

1 **THE COURT:** Good afternoon.

2 This is MDL Cause Number 2391, our Cause Number
3 12MD2391, **In Re: Biomet M2a Magnum Hip Implant Products**
4 **Liability Litigation.** We are gathered for our
5 regularly-scheduled status conference or case management
6 conference.

7 We have in the courtroom for the -- well, let me just
8 ask everybody to state your appearances for the record. It
9 will be a little easier.

10 **MR. NAVAN WARD:** Navan Ward for the Plaintiffs'
11 Steering Committee.

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

14 **MS. HANIG:** Erin Hanig on behalf of Biomet.

15 **MR. WINTER:** John Winter on behalf of Biomet.
16 Good afternoon, Your Honor.

17 **THE COURT:** Good afternoon.

18 **MR. LaDUE:** And John LaDue for Biomet.

19 **THE COURT:** Okay. Welcome, counsel.

20 And, for the record, we preceded this conference with
21 a couple of telephonic hearings on individual cases and then
22 took a break so that the people who were going to call in to
23 listen to the case management conference could be switched over
24 and those who were just on the phone for the conference -- for
25 the hearings could switch themselves over, if they wanted, but,

1 otherwise, make room for the others.

2 I do have your agenda. I have one or two points that
3 I want to add, but we'll go ahead and move through these with
4 active case count. Usually I look to Ms. Hanig first so I'll
5 look there first. If I should look somewhere else, speak up.

6 **MS. HANIG:** No. This is the right place to look.

7 So, there are approximately 300 cases that are
8 currently pending and active. About 80 of those cases are
9 currently in settlement negotiations and are at various stages
10 of waiting for responses as to whether or not a Plaintiff is
11 going to accept an offer, so the realistic number of cases that
12 are pending, when you take into account statute-of-limitations
13 cases, the few metal-on-poly cases, is approximately 215 that
14 we believe are actively going to go forward at this point.

15 **THE COURT:** And that matches, at least roughly, what
16 the Plaintiffs count?

17 **MS. FULMER:** Yes, it does, Your Honor.

18 **THE COURT:** Okay. Group 1 and 2 discovery status.

19 **MS. HANIG:** I'll take that one, too.

20 Your Honor, we put this on here as a general update.
21 Group 1 is done and closed. Group 2, we have completed
22 Plaintiff depositions, and we're in the process of completing
23 physician and sales rep depositions for Group 2, with the
24 deadline on that coming in about six weeks, December 26th.

25 If you have any questions, I'd be happy to address

1 them, but that's the general status on discovery.

2 **THE COURT:** Okay. Anything to add from the
3 Plaintiffs' standpoint?

4 **MR. NAVAN WARD:** Your Honor, Defense counsel's
5 representation is, for the most part, correct.

6 A slight clarification with regards to Group 1.
7 There are about five or six cases that I'm aware of have that
8 have pending motions regarding sales representative depositions
9 that should have been taken during the first Group 1, and, with
10 that, those group of cases are the only ones that I'm aware of
11 that would need to be added to the status on that with regards
12 to being able to complete those depositions.

13 **THE COURT:** Okay. Motions pending before me?

14 **MR. NAVAN WARD:** Yes, Your Honor, their motion to
15 quash, and I just pulled them up.

16 **MS. HANIG:** Your Honor, there's motions to quash
17 deposition subpoenas to sales reps pending in five cases
18 represented by Mr. Ward.

19 To give you the 10-second overview on those, the
20 deposition subpoenas were noticed on our end and served within
21 days of the Group 1 discovery deadline, and our position was
22 that it was too late for those people to sit. And when we
23 reached out to them, none of them were available, so we filed
24 motions to quash. They've responded. They're fully briefed so
25 it's just a matter of hearing those motions.

1 **THE COURT:** Somehow I don't have them on my list.
2 Do you have cause numbers?

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

4 **THE COURT:** Oh, I'm sorry. I guess, in my absence,
5 we referred those to Magistrate Judge Gotsch, so my ignorance
6 is not necessarily defensible but at least explicable.

7 Okay. So that brings me down to date. Thank you.

8 I guess, just so that makes sense, I was away from
9 here for about a month for shoulder surgery, and we tried to
10 keep all the balls in the air, and that's where those balls
11 wound up.

12 Okay. Proposed Group 3 composition. Your
13 explanations made sense. I know there's one or two where you
14 disagreed, and I'll go back over those after I hear from you
15 today.

