 8, the (undiscernible) of remand -- and I'm assuming it's the same one for each one -- on Page 8, it is what you contemplated, that no further discovery would be allowed. And, of course, that's the Court's contemplation. And the issue that Ms. Fulmer brought up is the same issue that I have as far as cold-welding. The Court, assuming, didn't contemplate these extra issues that have come up.

Additionally, the Court also didn't have the ability, when discovery completed back in '15 and '16, 2015 and '16, the ability to see the 40 additional depositions that are directly related to each of these individual cases that have taken place in the other jurisdictions, as well, which are also things that have become very necessary for each and every one of the cases that have been remanded from this particular Court back to their local courts.

Again, in furtherance of, I guess, the phrase that

Ms. Fulmer used as far as the haves and have nots, that is what has been created with regards to the necessity to be able to get that particular -- those particular discovery materials, because, again, you have experts, as well as lawyers who are a part of these other jurisdiction who have access to that information, and we are asking our experts to unknow things that they already know from other jurisdictions.

And, so, you know, you made a very poignant point in the fact that this is not an issue that has been brought up to the local courts. And to the extent that it has, it has overwhelmingly been ruled on that access should be granted to various different jurisdictions because we're dealing with the same issues.

And, so, Your Honor, as it relates to -- and, again, I know time is short. The drastic measure of sending cases back here not only is unprecedented, it's highly out of character with what this Court has done, which is a fantastic job of moving this case along and sending it back in its natural course. We are having to deal with a lot of issues that would be inevitable because, at some point in time, the discovery had to stop. At some point in time, you had to move it on and remand cases, but that should not, obviously, negatively affect any of the other cases, and that should also not be a reason for these cases to go back to the Court when you have courts like Judge Self and the court that **Harbison** is

in who is ready and able to move forward with trial dates that are occurring, not to mention it being highly prejudicial to plaintiffs who have spent a tremendous amount of money in the natural course of litigation doing their case-specific experts, taking depositions of both our experts and their experts and having everything ready to go and a judge that is ready to hear these matters in trial.

And, so, the part of having an order that would allow or, either, suggest to the remanding courts that allowing discovery or accessing discovery for all the cases is certainly a very, very good way to avoid what defendants are asking this Court to do and to solve the problem that they have come to appreciate as an issue with moving forward, Your Honor.

THE COURT: Thank you, Mr. Ward.

We're deeper into oral argument on motions that don't exist than I've ever been before.

But, Ms. Stephan or Mr. Franciskato, since you came, if there's anything you want to add, I would ask that it be brief, because you'll notice a lot of people having nothing to do with your MDL are waiting for a proceeding.

MR. FRANCISKATO: Your Honor --

COURT REPORTER: Microphone, sir.

MR. FRANCISKATO: Oh, sorry.

-- I don't have anything necessarily to add. I decided to appear in this matter since we did file a response

on behalf of our clients who are in the MDL and subject to your jurisdiction and now been remanded and subject to specific federal court jurisdictions throughout the country and, of course, that we have had over the last several years hundreds of state court cases throughout the country. And I'm here and Ms. Stephan is here. We filed our response and happily are available to answer any questions that the Court may have of us and what is pending in any of our cases.

I will echo that we have a matter that is set in Texas that is set for trial in September. We've done case-specific discovery. We've worked it up. And I feel the same compelling reasons that, when we're up on remand, doing our job, doing the work that you've asked us to do, to have these clients' trials be stopped would be unjust to them. They've been waiting a really long time for court.

Thank you.

THE COURT: Thank you, sir.

Mr. Winter, I did want to ask you. You began by saying at the end you were going to ask me to do something.

MR. WINTER: Yes, Your Honor.

THE COURT: Let me invite you to do that.

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

THE COURT: I don't think I can give you the right to close because there's nothing on which anyone has a burden.

MR. WINTER: Your Honor, 10 days from today, we will

file a motion and it will ask you to consider four things, and we will figure out whether we ask you for all four or we ask you for two and go to the panel for two, just hypothetically.

The four things: No more remands of cases pending in this Court, pulling in the cases filed after August 31st of the 2018 that are still spending in federal court and pulling back the remanded cases that are not resolved, currently pending in federal court, and to have a robust discussion with the various state courts, as you did before, on coordination.

And, very briefly, Your Honor, I'm sitting here thinking this was a bait and switch, very candidly.

You offered all sorts of opportunities for discovery here. It didn't occur. And you said, a couple of times, "I'm going to have to remand the cases," Your Honor, and then you made your ruling on common-issue discovery.

There are now 42 depositions taken in different state courts, which you recognized as we started, under different rules.

So we're now looking at something where they say, "Okay. Give every deposition you took in a state court case for every remanded case."

Now, if that was done under your supervision, we'd have a uniform set of rules to be applied on remanded cases. They never served, like, can you authenticate these documents, which is, like, common practice in an MDL before cases get

remanded.

You saw, like, 20 different discovery requests. I have 1700 documents. Tell me whether they're admissible or not. Once someone serves 17 requests that are the same, Your Honor, that's, by definition, common discovery.

And they, people, I guess, decided to wait until they were out of this Court to start serving discovery, and we think that that can't be fair, at this point. They talk about just and fairness. Well, you know, last time I checked, fairness applies to both sides.

And we want to file that motion within 10 days, however long they want to respond, give us three days to reply, and we'll come back and argue the motion.

THE COURT: Let me ask you this: If I can and choose to grant your request about retrieving the cases that have been remanded, and if between now and then I have remanded the cases in Group 8A, I could just as well retrieve them, at that point, couldn't I?

MR. WINTER: Yes, Your Honor.

THE COURT: So what would be the point of not remanding 8A, at this point?

MR. WINTER: Because, I think, Your Honor, at this point, we may have a lot of back and forth between this Court, the litigants, and the panel, and my thought would be: Let's minimize the amount of possible disruption with you remanding a

case and then 45 days later, the panel says, "Pull it back," or you pull it back, so it really is trying to triage a problem, Your Honor. That's why we suggested that.

THE COURT: Okay. Thank you for your comments today. I can't call it argument because I don't have anything to rule on. But I will get a ruling out this week on where I plan to go with it.

We had talked in advance -- I know counsel talked about having a separate issue not relating to the entire thing.

The court reporter will be taking the work of the other judge. Either I can talk to you in camera, off the record, if both sides are agreed, or, alternatively, I can set up a telephonic hearing for next week or something.

MR. WINTER: We can do it -- Ms. Fulmer and I can do that, Your Honor.

THE COURT: Agreeable?

MS. FULMER: That's fine, Your Honor.

MR. WINTER: One last thing, Your Honor.

We're going to file, this afternoon, the transcript of the **Harbison** hearing.

THE COURT: I would ask that you do that, as well as the order of the panel denying your earlier request by the panel because I haven't seen that yet.

MR. WINTER: I'm sorry, Your Honor. We will do both.

THE COURT: Okay.

LAW CLERK: All rise.

(All comply; proceedings concluded.)

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CERTIFICATE

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

DATED THIS 11th DAY OF MARCH, 2020.

S/S DEBRA J. BONK

DEBRA J. BONK
FEDERAL CERTIFIED REALTIME REPORTER