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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

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IN RE: ATRIUM MEDICAL CORP. *
C-QUR MESH PRODUCTS LIABILITY *
LITIGATION *
* * * * *

16-md-2753-LM
November 9, 2017
9:00 a.m.

TRANSCRIPT OF TELEPHONE CONFERENCE
BEFORE THE HONORABLE LANDYA B. McCAFFERTY

Appearances:

For the Plaintiffs:

Jonathan D. Orent, Esq.
Motley Rice, LLC

Russell F. Hilliard, Esq.
Upton & Hatfield, LLP

Josh B. Wages, Esq. (Via tele)
Blasingame Burch Garrard & Ashley

Adam M. Evans, Esq. (Via tele)
Hollis Law Firm, PA

Anne W. Schiavone, Esq. (Via tele)
Holman Schiavone, LLC

David Selby, II, Esq. (Via tele)
Bailey & Glasser, LLP

For the Defendants:

Enjolique D. Aytch, Esq.
Elan S. Hersh, Esq. (Via tele)
Rebecca Ocariz, Esq. (Via tele)
Akerman, LLP

John E. Friberg, Esq.
Pierre A. Chabot, Esq.
Wadleigh Starr & Peters, PLLC

Court Reporter:

Sandra L. Bailey, LCR, CRR
USDC - 55 Pleasant Street
Concord, NH 03301
(603) 225-1454

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P R O C E E D I N G S

THE COURT: All right, let me just state for the record the case name and number. It is In Re: Atrium Medical Corp. C-Qur Mesh Products Liability Litigation, MDL number 2753. And this is the status conference for today and I'm looking at document number 260 which is the plaintiffs' and defendants' joint agenda for the status conference scheduled for today.

We have a number of people here today and then a number on the phone. And so what I'd like to do is just remind everybody on the phone please don't put your phone on hold during this conference. However, if you're not in a leadership role, please mute your phone. And those who are present today or anyone in leadership on the phone would please just identify themselves for the record. We'll go around the room starting with Attorney Orent.

MR. ORENT: Good morning, your Honor.
Jonathan Orent for the plaintiffs.

MR. HILLIARD: Good morning. Russ Hilliard for the plaintiffs.

MR. LAJOIE: Ben Lajoie for the plaintiffs.

MS. BENARD: Kate Benard for the plaintiffs.

MR. FRIBERG: Jack Friberg for the defendants.

MR. CHABOT: Pierre Chabot for the defendants.

1 MS. AYTCH: Enjolique Aytch for the
2 defendants.

3 THE COURT: Excellent. All right, now, I am
4 looking at the agenda. I'm wondering if we couldn't
5 start with the more discrete issues at the end and see
6 if we can resolve those unless somebody thinks it would
7 help me to have a better perspective, a broader
8 perspective if we talk about agenda items one and two
9 first.

10 MS. AYTCH: I think it's fine to go in your
11 Honor's preference.

12 MR. ORENT: I agree, your Honor.

13 THE COURT: All right. Then number three is a
14 motion to amend confidentiality order, and I understand
15 by the summary here what the issue is, and I think just
16 reading the summary I'm not clear on why the defendants
17 are opposed to this revision. So, perhaps Attorney
18 Aytch could clarify for me.

19 MS. AYTCH: Yes. So, there is a body of case
20 law out there that highlights this issue and shows the
21 dispute. But the problem or the issue as the defendants
22 see it is the ex parte conversation that plaintiffs'
23 counsel could have with the treating physician showing
24 confidential documents that the defendants are not aware
25 about and they're not present to see to give a more

1 fulsome story and to understand how the documents could
2 be presented to plaintiffs' treating physicians prior to
3 defendants being able to discuss it with them at a
4 deposition and such and the fundamental fairness issues
5 that are involved in that.

6 THE COURT: Okay. And explain to me why you
7 couldn't simply ask these doctors what they were told,
8 what they were advised when you depose them. You're
9 going to have to educate me on it. I haven't read the
10 case law. So, go ahead.

11 MS. AYTCH: Well, while that is a way that we
12 can find out later what happened and what was said and
13 try to recover absent or after the fact, the issues and
14 the fairness issues of it appear at the beginning, and
15 being able to, you know, create a narrative that the
16 defendants don't have a role in when many other courts
17 have limited those discussions to just what the issues
18 are that the treating physicians would discuss, which
19 are the plaintiffs, the plaintiffs' treatment and
20 surrounding that issue with their diagnosis or prognosis
21 and things like that.

22 MR. ORENT: Your Honor, we see it very
23 differently and I see the case law very differently with
24 the exception of one minority line of cases. The vast
25 majority of cases that are around the country I believe

1 hold to the plaintiffs' position that we have an
2 absolute right to meet with our treating physicians. In
3 fact, my understanding of the AMA Rules of Ethics is
4 that the doctors are supposed to aid their patients, and
5 as part of that aid it is to assist them by providing
6 background information and conversing with them at the
7 doctor's discretion.

8 Now, what happens is ultimately in these cases
9 we have a burden. It is the plaintiffs' burden to
10 overcome what's called the learned intermediary doctrine
11 that you're going to hear a lot about. Essentially the
12 learned intermediary doctrine that the defendants are
13 going to push very hard on is the doctrine that says
14 that the warning goes to the doctor and not to the
15 individual plaintiff. So the warning that we learned
16 about last week that's inside the box does not go to the
17 plaintiff, it goes to the doctor. And so over the years
18 before this litigation began the defendants have had
19 numerous contacts with doctors educating them as to the
20 nature and quality of the products, showing them Levine
21 (ph) materials, showing them education materials, giving
22 them speeches, calls, things like that. And what
23 happens is is that we're certainly entitled to know what
24 the doctors were told but also to understand, because
25 we're starting behind the eight ball, if the doctor had

1 been told X, would that have changed their decision to
2 prescribe this particular device. That's part of our
3 burden under learned intermediary. So we're entitled to
4 probe that question with the doctor. There are numerous
5 courts that, as I've indicated, I think the vast
6 majority of cases in the country have held that
7 plaintiffs are absolutely entitled to those
8 communications.

9 The issue with the protective order is really
10 focused on whether or not we can show them materials
11 that have been confidentially marked. Now, when we
12 first undertook the confidentiality order we were told a
13 particular paragraph would apply to doctors and the
14 defendants would concede and allow us to speak with
15 them. I understand now there's dispute as to whether or
16 not we understood that communication to be what we
17 thought it was, but the bottom line is this. Part of
18 the issue in this case we think is that the defendants
19 have also gone way too far with their confidentiality
20 designations, and so what we're having is we're having
21 on one hand the defendants are trying to prevent doctors
22 from seeing documents by not letting them see
23 confidential documents, on the other hand defendants are
24 marking everything under the sun, including instructions
25 for use, those documents that went into the box that are

1 publically available, those are marked confidential.
2 Peer-reviewed medical literature. I believe we found
3 some peer-reviewed medical literature to be marked
4 confidential. Other sales documents that are given that
5 open presentations for them. Things like that that
6 aren't really confidential. We've been seeing as we've
7 been going through that the defendants' documents are in
8 fact marked confidential. So, what we're getting is a
9 one-two punch to tie our hands behind our back as we're
10 trying to meet with these doctors to understand what
11 they were told, and have they been told the whole story
12 that would affect their ability to provide prescriptions
13 of these devices, would they have still prescribed it,
14 because that's our burden.