16 Before inviting comments, let me ask whether it would
17 be appropriate to add -- we have a few cases in which there
18 were tracks for summary judgment motions on either spoliation
19 or statute of limitations, and either a motion was withdrawn or
20 not filed.

21 Those would be 13-725 -- I would pick the most
22 difficult to pronounce to start with -- **Balajadia** or
23 **"Balajadia" versus Biomet**. The complaint was filed
24 July 22nd of '13. It was on the statute-of-limitations list.
25 Biomet withdrew its motion, which is fine, but I'm just

1 wondering if that would make it appropriate for Group 3.

2 14CV310, **Moxley versus Biomet**. It was filed in
3 February of 2014. It was on the statute-of-limitations list.
4 A motion wasn't filed.

5 14CV1649, **Gaffney versus Biomet**. It was removed in
6 May of '14, was on the statute-of-limitations list, no motion
7 filed.

8 14CV1654, **Strange versus Biomet**. It was removed May
9 of '14 on the statute-of-limitations list. A motion was not
10 filed.

11 14-1896, **Bingham versus Biomet**. The complaint was
12 filed in September of '14. It was on the spoliation list, and
13 the motion was withdrawn.

14 And then, finally, 15-286, **McWilliams versus Biomet**.
15 The complaint was filed in July of 2015. It was on the
16 statute-of-limitations list, and no motion was filed.

17 Again, I have no complaint with the motions not being
18 filed, but just wonder whether those would be appropriate.

19 **MR. WINTER:** Your Honor, I need to doublecheck, but
20 my belief, as I sit here, is all those cases were resolved.

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

22 **MR. WINTER:** I know, with the first case, which I am
23 not going to pronounce its name either, that case, I know, has
24 been resolved, and I'm pretty sure all the other ones were
25 resolved, which is why a motion was withdrawn or, in fact, not

1 filed.

2 **THE COURT:** Okay. Let me ask you to go ahead and
3 check your records on those, and if there are any that have not
4 been resolved, then we can go ahead and put them in Group 3.

5 Is that --

6 **MS. HANIG:** Judge, can you repeat what the second
7 case was that you mentioned?

8 **THE COURT:** Sure. The second one was 14CV310,
9 **Moxley** -- M-o-x-l-e-y -- **versus Biomet**.

10 **MR. WINTER:** Yeah. That one, also, I am almost
11 certain, was resolved.

12 **THE COURT:** Okay.

13 **MR. WINTER:** What we will do is we will check. We
14 will confer with our colleagues. If it's been resolved, then,
15 obviously, it doesn't need to go into Group 3. But if there
16 was one that, for whatever reason, is still active, we would
17 agree to put it in Group 3.

18 **THE COURT:** Okay. That's fine.

19 And I tried to remember what your disagreement was
20 with respect to the -- it seems like there was a modest
21 disagreement with respect to the Case 3 list that came up after
22 I invited you to discuss it.

23 Ms. Fulmer, I see you nodding.

24 **MS. FULMER:** Is it okay for me to address you from
25 here?

1 **THE COURT:** Sure.

2 **MS. FULMER:** The only real area where we have a
3 disagreement is with regard to cases that Biomet contends have
4 nominal value. Those were the revision surgery took place more
5 than 10 years after the initial surgery, and so those are the
6 cases that they have asked to exclude from Group 3, as well as
7 what we call the metal-on-poly cases.

8 **THE COURT:** Uh-huh.

9 **MS. FULMER:** And the PSC does not disagree with
10 regard to the metal-on-poly cases, but we do disagree with
11 regard to those who have been implanted for more than 10 years.

12 I happen to have a client that was implanted 10 years
13 and nine days, and I don't see a big distinction between that
14 and, you know, someone that was implanted for nine years and
15 300 days.

16 **THE COURT:** Okay.

17 **MS. FULMER:** So that's probably the biggest
18 disagreement. Otherwise, we pretty much agree as to what's
19 appropriate for Group 3.

20 **THE COURT:** Do you want to be heard with respect to
21 your position or satisfied with what's been submitted?

22 **MS. FULMER:** It's the position of the Plaintiffs'
23 Steering Committee that there's no rationale for not including
24 those additional cases in Group 3. They have active cases
25 before the Court. If Biomet's not going to pursue some type of

1 a dispositive motion, then those Plaintiffs are entitled to
2 engage in case-specific discovery in this litigation just like
3 anyone else, and so that would be our position, Your Honor.

