

1 **THE COURT:** Good afternoon. This is Judge Miller.
2 This is our Cause Number 3:12MD2391,
3 MDL Panel Number 2391, **In Re: Biomet M2a Magnum Hip Implant**
4 **Products Liability Litigation.**

5 As I understand, the Plaintiffs' Steering Committee
6 is attending telephonically.

7 **(Telephone interruption.)**

8 **THE COURT:** I don't know what that means.

9 Do we have people on the line for the Plaintiffs'
10 Steering Committee?

11 **MR. WARD:** Yes, Your Honor. This Navan Ward, for the
12 Plaintiffs' Steering Committee.

13 **THE COURT:** Mr. Ward.

14 And are you the only one participating today?

15 **MR. WARD:** There may be --

16 **MS. FULMER:** Your Honor, Brenda Fulmer is also
17 present.

18 **THE COURT:** Ms. Fulmer.

19 Okay. So we have Mr. Ward and Ms. Fulmer for the
20 Plaintiffs' Steering Committee.

21 If I could ask those of you who are in court to state
22 your appearances, for the record.

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

24 **THE COURT:** Ms. Hanig.

25 **MR. LaDUE:** John LaDue, for the Defendants.

1 **MR. WINTER:** Good afternoon, Your Honor. John
2 Winter, for Defendants.

3 I would like to introduce my colleague, Joe Tanner,
4 from the Faegre firm, who is joining as a co-liaison counsel
5 here.

6 **THE COURT:** That was one thing I wanted to raise. We
7 have been trying to leave time for responses on just about
8 every motion that's passed through.

9 I know that, if I understand the purposes of adding
10 the four additional co-counsel as liaison counsel, it's to try
11 to handle the remands, I assume.

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

13 **THE COURT:** I don't truly want to build in the time.
14 Am I correct in assuming that the Plaintiffs'
15 Steering Committee has no objection to the expansion with four
16 liaison counsel for the Defendant?

17 **MS. FULMER:** That's correct, Your Honor, the
18 Plaintiff has no objection.

19 **THE COURT:** I couldn't imagine what it would be, but
20 I've been surprised before. Okay. I will grant the motion to
21 add co-liaison counsel.

22 Welcome aboard, Mr. Tanner.

23 **MR. TANNER:** Thank you, Your Honor.

24 **THE COURT:** I do have your joint status conference
25 agenda. We are, in some ways, looking at moving targets. I

1 know things are happening pretty quickly.

2 Ms. Hanig, you're usually the one who gives us the
3 active case count.

4 **MS. HANIG:** Yes, Your Honor.

5 We're at -- our count is 326 for what's actually
6 active, unsettled, and on the MDL docket, and, just as a
7 caveat, that takes out cases that have been transferred and
8 you've actually closed the case.

9 **THE COURT:** Okay. We're actually back up by three.
10 I don't know if you got the notice. You probably have, but may
11 not have seen it yet. The Panel has received objections to
12 three of the remands, and those are the three that we knew were
13 at issue, because at least it looked to me like they were
14 trying to go back to courts where they hadn't been before.
15 We'll see what the Panel does with it, but the Panel's letter
16 to the transferee judge says that they're still mine, so we may
17 be back up to 329.

18 I know we seem to have been the most popular kids on
19 the block the day before we cut off direct filings.

20 How many new ones did he get?

21 **MS. DARRAH:** We received forty-four on the 31st.

22 **THE COURT:** Okay. So we have a lot of fresh faces
23 with us on the docket.

24 That leads to the discovery update. Let me ask you
25 to go ahead with the update on Group 6 and Group 7, and then we

1 need to talk about whether we need more than that.

2 **MS. HANIG:** Sure. I'll handle Group 6, and then I'll
3 let Mr. Winter talk to you about Group 7.

4 **THE COURT:** Okay.

5 **MS. HANIG:** So, Group 6, current status, is moving
6 along smoothly. I know we have until end of February, 2019 to
7 complete.

8 The couple situations where we've had issues with
9 scheduling or responsiveness from Plaintiffs have been teed up
10 by motion and are listed on this agenda. So, for example,
11 there's two pro se cases where Plaintiffs have been
12 unresponsive -- that's the **Nicholson** and the **Pendlebury**
13 cases -- and we moved on those cases, as suggested at the last
14 status conference.

15 And, then, in the **Gronning** case, where we have
16 counsel potentially moving to withdraw, we also filed a motion
17 for order to show cause there, and I believe you guys have
18 already set that for hearing next week.

19 **THE COURT:** Right.

20 **MS. HANIG:** So, that takes care of the three cases
21 with issues, and, otherwise, we're moving forward smoothly.

22 **THE COURT:** Okay. Mr. Winter, Group 7?