15 And so simply we're seeking an even playing
16 field to even the years of communications that the
17 defendants have had. We're seeking to understand prior
18 to the deposition, as is our right, to have an ex parte
19 communication with these doctors, understand how those
20 factors would have affected their decisionmaking. And
21 quite frankly, it's no different than the defendants
22 showing their own corporate witnesses or fact witnesses
23 in these cases documents in preparing them for
24 deposition. The defendants are more than free to ask
25 them about what we say. They are more than free to ask

1 after the fact what documents we've shown them. We're
2 not seeking to prohibit any of that. We're just simply
3 seeking to make the doctor a party to the protective
4 order so that they can view confidential material.

5 Ultimately that will ease our battle, our
6 burden in terms of taking the Court's time to file many,
7 many motions to release these documents from being
8 called confidential and it will move things along a lot
9 smoother if we simply allow the doctor to become a party
10 to this protective order.

11 THE COURT: So the doctor would be signing an
12 agreement?

13 MR. ORENT: Correct.

14 THE COURT: Okay. And --

15 MR. ORENT: And we wouldn't be leaving the
16 document -- I'm sorry, I didn't mean to cut you off,
17 your Honor.

18 THE COURT: Go ahead.

19 MR. ORENT: We wouldn't be leaving the
20 documents with the doctor so the doctor would be free to
21 disseminate them. We're simply saying during our prep
22 session we'd show the doctor the documents, the doctor
23 would sign the confidentiality order, and then we would
24 take them back at the end of the day.

25 THE COURT: Okay. And with respect to case

1 law that Attorney Aytch is talking about, you're saying
2 that that would be minority.

3 MR. ORENT: That is absolutely. In fact, I
4 only know of one jurisdiction offhand that has held that
5 and there's a peculiar rule called Stempler in that
6 jurisdiction, it's in New Jersey, that is the reason for
7 that sort of framing of that way. But the other courts
8 that I'm aware of allow widespread use of --

9 THE COURT: Question for all of you. Why not
10 just, you know, brief this as you have and give me a
11 couple of cases. I can read them before this. I can
12 come in with it under my belt. I can give you a sense.
13 Why a formal briefing and oral argument on an issue like
14 this? Why couldn't you give me a little law on this so
15 that I could help you out, move the case along, make a
16 decision on this?

17 MR. ORENT: We certainly could, but I guess
18 because of the amount of briefing that has been done,
19 and having recently briefed this in other contexts, we
20 found that the briefing tends to get a little bit
21 detailed, and so while we certainly could do a condensed
22 version, my past experience has been that there is a
23 significant education component to the longer briefing,
24 and that's sort of what we wanted the Court to have the
25 benefit of. But if your Honor is interested in at least

1 seeing a short one or two-page memo first, we're
2 certainly willing to do that.

3 THE COURT: Go ahead, Attorney Aytch.

4 MS. AYTCH: So just to your Honor's last
5 question. The plaintiffs want a formal briefing, we
6 have no objection, but we also can reduce it to one or
7 two pages if that's what the Court prefers initially.

8 We of course dispute the suggestion that there
9 is only a minority body of law. In fact, I'm looking at
10 five cases right here that I've recently pulled. One
11 really instructive one, Doe versus City of Chicago,
12 which is a Northern District of Illinois case, compiles
13 many of the cases in a fashion that shows going back --
14 first of all, every jurisdiction does not restrict
15 defendants from also having communications with the
16 treaters, so that the idea that only plaintiffs may have
17 them, while we're definitely allowing that right now, in
18 every jurisdiction that's not the case.

19 We're focusing in primarily right now on what
20 they are asking which is to amend the confidentiality
21 order and the burden that they have to show considering
22 that this was negotiated and they had input into that
23 confidentiality order, that these issues could have been
24 hashed out then and if there was any agreement and now
25 showing what substantially changed insofar that this is

1 requiring an amendment to the confidentiality order.
2 But in that case, Doe versus City of Chicago, which is
3 1998 Westlaw 386352, it gives a compendium of cases that
4 really analyze this issue and you can look at it on both
5 sides.

6 THE COURT: That would have been the perfect
7 case to give me just in one sentence so that I could be
8 prepared to help you.

9 MS. AYTCH: Apologies, your Honor, going
10 forward we will definitely do that.

11 But then there is other MDL litigation where
12 even, where the court may recognize plaintiffs' right to
13 have these communications limited in just this way
14 because of the fundamental fairness issue that I am
15 speaking of and not -- I have some four cases here, but
16 if your Honor prefers, we can put that in the letter
17 brief, in a longer brief, or I can give those to your
18 Honor at this moment.

19 THE COURT: All right. I can tell you that I
20 think that this is an issue well-suited for a discovery
21 dispute informal resolution and I'd be happy to take it
22 out of order so that you don't have to wait for the next
23 status conference. And if you think you need two pages
24 instead of one, go ahead, I'm not going to reject it, I
25 promise, but just get me the issue, get it in front of

1 me. If I feel like I need further briefing, it's just
2 not clear to me, I'll ask for that, but otherwise I'll
3 get you on the phone for informal resolution so you can
4 move the case along.

5 So that would be in accordance with document
6 number 39 which is case management order number three
7 and section five, discovery disputes informal
8 resolution. It lays out the informal process. It says
9 one page letter. Again, if you need two pages, I'm not
10 rejecting your two-page submission. And as long as both
11 counsel agree on procedural, amending procedures
12 slightly to amend your letter to three pages, as long as
13 the two of you agree on that, it's not something I'm
14 going to stand in the way of as long as it's reasonable.
15 Okay.

16 So, that takes care of issue number three.
17 And obviously get that to me in a timely manner, within
18 the next ten days.

19 MS. AYTCH: Okay.

20 THE COURT: All right.

21 MR. ORENT: Absolutely. Thank you, your
22 Honor.

23 THE COURT: Okay. Number four is the
24 pathology protocol. This is the second time this has
25 arisen, this concern plaintiffs have. Plaintiffs

1 originally raised this issue, as I recall, and
2 ultimately I think you reached some sort of agreement.
3 You submitted the pathology protocol.

4 I do think when you submitted your argument I
5 heard you out and I think I ended up agreeing perhaps
6 with the defendants, I can't recall, but in any event,
7 this is an issue obviously that you're raising again, so
8 you obviously have continued concerns.

9 Can you tell me what those are?

10 MR. ORENT: Sure. So this, actually just to
11 go back on the process. If you'll recall the first
12 hearing after leadership was appointed, we raised
13 concerns about this issue but did not push the Court to
14 amend or actually formally do anything with it because
15 we had recognized at the time that the temporary lead
16 counsel had made an agreement and we were hopeful to try
17 and abide by any agreements that even others had made.