4 **THE COURT:** Okay. Mr. Winter.

5 That's fine.

6 **MR. WINTER:** Your Honor, with respect to the
7 metal-on-poly cases, I apologize for not bringing this up
8 sooner. But if you were to look at your order, Number 3047,
9 the scheduling order you filed in December of 2015, and you
10 look at Paragraph 2, metal-on-poly cases were excluded by
11 definition from Groups 1 and 2, so there's no reason to put
12 them in Group 3 now.

13 We said -- and we can explain why -- a case that's
14 revised after more than 10 years really shouldn't be the
15 subject of discovery. But when we went through and created
16 Group 3, there were a handful -- I want to say less than
17 four -- that fell into that category, and we said, therefore,
18 they're out. But after we saw the response from our
19 colleagues, those cases all were excluded for multiple reasons,
20 statute of limitations being the principal one, so I don't
21 think we have anything to debate in a live, you know, case in
22 controversy sense for a case that was revised after more than
23 10 years. There are a fair number of them in what's left after
24 Group 3. But for what Group 3 is, we did not -- there's no
25 case that's been excluded from Group 3 only because it was

1 revised after 10 years.

2 So the only case that actually is in dispute --
3 because **Gearon** was one, and I think, based on what you said
4 earlier this afternoon, **Gearon** belongs in Group 3 -- is the one
5 case, **Zamora**, which is the executor or executrix for someone
6 who passed away whose last name began with a B.

7 As we pointed out in our submission, when we did
8 Group 1 in a meet-and-confer basis, there was an extremist
9 plaintiff, Mr. Cook, who went into Group 1, even though he was
10 out of, you know, the sequence because he was an extremist.
11 He, unfortunately, passed away, like, as the list was being put
12 together, and everyone agreed that that case, involving a
13 deceased Plaintiff, didn't belong in Group 1.

14 And there was another person who, we thought, upon
15 discussion, was a non-revision case that had been missed -- in
16 other words, didn't get subject -- and we both agreed that
17 non-revision cases -- meaning both of us, PSC and Biomet --
18 that non-revision cases didn't belong to Group 1. It turned
19 out that case was a revision, went into Group 2.

20 So this case that we're arguing about now, the only
21 one that, by index number, has been excluded from Group 3,
22 other than the metal-on-poly, statute-of-limitations,
23 spoliation, is a non-revision wrongful death case. So the
24 logic that drove Groups 1 and 2, we believe, drives the logic
25 that excludes that case from Group 3. That case is not being

1 singled out, other than, through a meet-and-confer process,
2 non-revision, deceased plaintiffs didn't go through
3 case-specific discovery. That made sense then, makes sense
4 now.

5 **THE COURT:** Let me ask you about that.

6 Group 1, of course, is going to be the first people
7 through the process. And I understand trying to hurry up the
8 person who was an extremist and also not hurrying his case up
9 once he passed because there was no longer any urgency to it.
10 But tell me where my gut reaction is wrong that a decedent with
11 a non-revision is a little different than a living Plaintiff
12 with a non-revision because the living Plaintiff without
13 revision can't really prove that anything happened because it's
14 all inside, but the decedent, at least arguably, there could
15 have been an autopsy or something to see what happened.

16 Why wouldn't that be a little different kind of
17 non-revision case than the others that we've segregated out?

18 **MR. WINTER:** Your Honor, for all the reasons that,
19 once Mr. Cook passed away, the reasons why you would proceed
20 with discovery, having moved to one side, applies to someone
21 who filed their case after they passed away. And there was no
22 autopsy in this particular case, so, from our perspective, the
23 logic that led to excluding Cook applies to the -- is the logic
24 that excludes this case from Group 3.

25 **THE COURT:** But Cook didn't go to the back of the

1 line; Cook just got removed from the head of the line, right?

2 **MR. WINTER:** Correct, so that we could do discovery
3 because that person was alive, and, therefore, there was
4 information that needed to be preserved. We all agreed.

5 **THE COURT:** Right.

6 **MR. WINTER:** So if this person has already passed
7 away, the reason that we put Cook in was to preserve his
8 testimony.

9 **THE COURT:** Right.

10 **MR. WINTER:** This one case we're talking about, it's
11 the same logic; there's no testimony to preserve.