23 **MR. WINTER:** Your Honor, in Group 7, we have to
24 confer with the Plaintiffs' Steering Committee to make sure
25 we're apples to apples on Group 7. But, to give Your Honor a

1 little bit of perspective, there were 121 cases filed in 2018,
2 which would be, sort of, the dangling participle, a lot of
3 this. We have completed the Plaintiffs' fact sheets in
4 forty-three cases, and there are seven with overdue fact
5 sheets, which leaves us with, approximately, eighty cases after
6 we probably finalize Group 7. There are a few cases where we
7 need to confer as to whether or not resolution, in fact, has
8 occurred, so we want to give you a tight list for Group 7. I'm
9 thinking we'll get the proposed list to our colleagues this
10 week, with a target to give you a Group 7 list at the end of
11 this month, or, you know, next Friday when we submit the
12 proposed list for the second remand group.

13 Just to flag this for Your Honor, I think, given the
14 time for people to submit fact sheets, we're probably looking
15 at a cleanup Group 8 starting sometime in early 2019.

16 **THE COURT:** Now, the 121, you said, 124 --

17 **MR. WINTER:** Yes.

18 **THE COURT:** -- does that include our brand-new
19 arrivals?

20 **MR. WINTER:** Yes, it does, Your Honor.

21 **THE COURT:** Okay. We counted about 169, so I'll look
22 forward to seeing your list, and we can compare notes. 169
23 sounded like you might need one more discovery group. But if
24 you have got your fingers on the pulse --

25 **MR. WINTER:** Yeah. Your Honor, if it turns out

1 there's, like, an extra forty cases, then we'd need two groups
2 after that, because Group 7, now, is looking to be something
3 around sixty --

4 **THE COURT:** Okay.

5 **MR. WINTER:** -- which is big but pretty much in line
6 with what we've done in the past. We would then have to split
7 8 and 9, then.

8 **THE COURT:** Mr. Ward or Ms. Fulmer, anything to add
9 on the discovery update on Groups 6, 7, and potentially 8?

10 **MS. FULMER:** I don't believe so, Your Honor. We're
11 anxious to meet and confer with the Defense so that we can come
12 up and make certain that we have a matching list.

13 I'm hoping that the forty or so cases difference
14 between the 121 and what the Court shows, some of those might
15 have actually been cases that resolved recently and just
16 haven't been dismissed yet.

17 We certainly are fine with the timetable that's been
18 proposed by Mr. Winter, as far as sending the Court a list for
19 the Group 7 list, and agree that there's probably a Group 8
20 that needs to be activated for discovery early next year.

21 **THE COURT:** Okay. Thank you, ma'am. I thought we
22 might have settlements that haven't quite wound there way into
23 our docket yet, that that might be the case, but, on the other
24 hand, we show 169, and that seemed worth mentioning.

25 Remand procedure. We've got Group 1 issued, Group 2

1 list. I think you may have touched on that.

2 **MR. WINTER:** Your Honor, one of your orders gave us,
3 the parties, till September 28th to submit a proposed remand
4 Group 2 list to you. We will send what we think is the right
5 list to our colleagues this week, so I think we should be able
6 to meet that deadline of next Friday for the proposed remand
7 Group 2, and I think you then built in another thirty days for
8 anyone to object.

9 **THE COURT:** Yeah, October 29th we show as the
10 deadline for objections.

11 Hold on just a minute.

12 **(Discussion held out of reporter's hearing.)**

13 **THE COURT:** Okay. We may not yet have assembled all
14 the nuts and bolts on Group 7. So when you folks talk about
15 Group 7 between the two sides, if you can try to figure out
16 what would appropriate deadlines be, I'll work with that, then.

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

18 **THE COURT:** Okay. Anything to add to the report for
19 the Steering Committee on remand procedures, Group 1 and
20 Group 2?

21 **MS. FULMER:** I don't believe so, Your Honor.

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

23 **THE COURT:** Pro se cases. Again, this is where we're
24 looking at, sort of, a moving target.

25 I see that the Defense, today, filed the motions to

1 dismiss on **Nicholson** and **Pendlebury** for discovery violations.

2 My understanding is that Mr. Pendlebury has been
3 refusing our mail.

4 But with respect to Ms. Nicholson, I think I'm going
5 to tack on just a brief explanation, if she fails to respond,
6 that dismissal may be entered against her, much like we do in
7 other types of pro se cases, though not all types.

8 We also show -- and I think you may have touched on a
9 couple of these, Ms. Hanig -- **Soustek**, **Edwards**, and -- I can't
10 even read my own writing here. Let me see if I can find it.
11 **Soustek** indicates that the July status conference -- this is
12 15CV358. We asked for a joint status report on the pro se
13 case. None was filed. I don't know if that means it was
14 resolved. Mr. Stowsteck was in Discovery Group 3. Discovery
15 was completed before his attorney withdrew, so we should be in
16 the suggestion of remand, from what it looks like to us.