18 Nonetheless, as we've gotten further and
19 further into the investigatory process of this case and
20 understood what the claims and the defenses would be,
21 you know, it's become abundantly clear to plaintiffs
22 that the pathology protocol where you're actually
23 cutting the pathology in half before you do anything is
24 itself destructive and there's data being lost by that.
25 And what I mean by that is we heard during science day

1 last week, one of the defenses in this case is that
2 according to the defendants, they don't believe that the
3 mesh should contract if it's well placed, if it's well-
4 sutured in place, or that it should migrate if it's well
5 placed and sutured in place. Contraction is something
6 that can actually physically be measured depending upon
7 the circumstances and the qualities of the explant.
8 Likewise you can actually still see when a device comes
9 out the tacking that's been done or the stitching that's
10 been done on the exterior.

11 So, there's a lot of information to be gained
12 from actually looking at a single piece of pathology
13 without cutting it in half, and so the proposal that I
14 gave Ms. Aytch, and I think we're actually working
15 towards an agreement, we sent comments back and forth,
16 would be a process where we would both have an
17 opportunity to look and do a gross examination of the
18 device before either party does anything with it,
19 photograph it, and then discuss with the other side how
20 that piece of pathology should be divided.

21 There's a sort of a standard way of doing it
22 which would be perhaps to divide it in half, but then if
23 there are concerns that either party raises to dividing
24 it in half, you could, the two experts would meet and
25 they'd discuss how to slice off pieces. So if you're

1 looking at a single piece of pathology and we want to do
2 what's called microscopy, that is taking and making
3 slides off of the pathology, you don't necessarily need
4 to cut it in half to take a little slide off of it. We
5 might both agree that this one corner here is the corner
6 that we should make slides of, so we'll make some slides
7 off of that section and then we can share slides with
8 each other or we can make what are called recuts. We
9 can make identical slides essentially so they can have
10 some and we can have some. But the pathology will be
11 preserved so that the jury can see it, so that other
12 experts can look at it, and there's no loss of evidence.
13 I think we're close to agreement on the actual language.

14 What the issue here as far as the agenda item,
15 is what to do in the interim until such time as we have
16 an agreement that is actually formalized. My concern is
17 that the existing pathologies protocol that's in place,
18 to the extent that we're required to undertake the
19 efforts of actually having facilities divided, we'll
20 actually allow for the destruction of evidence while
21 we're negotiating this document.

22 So, what I would like in the interim, and this
23 is the issue of dispute, is I would like it to be
24 plaintiffs' obligation to maintain, to advise a facility
25 to preserve the pathology and to send it to a neutral

1 facility where it will be not touched, but chain of
2 custody will be maintained until such time as pathology
3 protocol is formally entered. Defendants want to adhere
4 to the current agreement until such time as the new
5 agreement's worked out. That's the issue of dispute.

6 THE COURT: And how much time are we talking
7 about before you get an interim preservation protocol?

8 MR. ORENT: Well, this had been going on,
9 we've been sending drafts back for quite some time now,
10 several weeks, and to be quite honest with you I think
11 we can probably get it done within the next week, but
12 the fluid nature of this where people are constantly
13 having surgeries is a cause for concern that even if we
14 were to lose one piece of pathology or evidence under
15 it, it could hurt that individual's case, and so the
16 urgency that I feel is really because every case matters
17 and that the more we get into this, the more value there
18 is in having preservation over the intact mesh as it's
19 explanted.

20 MS. AYTCH: Your Honor, so this issue was
21 raised in April, and we have the transcript here, and
22 the way that that resolved is that you asked if the
23 defendant shared the concern and we do not. However,
24 you asked if we would be willing to hear plaintiffs out
25 and look at their language and that's what we have

1 agreed to. We have been exchanging drafts. I just got
2 the last draft from Attorney Orent yesterday, I believe,
3 and I still need to look at that. And part of the
4 issues that we're going through in hitting the language
5 is that the proposals that I've seen have not actually
6 addressed this particular concern. Maybe this latest
7 draft, because that was my comments due and I'll take a
8 look. But again, one of the things that was said at
9 that time was whether or not this issue, this concern
10 has actually become ripe. And to our defendants'
11 knowledge it has not.

12 So, we still just don't understand the need to
13 stay an order that was negotiated and entered upon for,
14 again, a concern that has not come to pass to
15 defendants' knowledge. We've been getting the letters
16 from various plaintiffs that there is pathology. Under
17 the current order we would send our specific
18 instructions. We personally have not done that to give
19 plaintiffs and defendants time to go over another
20 potential order if we can have some type of
21 reconciliation on that, but it just doesn't seem that
22 there's any immediate concern that would merit a stay,
23 which is the standard to merit a stay of any active
24 order.

25 THE COURT: And is that correct as far as you

1 know, Mr. Orent, that you don't -- you have a concern,
2 it's just not a ripe concern yet.

3 MR. ORENT: Well, I don't have a case specific
4 concern at the moment, correct. It is more of a concern
5 that at any moment this could become a real issue and
6 that, you know, we represent a large number of people
7 both filed and essentially folks who have unfiled cases
8 at this point are looking to the orders of this Court,
9 and so we're talking, you know, hundreds if not over a
10 thousand individuals. And so being able to provide
11 guidance to them what to do in this interim period is of
12 real concern and I think whenever you're dealing with a
13 medical condition like this there's always a concern of
14 some urgency. But as far as I am aware there's no
15 impending surgery right now.

16 THE COURT: Okay. All right. And do you
17 agree that you're close to resolving the language that
18 that might be a week in the making?

19 MS. AYTCH: I will agree that I will
20 immediately give Jonathan Orent's recent version a
21 review. We had a number of substantive comments to the
22 last version that we received, so I can't without having
23 seen the most recent version make a representation that
24 we're close. But as we said in the agenda, I do believe
25 that we can come to resolution. I do believe that we

1 will get this done. I just don't want to commit that
2 we're within a week of that.

3 THE COURT: Two weeks do you think?

4 MS. AYTCH: I think we can probably get it
5 done within two weeks, two to three weeks.

6 THE COURT: Okay, all right. In light of the
7 fact that we're talking about a very limited period of
8 time, I appreciate the plaintiffs' position, but in
9 light of the limited small period of time and it does
10 appear defendants are working with you in good faith in
11 resolving this issue and helping to rewrite an agreement
12 that's already been entered into, a protocol that's
13 already been entered into, and I suspect the defendants
14 will continue to reasonably negotiate with you, in light
15 of the short length of time we're talking about and
16 coupled with the fact that there really is no issue
17 before me of concern or before the plaintiffs, this is
18 more or less a real but somewhat hypothetical concern,
19 I'm going to keep the protocol in place. If in fact
20 your new protocol is not revised within the next two
21 weeks, I think I would reconsider a request to stay.