12 **THE COURT:** So is it your position then that that
13 case should, as the line grows, because we keep getting cases,
14 that case should be at the end of the line -- every case that
15 comes in with a live Plaintiff with revision surgery goes ahead
16 of that one? I guess I'm not sure where that leaves us.

17 **MR. WINTER:** Well, that particular case --

18 **THE COURT:** This is the wrongful death case?

19 **MR. WINTER:** -- the wrongful death case.

20 -- was after Group 1, after Group 2, when we're
21 getting to Group 3, so there are no other cases involving a
22 deceased Plaintiff in this MDL.

23 **THE COURT:** Right.

24 **MR. WINTER:** So if we were to get whenever you say
25 Group 3 discovery goes, and then you'll say meet and confer

1 about what to do about what's left on or about this day in
2 2017, then we'll have to look at what is there in terms of
3 what's left, and then maybe that case, **Zamora**, if I'm
4 pronouncing the name right, still sits; or you look at it and
5 you're going to say, "This is what I have left. I'm at this
6 point in the middle of 2017. I've seen the expert disclosures.
7 I've seen the parties' expert discoveries. I've seen Biomet's
8 summary judgment on this matter or the Plaintiffs' Steering
9 Committee's summary judgment motion on that matter," and you'll
10 begin to make judgments as to, like, the end game for this MDL.

11 And what happens with this particular case we're
12 talking about now, at that point in time, I can't predict to
13 Your Honor. But if we're talking about prejudice, having that
14 case continue to sit is not prejudicial to that family. And,
15 from our perspective, there's lots of things that should be
16 done between now and the middle of 2017. And if we're going to
17 invest our resources in things that we think help the global
18 process, that's what we'd like to focus on.

19 Thank you, Your Honor.

20 **THE COURT:** Ms. Fulmer, any closing comment on that?

21 **MS. FULMER:** From the PSC's perspective, we really
22 don't see any reason why that case should be treated
23 differently than others that are pending in this MDL. So if
24 it's right for Group 3, we believe that it should belong there.

25 I don't know if Plaintiffs' counsel is on the phone,

1 Your Honor. I think that they might also have asked to have
2 been heard on this issue, but, otherwise, I'll be happy to
3 speak on their behalf.

4 **THE COURT:** Okay. I did not bring out -- well, they
5 won't be able to talk, anyway. We're not set up for people who
6 are a listening to speak, so I hope you presented their
7 position well.

8 **MS. FULMER:** So do I.

9 **THE COURT:** Okay. I will get a ruling out on that in
10 a day or two, literally not more than that.

11 And now I have lost the agenda, trying to avoid the
12 sunbeams.

13 Okay. What's next on the agenda?

14 **MS. FULMER:** Item Number 4, Your Honor, is pro se
15 Plaintiffs and the Lone Pine order.

16 **THE COURT:** Okay. I'm certainly open to anything
17 that you folks want to add -- oh, there it is -- anything you
18 folks want to add to what you've submitted. I kind of kept --
19 I'm coming in with no inclination on what to do because both
20 sides have pretty reasonable positions. That always makes it
21 challenging.

22 Ms. Fulmer.

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

24 **MS. FULMER:** Your Honor, with respect to the pro se
25 Plaintiffs, we believe that the request for an imposition of a

1 Lone Pine order is too -- it's premature and it's really an
2 extraordinary request.

3 As we've fully briefed, there are lots of other
4 options to the Court. It's certainly within the Court's
5 rights, for case management purposes, to enter whatever orders
6 are necessary, but we believe that the objective of trying to
7 figure out whether the pro se Plaintiffs intend to proceed with
8 their claims can be met through far less onerous measures.

9 In particular, we've recommended that there be a
10 declaration-of-intent form filed, as well as a show-cause
11 hearing, which is more than other judges have done under the
12 circumstances. Several MDL judges, when faced with this issue
13 in the past, have required a declaration of intent.

14 What's kind of unique here is also the timing. When
15 we went to do search for, you know, what other MDL judges have
16 done in the past or other federal court judges, we were unable
17 to find any use of this particular mechanism directed solely to
18 pro se Plaintiffs and also use of a Lone Pine at such a
19 relatively early stage in the proceedings. Most of the Lone
20 Pine orders that have been entered have been entered after core
21 discovery has been completed, after the completion of expert
22 witness discovery, and after usually numerous bellwether trials
23 had been completed. It was, essentially, a way to clean up the
24 docket at the very end of the proceedings.