17 **MS. HANIG:** I think that's correct, Your Honor. I
18 know that that case is still pro se and that case-specific
19 discovery is complete.

20 The only case that I show as pro se where we have an
21 issue with case-specific discovery not being complete and there
22 is no motion filed would be the **Rice** case, where, I believe,
23 either at the last conference or one before, you set the
24 deadlines for the filing of the declaration of intent to
25 proceed and then also a deadline for the expert causation

1 declaration, and we've passed the first deadline and haven't
2 received anything.

3 **THE COURT:** Okay. I did want to ask whether the
4 Steering Committee has the same information on **Rice**, that the
5 declaration of intent was due on September 6th and was not
6 presented, just in case they sent it to you.

7 **MS. FULMER:** To my knowledge, we have not heard from
8 that Plaintiff, so that is correct, Your Honor.

9 **THE COURT:** Okay. The other ones we have:

10 **Edwards versus Biomet** -- and I issued an order
11 yesterday -- Mr. Edwards wanted the stay continued to give him
12 time to find opposing counsel. It looks like discovery was
13 completed before his attorney left, so I wasn't sure what we
14 were staying, under those circumstances, so I just reminded him
15 of the deadlines and gave him time to notify us by
16 October 29th, whether he was going to be proceeding pro se or
17 without counsel.

18 And then **Hamm versus Biomet**, 14CV1693, I think
19 somebody at the July status conference said that Biomet had
20 received the release and the case was settled. We haven't had
21 any paperwork find its way here.

22 Has there been a problem?

23 **MR. WINTER:** There's no problem there, Your Honor.

24 **THE COURT:** Okay.

25 **MR. WINTER:** I don't want to say, "The check is in

1 the mail," but it's in that situation. And once Mr. Hamm gets
2 the check and confirms he's received it, we'll figure out how
3 we file the dismissal with him.

4 **THE COURT:** Okay. All right. I know there's a lot
5 of moving parts on these. I just try and be sure we're all on
6 the same page.

7 Anything else to report on the pro se cases?

8 **MS. HANIG:** Not from Biomet's end, Your Honor.

9 **THE COURT:** And I should tell you, the reason that we
10 set the hearing next week in the one case where the Plaintiff
11 has been unable to contact his attorney, I wanted to take one
12 last shot at getting the attorney here to talk about what the
13 problem is. If the attorney doesn't show up, then I guess we
14 cross that bridge.

15 Anything else from the Plaintiffs to report on the
16 pro se cases?

17 **MS. FULMER:** I don't believe so, Your Honor.
18 Although, I do have a question.

19 Do you want the Steering Committee to participate in
20 the hearing that you set for next week?

21 **THE COURT:** I don't think it's required, it would be
22 necessary. I think the problem that they've had -- and correct
23 me if I'm wrong, from Biomet's standpoint -- the Plaintiff said
24 that she -- I think it's she -- hasn't been able to get her
25 attorney to respond to calls.

1 I assume Biomet's having the same issue. I can't
2 remember what your motion cited.

3 **MS. HANIG:** So, it's sort of a complicated back and
4 forth, but, long story short, Plaintiff's counsel indicated to
5 us that counsel intends to withdraw, but that hasn't happened,
6 and there's been a period of time that's elapsed in between.
7 And we needed to complete the depositions for Group 5, and that
8 didn't happen. And pro se Plaintiff actually has contacted us,
9 trying to move forward with the deposition, and we've had to
10 tell him, "You need to talk to counsel. She hasn't withdrawn
11 yet," so we're in this boat where we're not quite sure what's
12 happening with the representation.

13 **THE COURT:** Okay. So I don't think it's essential
14 that you participate. If you do want to participate, certainly
15 we can set up a phone call, but there's a possibility this
16 person will become a pro se Plaintiff following that hearing,
17 so I don't know if you want to join in or not. Just let us
18 know, if you do, and we'll hook you up. And, if you choose not
19 to, that's fine, too. I don't think there's anything that you
20 would contribute that I would need to rule. It would just be
21 more informational. That's how it looks to me.

22 Does that sound about right to the Steering
23 Committee?

24 **MS. FULMER:** Yeah, that's fine, Your Honor.
25 Although, in the past, we have helped pro se Plaintiffs find

1 new counsel, so to the extent that we could be helpful in that
2 respect. I don't believe we've heard from this particular
3 Plaintiff directly.

4 **THE COURT:** Okay. Yeah. That's why I was thinking
5 you might want to listen, but your role would not begin until
6 after the hearing, if the person becomes pro se, so it's your
7 call as to whether you want to join up on the call, but, again,
8 I don't think it's critical for what I have to decide in that
9 hearing.

10 I know you have helpfully put together things where I
11 owe you rulings, and I had hoped to have several of these ready
12 for you by today. I haven't been able to.