22 So, I think hopefully you can pull this off as
23 you say, Attorney Orent, within one week. But if it
24 doesn't happen within two weeks, I think you can have an
25 issue that you might be able to bring to my attention on

1 an emergency basis.

2 MR. ORENT: Okay. Thank you. We appreciate
3 that, your Honor.

4 THE COURT: All right. So now number three --
5 number three and number four we have resolved.

6 Now, I'll tell you number one and number two,
7 it's hard for me to get a sense of what the arguments
8 are. So, to the extent these are intended to help me
9 think through the issue ahead of time, I can tell you
10 that I don't have a real good handle on what the dispute
11 is, so let's start with the status of discovery.

12 I have certainly read this brief summary. It
13 makes sense to me that defendants are saying let's deal
14 with general issues concerning discovery and let's
15 address those before we address, you know, hundreds of
16 specific objections. That makes commonsense to me.

17 And so tell me -- again, though, I don't even
18 understand the context of the dispute, so I'm going to
19 need some basis.

20 MR. ORENT: Well, your Honor, neither do we to
21 be quite honest with you. The first I learned that
22 there was a discovery dispute was when I saw a draft of
23 the agenda. We served on October 24th what we thought
24 were six, but when we got the draft agenda we learned
25 that the defendants had only received five of the six

1 notices of deposition along with one set of requests for
2 production.

3 We're seeking to start, as this Court is aware
4 when it looked at the stay, we're seek to go do
5 depositions and to get trial ready particularly since
6 we're working with the state court for their bellwether
7 process which is on the clock and we're also looking to
8 hopefully enter an order at some point within the next
9 couple months setting our own bellwether schedule. So,
10 we've noticed our first six depositions including two
11 30(b)(6)'s related to, the first one related to the
12 defendants' manufacturing processes and the individuals
13 involved with that, a second one related to the actual
14 products at issue in these cases.

15 We've also noticed two fact witness
16 depositions of Steve Herweck and Reinhard Mayer. And
17 then we've noticed two 30(b)(6)'s related to the
18 jurisdictional issues but also relevant to issues of
19 corporate successorship in piercing the corporate veil,
20 two issues which will be highly contested.

21 Parenthetically I want to just note to the
22 Court we did file supplemental authority this morning
23 for the motion to dismiss, and recently we were able to
24 photograph the Atrium facility which actually says
25 Getinge on the signage and throughout the parking lot

1 there are signs that say one brand one promise Getinge.
2 So we wanted that to be part of the evidentiary record
3 for that motion. That was filed this morning.

4 But getting back to the discovery issues, so
5 we wanted to start taking depositions and we then served
6 the request for production that we had presented with as
7 the discovery, jurisdictional discovery we would do --

8 THE COURT: 106 requests are the same 106
9 requests that was within the motion to dismiss?

10 MR. ORENT: Correct. And I believe what
11 they're doing for the 300 discovery requests in total is
12 simply tallying up the specific areas of testimony
13 related to the 30(b)(6) depositions and simply saying
14 that those are discovery requests. And then of course
15 we ask for documents related to what was used to prep
16 the 30(b)(6) and refresh recollection, all of the sort
17 of standard things that go with the deposition notice.

18 So we served all of these back in October. We
19 actually served them pursuant to the Court's protocol
20 which asks us to essentially seek to cooperate with
21 defendants to set scheduling, location and timing of the
22 depositions. So we did that. We asked for some dates
23 and times to coordinate these depositions so that they
24 would work for everybody, and we didn't hear back until
25 we got this motion.

1 So, I don't really know the specific issues,
2 though I would just say that we're entitled to all of
3 this discovery. I do take significant issue with the
4 implication in the defendants' comments that somehow the
5 ESI Protocol limits our ability to do other discovery.
6 It does not by its very terms and we never would have
7 agreed to something that would limit our ability --

8 THE COURT: Where is that? Show me where they
9 are making that assertion, because there is a sentence
10 where I have a big question mark I didn't understand
11 what it meant, and it says due to the significant volume
12 of discovery requests where the primary electronic
13 production agreed to by the parties has not been made by
14 agreement of counsel for all parties, defendants believe
15 that requiring objections to all of the requests, let
16 alone document productions inside of 30 days is
17 infeasible, et cetera. I didn't understand what that
18 meant. I assume that's a submission from the
19 defendants.

20 Is that what you're talking about, Attorney
21 Orent.

22 MR. ORENT: Um --

23 THE COURT: No?

24 MR. ORENT: No. On the bottom of the first
25 page it says, however, defendants take the position that

1 the deposition notices and discovery requests are
2 premature and in violation of the letter and spirit of
3 the parties' ESI stipulation.

4 THE COURT: Okay.

5 MR. ORENT: And just to refresh your Honor,
6 the ESI stipulation actually states very specifically
7 that the plaintiff, on the bottom of page three, and
8 this is case management order --

9 MR. CHABOT: Document 130.

10 MR. ORENT: 130, yes.

11 THE COURT: Give me the CMO number.

12 MR. CHABOT: It's 3F, your Honor.

13 MR. ORENT: 3F.

14 THE COURT: 3F. Just a second, let me get
15 there. What page?

16 MR. ORENT: It's page three of the document,
17 your Honor.

18 THE COURT: Okay. And what paragraph?

19 MR. ORENT: It's the paragraph B at the
20 bottom.

21 THE COURT: Okay.

22 MR. ORENT: And it says the parties agree that
23 these data sources shall be the entire universe of ESI
24 subject to the TAR process. That this TAR process
25 intended to constitute the major but not exclusive ESI

1 production by defendants, and that to the extent
2 plaintiffs request additional ESI from sources other
3 than those listed in paragraph, and then it gives a
4 process. But then it goes that the parties, nothing in
5 the stipulation shall preclude a requesting party from
6 seeking additional discovery.

7 THE COURT: Where does it say that?

8 MR. ORENT: The bottom of the paragraph, last
9 two lines. So, I want to start off by saying these may
10 be a large number of requests, but they're not --
11 they're not onerous requests. They're discrete. And in
12 fact these are not items that have been previously asked
13 for. These are items that have been outstanding for
14 some number of months. And quite frankly I'm not sure
15 what the issue is and we're clearly entitled to
16 discovery on a defense that they've raised in this
17 process.

18 So, really without further information on it,
19 I would say that the Federal Rules and the case law
20 don't generally allow general objections to discovery in
21 that objections to discovery need to be particularized.
22 And so we would object to allowing defendants to not, or
23 to defendants not particularizing objections to specific
24 document requests or specific discovery.

25 What we're seeking is clearly relevant. These

1 are issues that the defendants have raised themselves,
2 and they go to the heart of the litigation.

3 THE COURT: Okay. So am I clear that there
4 was not like a meet and confer before this was filed?

5 MR. ORENT: Correct, your Honor. The first we
6 ever saw of it was when it made the agenda.

7 THE COURT: Okay, well, that is troubling.
8 So, go ahead, Attorney Aytch.

9 MS. AYTCH: So the issue here is not
10 necessarily the propriety of them being able to, but
11 what the parties or at least the defendants'
12 understanding of is what's currently pending and then
13 what the parties' agreement was as to the order of
14 things.