25 So the PSC is very concerned about the timing, and I

1 believe that there's ample case law to support that this should
2 be, kind of, an extraordinary remedy and one that you only
3 implement at such time when everything else has failed. And so
4 we believe that the filing of a declaration-of-intent form, as
5 well as a show-cause hearing would probably achieve what the
6 Court is trying to achieve here.

7 The Plaintiffs' Steering Committee has already
8 reached out to all of the pro se Plaintiffs on several
9 occasions. We have provided them with a list of every attorney
10 in the country who is active in this litigation, so those pro
11 se Plaintiffs have already had an opportunity to consult with
12 counsel, if they chose to do so. Also, my office is the point
13 of contact with them so we've had quite a bit of discussion
14 with the various pro se Plaintiffs.

15 I think that, like I said, the less onerous means
16 that we've recommended to the Court would be sufficient for
17 those Plaintiffs to make final decisions with regard to their
18 case and would allow us to go forward. And if there are pro se
19 Plaintiffs that truly want to proceed pro se, then I think they
20 should be included in Group 3 or a future group.

21 Thank you.

22 **THE COURT:** Let me just clarify.

23 First of all, I want to thank you and the Steering
24 Committee because it does, from what you've said in the past
25 and what you said today, sound like you've gone well beyond

1 what other steering committees have done to try to minimize the
2 problems, both to the pro se Plaintiffs and, frankly, to the
3 docket, because it's always hard to coordinate with people
4 representing themselves.

5 The flip side of that, though, is, I gather, that
6 these folks have already -- and I think they all lost their
7 original attorneys, for whatever reason. I don't think any of
8 these were actually filed pro se, but they have been offered
9 your assistance, as far as putting them with other attorneys.
10 So while we haven't gotten through bellwether trials or
11 completed discovery, these folks have had more offers for
12 assistance with getting counsel than most others in other
13 dockets.

14 I don't mean to put you where you've got to either
15 pat yourself on the back and hurt them, but is my perception
16 close there?

17 **MS. FULMER:** I believe that, as a steering committee,
18 we've probably done a little bit more than has been done in
19 other litigations. But I've been doing this for 23 years, and
20 there are MDLs that I've been involved in where they had a
21 curator or special person appointed solely to deal with the pro
22 se litigants. So I think that there have been circumstances
23 where more has been done, but I don't know that those were done
24 under circumstances where we're talking about so few
25 Plaintiffs. I think we're talking about 18 Plaintiffs here in

1 the entire MDL. So I think we've done a lot, and perhaps we've
2 done a little bit more.

3 My perspective on it is that these Plaintiffs need a
4 deadline, and that's why we proposed what we did. And,
5 actually, what we're proposing is two separate deadlines, and I
6 think that's enough for people to make a decision. But a
7 letter coming from me or an e-mail doesn't nearly have the same
8 impact as something coming from the Court, and so I think
9 that's what it will take. I predict that we could solve the
10 problem with just a declaration of intent and a show-cause
11 order and never have to go through, you know, a Lone Pine and
12 all of the burdens associated with that.

13 And it would also be burdensome for the PSC. If this
14 Court were to enter the Lone Pine order that's been proposed by
15 the Defendants right now, we basically would be taking our
16 focus away from the core discovery and the case-specific
17 discovery that's going on right now so that we can help pro se
18 Plaintiffs prepare to meet the extraordinary burden imposed by
19 a Lone Pine order, including having to, kind of, put the cart
20 before the horse and focusing on expert witness discovery at a
21 time when that really cannot be our focus under the aggressive
22 scheduling orders that are in place.

23 Thank you.

24 **THE COURT:** Thank you, ma'am.

25 Who speaks to the Lone Pine here? Mr. Winter.

1 **MR. WINTER:** Your Honor, of the first 30 cases, by
2 index number, the '12 filings and the '13 filings -- there's
3 actually 31 of those -- ten of them are now pro se litigants so
4 we're talking about cases that are all more than three years
5 old. So if they were a pro se litigant on your docket not from
6 the MDL, you would be taking some -- I'm not -- I am surmising
7 that you would have been taking some action on these cases.

8 And the other ones, most of them were 2014 filings,
9 and they were all people that were represented by an attorney,
10 filed by an attorney, and, as we gave you some examples,
11 they're people who chose, for whatever reason, not to take
12 lawyers' advice. That's their prerogative.

13 Here, our colleagues -- and we are very appreciative
14 of our colleagues' efforts, to use the vernacular, trying to
15 herd cats here.