13 I show, or you show and I agree with, eight pending
14 statute of repose motions that became ripe on June 7th; two,
15 four, six, seven pending statute of limitations motions that I
16 don't feel as bad about because they just became ripe on
17 September 10th.

18 I show, on the pending spoliation motions, with
19 respect to **Bruton**, there's a response due Friday. With respect
20 to **Babcock**, the motion was withdrawn and re-filed on the
21 10th of September, so response is not due yet. And then in
22 **Jeffers**, the response is due Friday.

23 We have the motions regarding the **Cuckler** Defendants,
24 which became ripe on July 9th, except the last two listed here
25 became ripe on September 10th, if I have that correct.

1 Finally, we have the motion to enforce the settlement
2 in **Simpson** that became ripe on the 6th of September, and then
3 **Gronning**, with a motion for order to show cause, and that's
4 what we're set for the hearing on.

5 Anything to add to that, from Biomet's standpoint?

6 **MR. WINTER:** Your Honor, with respect to Simpson, I
7 think, based on a communication with Mr. Ward, both sides would
8 like that set down for argument at the next case management
9 conference, if Your Honor will indulge the parties on that.

10 **THE COURT:** Okay.

11 **MR. WINTER:** And I think we're right on this,
12 Your Honor. One of the statute of limitations motions is
13 actually unopposed. I believe it is **Eklund**, 17CV639. And I'm
14 pretty sure, if I'm doing this right, from memory, Your Honor,
15 we've sent some submission in on or about the day that our
16 reply would have been due to say the motion is unopposed.

17 **THE COURT:** Okay. All right. Then I should be able
18 to get to that more quickly.

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

20 **THE COURT:** From the Steering Committee's standpoint,
21 is there anything to add or correct, as far as my
22 understanding, as to what we've got out here?

23 And, Mr. Ward, if you could confirm, or, I guess,
24 disagree, the request for the argument on the **Simpson** case at
25 the next status conference?

1 **MR. WARD:** Yes, Your Honor. Number one, I confirm
2 what my Defense counsel colleague has reported on the **Simpson**
3 case; and, number two, there are no additions that we have to
4 the cases that you've articulated with regards to the various
5 different agenda items, main agenda items.

6 **THE COURT:** Okay. All right. Thank you, sir.

7 I kind of filled in mine as we went along.

8 Anything further for Biomet?

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

10 **THE COURT:** Or for the Steering Committee?

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

12 **THE COURT:** Okay. I feel bad about owing you this
13 many rulings. They've all come in at once. I'll try and send
14 them out, perhaps, a little less at once.

15 For the next conference -- what are we on here?
16 We're on the 19th. For the next conference, how about the
17 24th of October?

18 **(Telephone interruption.)**

19 **THE COURT:** Something is happening on the line and I
20 don't know what it is.

21 I can give you the 24th of October or the 8th of
22 November. I guess the 8th of November might make more sense
23 because the objections to Remand Group 2 would not be due by
24 October 24th.

25 **MR. WINTER:** I think the November date probably makes

1 more sense, Your Honor.

2 **THE COURT:** Okay. Does that work? Any other
3 thoughts on that, for the Plaintiffs?

4 **MR. WARD:** I'm fine with the 8th.

5 **MS. FULMER:** The 8th would be preferable. I'm not
6 available on the 24th, so the 8th would be preferable for me.

7 **THE COURT:** Okay. If we set it for 1:15 on the
8 8th of November, does that work for everybody?

9 **MR. WARD:** You say 1:15?

10 **THE COURT:** That's what I'm proposing.

11 **MR. WINTER:** November 8th works for the Defendants,
12 Your Honor.

13 **MR. WARD:** Yes, and that works for Plaintiff, as
14 well.

15 **THE COURT:** Okay. Let me mark it down here.

16 You folks probably already know this, but if I've got
17 it figured right, the objections to the conditional remand
18 order -- normally, the Panel holds its hearings on the fourth
19 Thursday of an odd-numbered month, which would be next week,
20 and I don't think that they can get it before the Panel in that
21 period of time, so, in all likelihood, it will be the fourth
22 Thursday in November, which falls on Thanksgiving, so it would
23 either be the week after Thanksgiving or the following week,
24 before the Panel would be able to take it up, so I think those
25 three cases will stay with me for a time, and it will be

1 interesting to see what they do.

2 Anything further for the Plaintiffs today?

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

4 **MR. WARD:** Nothing, Your Honor.

5 **THE COURT:** Anything for the Defense?

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

7 **THE COURT:** Thanks, folks, and thanks for your work
8 on the case, moving these cases with the remands. I appreciate
9 it.

10 And welcome to the extra help.

11 **LAW CLERK:** All rise.

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

13

14

15

16

17

18

19

20

21

22

23

24

25