15 So, first of all, a lot of this discovery is
16 still under impending motion that has not been ruled
17 upon, which is the motion to take such jurisdictional
18 discovery.

19 THE COURT: Okay, now let me ask you, the
20 depositions that are listed, the one that would fall
21 under that looks to be the one of 30(b)(6) of Getinge.

22 MS. AYTCH: So, that discovery would be the
23 deposition of Reinhard Mayer, the deposition of Getinge
24 AB, and -- yeah, I believe those two.

25 THE COURT: Those two? Okay. Do you agree

1 with that that those two are designed around the
2 jurisdictional discovery or that those two could be at
3 least set aside until that issue is -- begins to be
4 resolved? And I intend to get you an order on that
5 fairly soon.

6 MR. ORENT: I don't know that we completely
7 agree. I think that they have relevance far beyond
8 these issues. However, we are certainly willing to
9 cooperate with defendants, and if pacing of these means
10 putting those sort of behind, we're certainly willing to
11 work with defendants in scheduling these, and to the
12 extent that the Court wishes to rule on these issues
13 before those two depositions, it might allow us to cater
14 those notices a little differently. Certainly the fact
15 witness would be, you know, we have issues beyond that
16 with him and that --

17 THE COURT: When you say him, Reinhard Mayer?

18 MR. ORENT: Correct. We still need to take
19 his deposition regardless of --

20 THE COURT: Well, you don't want to take two
21 depositions, right? So --

22 MR. ORENT: Correct, we don't. So we're
23 willing to wait on those, yeah.

24 THE COURT: Okay. Would that address one of
25 the major concerns here?

1 MS. AYTCH: So, yes, one of the major concerns
2 as to the discovery that is still pending under motion.
3 So, depending on what your Honor's ruling is on the
4 personal jurisdiction motion dismissal and then as well
5 as the discovery motion, that goes to those two
6 particular ones.

7 THE COURT: All right. And that would also,
8 you could put those two depositions in a delay pattern,
9 if you will, and I think I'll have an order for you
10 within a week. And then you would take some of the 106
11 questions, I presume, and their subtopics, and put those
12 to the side as well for those two witnesses?

13 MR. ORENT: Some of them bear on both the
14 Maquet/Atrium issue as well as Getinge.

15 So, we have three defendants in this case,
16 three liable parties. One is subject to a motion to
17 dismiss on personal jurisdiction. We still need to
18 understand the financial arrangement and interactions
19 between the other two. And so a lot of this information
20 is designed around just that.

21 So, these corporate issues go beyond simply
22 the Getinge issue, but they go towards the relationship
23 between Maquet and Atrium, between Maquet -- really
24 between the three of them, but we still need that
25 information between Getinge and Maquet.

1 That being said, you know, we're certainly
2 inclined to work with defendants, but we've just never
3 been approached on what they're looking for in terms of
4 extensions to answer and that sort of thing. We're, you
5 know, we would never hold the defendant firm to 30 days
6 to answer requests for production with 108 requests.
7 Had Enjolique, Ms. Aytch called me and said we need
8 another 30, 60 days, 90 days, you know, we're certainly
9 willing to be reasonable and work with defendants. We
10 don't want to put anyone under the gun. But we do need
11 to move the litigation forward.

12 So, you know, we're certainly willing to look
13 through the requests and give reasonable extensions or
14 time things, pace things in a way that makes sense, but
15 we've just never been asked.

16 THE COURT: Okay. If in fact we hold off for
17 a week, let me issue an order that perhaps will clarify
18 things, would that resolve your issues in number one?

19 MS. AYTCH: No.

20 THE COURT: So tell me to what extent.

21 MS. AYTCH: I'm sorry, your Honor, so that
22 would, I believe -- if you would like, here's a copy of
23 all of the discovery requests.

24 So, the issue wasn't just the impracticability
25 of doing it in 30 days, it was the appropriateness of

1 the discovery at this juncture. So, yes, as far as the
2 jurisdictional discovery of Getinge, that would resolve
3 it to have your order because our contention is until
4 you've ruled upon the personal jurisdiction motion, that
5 may not be a party. And to the degree that information
6 needs to be determined about the relationship between
7 Maquet Cardiovascular US sales and Atrium, it can be had
8 from those parties. So, that does set aside the one.

9 The other concern is, and I believe Attorney
10 Orent already read the operative language, and just the
11 way that the request for production were going to go, it
12 is our understanding, and I have Elan Hersh on the line
13 who can talk more about the parties' understanding in
14 the agreement, is that the TAR production was going to
15 be the primary production, and any additional
16 information, any additional documents needed after that
17 production would go. Practically it's difficult to
18 respond to these requests for production inserting
19 whether or not all documents, some documents,
20 objections, when with TAR as we agreed upon, we're just
21 going to cover the database and then pursuant to the
22 reading room provision, give them the documents. We're
23 not going to eyeball them unless it's privileged, so we
24 don't know what's in there. And so without having that
25 initial document production, that TAR production, it

1 just struck us, it just took us aback to receive all of
2 the requests for production.

3 I believe -- hold on one moment, if your Honor
4 will give me a moment. We have some of the language
5 here from the, I believe, the May -- I'm trying to pull
6 up the May transcript where --

7 THE COURT: Take your time.

8 MS. AYTCH: Okay, thank you.

9 (Pause.)

10 MR. HERSH: This is Elan Hersh. Can I say a
11 couple of words while Enjolique is looking for that
12 transcript?

13 MS. AYTCH: So, I'm just going to say this,
14 and then Elan, you may finish.

15 MR. HERSH: Okay.

16 MS. AYTCH: So essentially where the idea was,
17 that there was going to be a massive request for
18 production of documents unless defendants agree to the
19 alternative process that was being proposed by Attorney
20 Orent at that time, and that alternative process was
21 this TAR production.

22 So just, again, speaking from a practical
23 standpoint, being able to respond to the 106 discovery
24 requests about documents that we are essentially just
25 going to provide to them under the reading room

1 provision unseen and where the agreement of the parties
2 was to only do additional discovery requests if the TAR
3 production did not elicit what plaintiffs believe that
4 they needed to prosecute their case, was the
5 understanding of the parties and the reason that the
6 parties entered into the agreement that they did.

7 And I'm sorry, Elan, you can go ahead and
8 continue.

9 MR. HERSH: No, I just wanted to kind of
10 follow-up on that theme, and that was, your Honor, that
11 the negotiation surrounding TAR which occurred over the
12 course of several months included representations by
13 Attorney Orent that by agreeing to TAR, by the
14 defendants agreeing to TAR, that would obviate the need
15 to respond to voluminous requests for production. And
16 so Attorney Orent represented to me on at least two
17 occasions and then during a status conference with the
18 Court that, you know, if defendants decided to conduct a
19 preproduction review of documents, that he would serve a
20 large number of very detailed requests for production.