16 One of the former pro se litigants actually found an
17 attorney, and that attorney then went and resolved that
18 person's case, the **Dishman** case.

19 But we're now past all of that, Your Honor, and
20 multiple offers have been made to these people, and many
21 different attorneys have been suggested to them. They have
22 chosen not to do it. That's their prerogative. But this is
23 not, like, early in the game, rush to judgment, let's throw the
24 pro se litigants out. These are people that have picked a path
25 and expressly chosen, on multiple times, not to engage a lawyer

1 to move their case along, so we believe that the order that we
2 proposed is the order that you should enter.

3 And my colleagues suggestion that entering the Biomet
4 proposed Lone Pine, somehow, will put a burden on the PSC is
5 something I'm trying to process because they've done all they
6 could. These people have not heeded advice, not accepted
7 advice, not agreed to whatever was being offered to them. Now
8 they're on their own, and, therefore, they have to make
9 decisions. So this is, we believe, a very neutral way to
10 identify individuals who actually want to move their case
11 forward. They can fill out the form. They can provide it.
12 And then, to the extent they have done it, then we have a case
13 that we then have to work on. So it's not like -- at the end
14 of this process, we could end up with 12, we could end up with
15 3, we could end up with 18 pro se litigants, but we will have
16 started to move the process along, because, right now, it's
17 almost 10 percent. If, you know, everything works as we think
18 it will, 10 percent, roughly, of this inventory will be pro se
19 litigants.

20 Now, whether it grows, who knows, but it's something
21 that needs to be addressed, and we think our proposal is the
22 fair way to do it. There are precedents for it. Lone Pine
23 orders get entered in MDL litigation three and four years into
24 the litigation with a degree of regularity, so this is not
25 novel or new, and there may be more Lone Pine orders in the

1 middle of 2015 for a different reason as we look at what the
2 inventory is.

3 But, you know, we all want to move this forward. We
4 all have work to do. It's just finding the cases that we
5 actually should be working on, as opposed to letting them just
6 sit on the docket, Your Honor.

7 Thank you.

8 **THE COURT:** Thank you, sir.

9 This is one I can't give you a firm ruling, but I'll
10 tell you what I think I'm going to do and do this after I look
11 down over the proposed orders again and try to work my way
12 through it.

13 If I did have to decide, at this particular instance,
14 I would go at least with the concept proposed by the
15 Plaintiffs' Steering Committee.

16 I agree with -- I think both sides agree that we need
17 to move things forward. I agree with the Defense that it's not
18 too early to do this, "this" being something to try to find out
19 who plans to stay with us.

20 My reluctance to do a traditional Lone Pine order is
21 that I think all of these people -- and, if not, the lion's
22 share of them -- are people who were represented until the
23 Master Settlement Agreement, and I assume that what happened is
24 that their attorneys had a provision in the retention agreement
25 that allowed them to withdraw if a reasonable settlement offer

1 were declined, and so these people really, largely, at that
2 point, thought their case had more merit than what was being
3 offered. And I'm not sure that really justifies, just yet,
4 putting extra burden on them to come forth with a statement
5 from a doctor, or some equivalent, indicating that they can
6 prove -- at least they've got some evidence in support of
7 causation.

8 And I think, as I was reading through these, I said
9 both sides seemed to have reasonable positions. If we can
10 identify who it is that is serious about moving forward, not
11 just, I guess, the pro se equivalent of the dreaded free rider
12 watching the case go along without them, I think it might be a
13 better way to proceed. So I still want to look over the orders
14 one more time, both of them, to compare them. And I agree with
15 the Defense that we need to do something, but my inclination is
16 to try what the Plaintiffs' Steering Committee has proposed. I
17 may need to buck it up a little bit because I do think we need
18 to make some progress on this and sort out who's not only
19 serious about wanting to proceed but serious about being able
20 to proceed. So I will get something out to you yet this week.

21 **MR. WINTER:** Your Honor, understanding what you just
22 said, we ask that you make this the shortest --

23 **THE COURT:** I understand.

24 **MR. WINTER:** -- time frame possible because, if we're
25 saying 90 or 120 days or even 60 days or 45 days, you know,

1 we're kicking things into the middle of 2017, and we don't
2 think that that's, actually, fair to us.

3 **THE COURT:** Okay. I understand. I'll take a look at
4 it.

5 I think Number 5, the request for the state court
6 coordination letter, I think, is a ball that I fumbled. When I
7 started getting ready for surgery, I lined everything up that I
8 needed to do, and I didn't get that on the stack. So that,
9 too, I will get something to you by the end of this week. I
10 assume this was just to, kind of, be my snooze alarm, rather
11 than somebody wanted to add to the record on that, because I
12 think I had indicated I was going to try to soften what Biomet
13 had proposed, but still inform the state courts that we're out
14 here and we're trying to plug along and you're welcome to join
15 us.

16 Mr. Ward.

17 **MR. NAVAN WARD:** Well, Your Honor, I know that Jasper
18 Ward, Alex Davis worked on that. They're on the phone. They
19 may have something to add to it, to the extent the Court wants
20 any additional input on this particular matter.

21 **THE COURT:** Yeah, I'm going to put it out for your
22 comment. I'm going to set it out for your comment, is my plan.
23 I didn't make that very clear either, because that was my plan
24 before the surgery, so I'll get something out for your comment,
25 maybe two weeks to comment, and then issue something, because I

1 do think that it's appropriate to notify the folks that we're
2 out here.

3 **MR. LaDUE:** Judge, if I may? Again, John LaDue for
4 Biomet.

5 **THE COURT:** Yeah.

6 **MR. LaDUE:** On the timing, the sooner the better.
7 We've got a number of core depositions of Biomet
8 custodians that are pending as part of the MDL discovery, and
9 we've encouraged the folks who have cases pending in state
10 court to please join us for those depositions so these folks
11 don't have to sit two, three, four times, and some
12 encouragement from the Court, however you'd like to phrase it,
13 would be helpful in some of those cases. For the most part,
14 we've gotten a lot of cooperation. In some cases, not so much.
15 So it would be helpful to get whatever the Court's thoughts are
16 out to the state court judges so that we can share those with
17 the Plaintiffs handling the state court cases and encourage
18 them to do the best they can to coordinate with us as we go
19 forward.

20 **THE COURT:** Okay. I will bear that in mind.

21 And, again, my apologies to all of you who are here
22 and all of you who are off there on the phone lines. I truly
23 dropped the ball and didn't remember I dropped the ball until I
24 saw the ball on Item 5 on the agenda, so I'll get back on it.

25 Pending motions. I now realize there are five that

1 are before Judge Gotsch. As I understand it, we have nine
2 statute-of-limitations motions that are ripe, and I will tell
3 you that I'm trying to figure out any way to hold oral argument
4 on those. It's my preference to hold oral argument on
5 dispositive motions. I'm not sure what the logistics will be.
6 I plan to get you a ruling by the end of the month on those.

7 The spoliation motions, as I understand it, will be
8 ripe today. I think they're more complicated because there's
9 some sanctions issues flowing through them, so I doubt that I
10 can come up with logistics for an oral argument on those and
11 will just get the ruling to you as quickly as I can.

12 Does that cover all the motions that are pending
13 between Judge Gotsch and me?

14 **MS. HANIG:** I believe it does, Your Honor.

15 I had the count of nine statute-of-limitations
16 motions, six spoliation. One of them was just recently filed
17 because it had an extension, so that one wouldn't be ripe
18 today. And then there are the five motions to quash, and, I
19 should note, one of them is unopposed, so I think there's
20 really only four of them for hearing.

21 I do have one old motion that's showing up on my
22 list, and perhaps this is something that's done and I haven't
23 realized it. But in Cause Number 3:14CV619 -- the Plaintiff is
24 Randall Hix -- I believe there's a motion to enforce settlement
25 outstanding, and it's from 2015. And so perhaps I have missed

1 something here, but I just wanted to point the Court's
2 attention to that case. But, other than that, we're on the
3 same page.

4 **THE COURT:** Thank you.

5 The name, the Plaintiff's name, doesn't ring a bell
6 so it may well still be out there. On the other hand, there
7 have been several motions to enforce the settlement, so we'll
8 take a look.

9 **MS. FULMER:** Your Honor, I believe we looked at the
10 docket sheet and also showed that as a pending motion, as well.

11 **THE COURT:** Okay. Then it fell through the cracks
12 here, too.

13 **MS. HANIG:** Your Honor, I believe that, back in
14 mid-2015 when you held oral argument on several of these cases,
15 that this case was one of a group and, I think, maybe just an
16 order didn't get entered in this particular one. I'm not a
17 hundred percent sure.