21 And so during our negotiations one of the
22 representations that we relied upon in agreeing to use
23 TAR was that he would not then go ahead and serve a
24 large number of very detailed requests for productions
25 with subparts.

1 So, we came to an agreement a few days before
2 our, I believe it was our May status conference in which
3 the parties reduced their, the agreement regarding TAR
4 to writing. And one of those provisions, I believe it
5 was number four in the term sheet, says that plaintiffs
6 agree that the discovery/TAR process will constitute the
7 major ESI production in this case. Going forward,
8 defendant shall select the method of identifying and
9 collecting material responsive to RFP's and other
10 discoveries preserving all objections. The idea there
11 was that the plaintiffs wouldn't be prohibited from
12 serving RFP's if after that large ESI production for
13 which we'll discuss, you know, which we will talk about
14 relating to agenda item number two, was served, there
15 were still discrete categories of documents that
16 plaintiffs needed and at which point they would be free
17 to serve additional requests for production for those
18 discrete categories of record. The idea here is that
19 this large document production, for which we're working
20 very hard to prepare, should first be produced to the
21 plaintiffs, we're talking about an extreme large number
22 of documents we think, and then after that, if the
23 plaintiffs still believe that there are documents that
24 they need to prosecute their case, then they will serve
25 discrete requests for production on us and we will

1 respond accordingly.

2 But just to put a P on it, or a point on it,
3 rather, you know, we relied on certain representations
4 that the plaintiffs would not be serving these onerous
5 requests for productions because all relevant documents
6 would be produced as a part, as part of the TAR process,
7 and anything that wasn't would be requested after the
8 TAR process.

9 THE COURT: Okay. One question more to
10 procedure than any merits but, so this, the notice and
11 request for discovery in depositions was served on
12 October 24th. So, I'm counting approximately 16 days in
13 there before today. Why was no phone call made or no
14 attempt to clarify this by making the arguments that
15 you're making now to Attorney Orent?

16 MS. AYTCH: So after we did put this in the
17 agenda and once it became an issue we voiced, or at
18 least I voiced, so I believe that I said to Attorney
19 Orent what we're asking is that you withdraw these for
20 now, if you are willing to withdraw these for now, we're
21 not precluding plaintiffs' ability to seek discovery or
22 documents later on in the future, then we won't have an
23 issue, and this issue remained in the agenda. But it's
24 the timing of the discovery that defendants see as an
25 issue and no real room to move there until we do a TAR

1 production.

2 THE COURT: All right.

3 MR. ORENT: Your Honor, if I might. First of
4 all, I don't have a recollection of Ms. Aytch making
5 that request or actually going into any detail as to
6 what the objections were other than the text that was in
7 the agenda, so, I'm quite dumbfounded, to be honest with
8 you, and I don't really know what to say about that.

9 I will say that the intention of Mr. Hersh is
10 absolutely right, that we did memorialize in the order
11 the intention of the ESI Protocol was that electronic
12 data would be, the majority of it would be captured
13 through the TAR process, and your Honor went through
14 that with us and I need not go through the details.

15 THE COURT: Yes.

16 MR. ORENT: What we -- the majority of the
17 data was based on the request for production that the
18 state court had served on the liability science issues
19 to that date and time, and part of the agreements were
20 what discovery would be updated and as far as what
21 dates, things like that.

22 The discovery we're actually talking about now
23 is very unique discovery related to a separate set of
24 issues, and that I have never ever represented that I
25 would not serve requests for production on discrete

1 areas. What the defendants are now doing is they're
2 conflating very specific asks for very specific
3 documents with, and because they're very specific asks,
4 there's a lot of them. They're conflating that with a
5 general request for large numbers of documents. And
6 that's just not what these two things are doing. We're
7 being very specific with our requests, and yes, there
8 are a large number of them. And had the defendants come
9 to me and said we need to, have you thought about is
10 this in the TAR process, I would have said to them we
11 wouldn't expect this to be in TAR, and here's why.
12 Because the original TAR production was related to six
13 requests for production, the seed set was developed off
14 of responses to those sets, and this is unique
15 discovery. Moreover, this is to a defendant that was
16 not part of the TAR agreement, is not part of any of
17 these agreements, it is on Getinge and we have not
18 received anything from them.

19 So I would have responded in that way. But
20 then I would have said, to the extent you need to answer
21 these and you need more time, I'm willing to work with
22 you in a way that makes sense, because if it's simply a
23 timing issue, there's no reason to bring this to the
24 Court.

25 And so to be quite honest, your Honor, I'm a

1 little flat-footed at the moment. I don't quite know
2 what to say other than I completely disagree with the
3 way that this whole thing has been couched, and quite
4 frankly we should have heard from the defendants a lot
5 sooner as to what their particularized problems were
6 with the discovery instead of waiting through halfway
7 through the period to respond. We didn't know if they
8 were going to be objecting to giving us the 30(b)(6)
9 depositions, which I'm now presuming are entirely
10 proper, and we were hoping to get some depositions done
11 in the month of December.

12 And, you know, I'm still not clear on exactly
13 what the scope of the problem is because no one has ever
14 picked up the phone and called me.

15 THE COURT: Okay, let me ask you a quick
16 question. Do you want just as a matter of litigation
17 strategy to receive the TAR discovery which sounds like
18 it would be in January/February according to what the
19 defendants have said in this memo, do you want to have
20 that before you begin 30(b)(6) depositions? It appears
21 as though you don't view that as critical for those
22 depositions.

23 MR. ORENT: That's correct. For these
24 depositions we believe we have the documents that we
25 need, coupled with the document requests that go along

1 with these which is really asking for the documents that
2 are used to prep the witnesses. So, we're ready to go
3 forward with these depositions. We're eager to get
4 ready and going. We've been diligently working. And we
5 see them as two separate tracks. We have teams that are
6 reviewing documents just like we have teams that are
7 preparing for depositions, and so we're anxious to get
8 going.

9 The MDL has been going on for almost a year
10 now and we're really eager to move the ball forward and
11 get depositions on some of these critical issues like
12 the products and the manufacturing process.

13 THE COURT: Okay. What about his argument.
14 These are very specific requests for specific documents
15 that would not fall under TAR.

16 MS. AYTCH: We simply disagree with that
17 characterization. And part of the actual agenda item,
18 as we put in our email, is really to seek guidance on
19 the Court as the best way to object both to the breadth
20 of it, to the burdensomeness of it, and honestly to all
21 of the duplicativeness of it because of what would come
22 in through TAR. We have a copy here if the Court would
23 like to review them, but these are not discrete asks for
24 discrete documents that would not otherwise be in TAR
25 based on the custodians and the seed set that we're

1 using which is the state court production. We just
2 don't agree with that characterization, and so we're
3 approaching the Court with the best way to object.

4 Again, Mr. Orent is correct that the first
5 time that he saw these specific objections were in the
6 agenda, but following that we had a conversation, and in
7 my email I say in this large paragraph explaining
8 exactly what the agenda says that we're seeking
9 guidance, if you have any thoughts about how to
10 efficiently deal with these issues or in the event you
11 will agree to withdraw your requests and deposition
12 notices for now and reserve the same with the
13 appropriately narrow terms following your review of our
14 TAR production, we're happy to discuss prior to the
15 conference next Thursday. And that overture was not
16 returned with any response.