18 **MR. NAVAN WARD:** Well, actually, Your Honor, that's
19 my case, and there wasn't an oral argument on it, and so I
20 definitely want to take a look at that particular case to see
21 if there's anything distinguishing between the others, and it
22 may need we need to move forward with it or take some other
23 action as we go forward with it.

24 **THE COURT:** Okay. Well, I'll be dealing with these
25 other things this week, so, if you want to, take a look and let

1 us know if there's something agreed or something that I need to
2 do further.

3 One question that I had that occurred to me just,
4 actually, the last couple weeks. I was at a couple complex
5 litigation things. And I know I've raised the matter of
6 **Daubert** motions, and I know we're not fully there yet, but just
7 trying to get a feel for where we're going to be going.

8 Do we know -- do we anticipate any **Daubert** motions,
9 at this point?

10 I see you nodding, Mr. Winter.

11 **MR. WINTER:** We intend to file **Daubert** motions, once
12 we see the Plaintiffs' experts reports in February, because we
13 sort of have an idea of what's coming, and we have a belief as
14 to whether or not they'll pass **Daubert**.

15 **THE COURT:** Okay. It had been my sense all along
16 that there would be a **Daubert** motion or two, but, on the other
17 hand, I didn't remember anybody actually telling me that, so it
18 seemed worth asking.

19 **MS. FULMER:** And, your Honor, the Plaintiffs will
20 likely also be filing **Daubert** motions in this particular
21 instance.

22 **THE COURT:** Okay. As long as somebody's going to
23 file, that's all I need to know. Numbers start to pale at that
24 point.

25 I think that covers everything on your agenda, and

1 I'm not sure that I had anything else to -- I don't think I had
2 anything. Oh, maybe I did.

3 Did I have something else?

4 **(Discussion held off the record.)**

5 **THE COURT:** Oh, we do need to do a scheduling order
6 for Group 3. I see that's here on my list, scheduling order
7 for Group 3. I assume you folks would do better at it than I
8 would pulling dates out of the air, so let me ask that, before
9 the next conference, you folks try to develop what a deadline
10 would be on that.

11 **MR. WINTER:** Your Honor, I mean, the Group 1 and
12 Group 2 orders, there's a template for it.

13 **THE COURT:** Yeah.

14 **MR. WINTER:** Once we know what Group 3 is -- and I
15 think there's really one case in dispute -- we can provide you
16 an order very expeditiously, after conferring with our
17 colleagues, and we can get that order to you either Friday --
18 probably Friday of this week. And, I think, 30 days --
19 assuming it would be Monday of next week -- would be when the
20 updated authorizations would be.

21 **THE COURT:** Okay. All right.

22 **MS. FULMER:** That's acceptable.

23 **THE COURT:** That would be helpful.

24 For the next conference, it gets a little
25 challenging, and you folks probably have a better sense as to

1 when we would need to meet.

2 Looking in December, I have a Judicial Conference
3 Committee in San Diego the week of the 5th of December.
4 Although, I guess I could offer you the 9th, if we wanted to do
5 that. Then I have, at least in theory -- and we all know how
6 that works -- at least in theory, a five-day jury trial
7 starting on December 12th. And then, of course, we start
8 hitting the holidays.

9 I guess I would suggest maybe a telephonic
10 conference, say, at 9:00 a.m., Eastern Time, either on the
11 9th of December or the 15th of December.

12 **MR. WINTER:** The 15th would be our preference,
13 Your Honor.

14 **THE COURT:** And Plaintiffs' standpoint?

15 **MS. FULMER:** That would be our preference, as well,
16 Your Honor.

17 **THE COURT:** Okay. Let's plan to do it by phone,
18 unless something -- and I stress that, because I may be in a
19 jury trial, so I may need to keep it fairly brief. Obviously,
20 if something comes up that would require an in-person thing,
21 let me know, and we'll do what we need to do.

22 **MR. NAVAN WARD:** Did you say 9:00, Your Honor?

23 **THE COURT:** Nine o'clock.

24 That way, if I do have a case going to the jury that
25 day, you don't have to wait around until the case is with the

1 jury or something.

2 Anything further for the Plaintiffs today?

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

4 **THE COURT:** Or for the Defense?

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

6 **THE COURT:** Good seeing you all. I'm glad to be able
7 to wave at you with both hands.

8 **LAW CLERK:** All rise.

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

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