17 So that is what I was referring to earlier
18 about the email where I said if we could just withdraw
19 and deal with this later, then we would not have the
20 issue.

21 THE COURT: Can you show me an example of a
22 request that is not a specific ask for a specific
23 document type of request that you're going to object to
24 if we had a formal objection process?

25 MR. CHABOT: Your Honor, we didn't prepare an

1 extensive list because we do believe that we need to
2 meet and confer about these sorts of specific objections
3 first.

4 THE COURT: Okay. I'm not understanding why
5 that didn't happen here and it is confusing to me.
6 There have been 16 days where it could have happened and
7 instead what I get is a paragraph under status of
8 discovery that goes on for several paragraphs through
9 page three that honestly tells me almost nothing about
10 what the issue is. I should have gotten you on the
11 phone and said what in the world is number one about.
12 Just summarize it for me in commonsense language because
13 now I have a sense, having heard both sides, I have a
14 handle on what the issue was, but the presentation of
15 this does not help me. And I'm concerned about the
16 16 days between the time this was served and getting in
17 front of me that there hasn't been any effort to narrow
18 this. It seems like you're both making some reasonable
19 arguments. You both seem like you'd be open to each
20 others' concerns.

21 I'm inclined to say I'm going to not deal with
22 number one until I have an issue that's ripe in front of
23 me, because I -- at this point the parties haven't
24 really sat down and met and conferred. You can do that
25 after this conference. And then if to the extent you

1 have some issues that you can break down in a way that's
2 something I can understand and we can handle via
3 telephone conference, then I'm happy to do that. But
4 I'm not going to sit here and listen to arguments about
5 matters that frankly aren't really even ripe in front of
6 me because there hasn't been an effort on behalf of the
7 parties to narrow this yet.

8 I also think that once I get my order out that
9 that may help the parties as well. So, I can tell you
10 that's coming. And so I think that coupled with time to
11 meet and confer will help resolve number one. And to
12 the extent you need further help, I think we can get on
13 the phone and you can explain to me what the issues are.
14 And I think a telephone conference might be more
15 helpful, frankly, than whatever it is you put on a piece
16 of paper for me.

17 So, I'm going to move on from number one. I'm
18 not going to resolve at this point. I just don't have a
19 good enough handle on it to help you. I think both
20 sides are making arguments that make commonsense to me.
21 I'd need to get in the weeds and look at the specific
22 requests and understand what the defendants' arguments
23 are with respect, or objections, with respect to those
24 specific requests.

25 So, number one I'm going to table. Number two

1 was similar in that I, you know, I didn't really have a
2 handle on what the real dispute is, but.

3 MR. ORENT: Well, your Honor, for number two
4 there's really not a dispute. What really we wanted was
5 a detailed explanation. So, I want to make sure that
6 there's not a moving target with regard to the TAR
7 production. And I'm very cognizant of what the
8 defendants have produced both to us -- well, to the
9 state court folks and then also produced to us, however,
10 there's been no unique document production yet in the
11 MDL. And when we first started talking about the TAR
12 process, I was led to believe that October would be the
13 time where we would start seeing documents.

14 Again, we entered into this agreement many
15 months ago now. I understand that things happen, dates
16 move, and I was just hoping to get some more
17 clarification of where we are in the process, just an
18 explanation so that we do know where things are, and
19 sometimes I find that quite frankly having things on the
20 record and just getting a detailed status benefits
21 everybody so that, you know, we're aware of what delays
22 have occurred. I know that there was a major hurricane
23 that I presume added some time, but again, you know,
24 we're anxious to get these documents.

25 You know, I understood that certain data had

1 already been collected and that's how we were even
2 negotiating who the custodians were going to be, and so
3 it's a matter of running computerized searches. And so,
4 you know, having discussed this issue with our vendors,
5 I'm just wondering why, you know, why we are where we
6 are, where exactly are we and, you know, when are we
7 going to start seeing documents that are responsive.
8 And I just want to get a status of that and, you know,
9 to really questions to be answered. It's not anything
10 that the Court needs to do --

11 THE COURT: And so why can't that be done by
12 letter? You'll have a record.

13 MR. ORENT: We've had, you know, letters, but
14 I've had conversations where there seems to be a moving
15 target. And again, and I just want, I feel like, you
16 know, the Court should be aware of what we're being told
17 so that ultimately when, if there are any discovery
18 disputes, at the end of the day we are all clear as to
19 what's happened and what is transpiring and that there's
20 no disagreement because we have a discussion on
21 something on the phone and then each side memorializes
22 it differently. And I thought perhaps by avoiding that
23 we could just simply present the status to the Court on
24 the record and then the record would be what it is.

25 THE COURT: Okay, now I'm reading the status

1 as defendants have put it in section two of the agenda.
2 They are saying that by agreement of the parties the TAR
3 production was going to be made in January 2018.
4 Defendants state over the past several months they've
5 been diligently working to supplement electronic and
6 hard copy files for future document productions
7 including the TAR production. They've been collected
8 and they're being processed. They're being loaded to
9 their review platform to do a preliminary analysis to
10 ascertain the date by which the TAR production would
11 take place. And they anticipate TAR to begin in
12 December or January. They've produced in excess of one
13 million pages of documents.

14 You've indicated those are not -- they're
15 nothing new there, that you already have those through
16 the state --

17 MR. ORENT: They're being produced
18 contemporaneously between the state and us. So some of
19 it is new for state productions but not new to what the
20 defendants are owing us as new discovery if you will.

21 THE COURT: Okay. Well, then they go on to
22 say, defendants go on to say that they're making
23 additional an production as of November 2nd, and they
24 anticipate making at least one additional non-TAR
25 production between now and the date of the TAR

1 production.

2 What more than that would you want?

3 MR. ORENT: So, for example, when we first
4 started this process out I was told it was going to be
5 October, that they would be done collecting in
6 September, that they would anticipate turning it around
7 in about a month. That's what Mr. Hersh told me. And
8 there's actually discussion in one of our transcripts
9 about rolling production.

10 I understand things move, but I don't
11 understand why we've now moved from collection in
12 October to production in January. I was also at one
13 point told November and December rolling smaller
14 productions and then a production in January, the big
15 production in January.

16 When I memorialized that I was then told,
17 well, you have it wrong. You're getting confused
18 between the state court production and the federal
19 production. But it's always, in my mind it's a moving
20 ball. I'm always being, I don't want to say I'm always
21 being told something separate, but it seems like the
22 target is moving along the way. And again, I want to
23 just have a better understanding. And again, quite
24 frankly, the information that they're willing to provide
25 to the Court in a document like this that gets filed is

1 far more comprehensive than the information that's
2 conveyed to me on the phone or far more comprehensive
3 that's given in letters. So the only way I'm that
4 actually able to get this more detailed information is
5 by placing it on the agenda, to which they respond by
6 putting a counter-statement on it, and that's the first
7 time I get this bigger bit of information.

8 I had a call with Mr. Hersh on these issues
9 about two weeks ago, maybe three weeks ago, and he sent
10 me a letter. But then I followed that up because the
11 letter was somewhat, in my opinion, inconsistent with
12 what I took from the conversation on the phone and I had
13 some questions about it, and that's why I put it on the
14 agenda because I wanted to understand the source of the
15 confusion.

16 THE COURT: Okay. So now that you've seen
17 it --

18 MR. HERSH: Can I interrupt for a moment?

19 THE COURT: In a moment. Now that you have
20 seen what the defendants have put in writing with
21 respect to the production, do you have a problem with
22 that? Obviously it's later than you anticipated. You
23 thought October. This -- obviously you just mentioned
24 hurricane and some other factors that could obviously
25 delay production, we're in November, and so they're

1 talking about, you know, a month or two. So tell me
2 what -- what your remaining problems are with what the
3 defendants have proposed by way of explanation in
4 section two of the agenda.

5 MR. ORENT: Well, I guess it's two things.
6 One was realtime communication. I feel like we as
7 plaintiffs have to constantly ask them for updates and
8 these status changes happen without us being told. So
9 we have expectations. I'm not blaming anybody, but
10 events happen, and we're not given any information other
11 than the day comes when we're expecting something and
12 then it just doesn't show up. And then we have a phone
13 call and, you know, things, you know, we perceive things
14 differently as a result of that and then I have to get
15 something on the agenda for the Court to -- for us all
16 to get more information. And so that's the biggest
17 thing. And this is an issue that I think we've been
18 complaining about for a long time.

19 If you remember when we first started this
20 process we had asked the Court to order weekly meetings
21 during that initial six months while we were getting
22 documents produced, and that was actually at a time
23 where communication was at its best. But quite frankly,
24 you know, the level of communication I think and
25 responsiveness could be improved, and I think that that

1 would go a long way on issues like this particular one.

2 We also have some questions about some of the
3 things that have been said. For example, what exactly
4 is going on between, you know, in these longer periods
5 of time. I understand it's going to take longer than
6 originally anticipated. There are events that moved the
7 ball further. But I don't quite understand why between
8 the time of collection and TAR that there's a greater
9 time in terms of production that they are engaging in a
10 review process, you know, some of these things just
11 haven't been explained to us, and so I do think that,
12 you know, the additional detail that we're getting here
13 is very helpful to us quite frankly.

14 THE COURT: Attorney Hersh.

15 MR. HERSH: Thank you. I'd like to respond to
16 a couple things and I take issue with some of the
17 characterizations about not being responsive, about
18 moving target, and about, you know, saying that we're
19 going to produce something and then it doesn't show up.

20 So, to begin with, over the course of the past
21 four months since the Court entered the CMO, which is
22 the ESI stipulation, we have made five productions
23 totaling close to 200,000 documents and over 1.1 million
24 pages. Attorney Orent has said that this is nothing
25 that hasn't been produced in the state court, but I

1 don't see how that really matters because it's the first
2 time that he's getting it, and he's gotten a million
3 pages of documents in a matter of five months where the
4 state court's taken several years. So, we produced an
5 extensive amount of information to plaintiffs in the
6 past five months.

7 And I'm particularly maybe feeling a little
8 unnerved at the moment or frustrated because I come to
9 find out last week that some of these document
10 productions, and Attorney Orent can tell me if I'm
11 wrong, but haven't even been downloaded yet. When we
12 send a production to the other side, we do so using a
13 hyperlink that they can click on and download the
14 production. And we tell them at the time, you know,
15 this link is active for two weeks, so make sure you use
16 it. And I come to find out last week that three of
17 these productions out of the five haven't even been
18 downloaded yet. And then we served a production on
19 November 2nd, a week ago, that according to my vendor
20 hadn't been downloaded yet either.

21 So, I'm getting -- their allegations that we
22 are delaying this process when nothing could be further
23 from the truth, we have produced an extensive amount of
24 information in the past five months. We've told
25 Attorney Orent that we were going to produce another

1 document production on November 2nd and we did. We also
2 told him there will be an additional document production
3 before the TAR production is complete, and we expect
4 that to be some time in December.

5 And while we're working on these state court
6 productions, we're also preparing for TAR. And that TAR
7 process requires a bunch of different steps. First it
8 requires the collection, and when you're dealing with a
9 corporate client trying to get documents from different
10 departments and different records custodians and talking
11 to the custodians and IT and legal and management, it
12 takes time, and we have been working diligently to
13 collect those documents since the case management order
14 was entered. I've been up to New Hampshire to meet with
15 records custodians. I've had a forensic technician meet
16 me there. And so we've spent a lot of time doing this
17 and we've completed our collection as of last month as
18 we said we would to Attorney Orent. But now that we've
19 collected the documents, they must be processed. And so
20 Attorney Orent was saying he doesn't understand why
21 there's two months between the time that we collect the
22 documents and the time that they are produced or in TAR.
23 Well, let me tell you why. And you've never picked up
24 the phone, Jonathan, and called me to find out why. We
25 had a conversation on October 6th. I followed up with a

1 memorialization of that conversation on -- I'm sorry, we
2 talked on the 5th, I followed up on the 6th I believe,
3 and I never got a response letter from you responding to
4 my memorialization of our conversation.

5 So, I want to set the record clear that we
6 have been working very hard. And just to let you know,
7 to let the Court and Attorney Orent know what happens
8 now is that data is processed, the data we have
9 collected is processed. It's extracted from container
10 files. It's made searchable. It's de-duplicated.
11 Metadata is extracted. It's cataloged, it's itemized,
12 and then it's loaded to the review platform where
13 analytics is conducted, and then there's a process
14 called categorization which is the seed set that we've
15 agreed upon with Attorney Orent, is used to category
16 documents as relevant or not relevant. So -- and then
17 there's a QC component to it. So, all this stuff takes
18 time. We've been working very diligently.

19 I agree that maybe we could be, both parties
20 could be communicating better, but I want to set the
21 record straight that we have been doing everything that
22 we're supposed to to move these document productions
23 forward, and we don't think that we have caused any
24 unnecessary delays. If anything, we've produced many
25 more documents that could be reasonably reviewed in the

1 amount of time that we've produced them in the matter of
2 several months.

3 MR. ORENT: Your Honor, if I just might
4 respond to a couple things that were said.

5 First of all, this is -- Mr. Hersh made a
6 statement that said we didn't download several of the
7 sets of document discoveries, and that is just not true.
8 About a week ago I asked Mr. Hersh if he could
9 reactivate the links. That was it. Because we switched
10 to -- we have obtained a new vendor, we switched
11 vendors, and quite frankly, we wanted to save our
12 clients money because it's more expensive for us to
13 reproduce it than to reactivate links. And so to get
14 from us asking to reactivate links to a statement and an
15 argument centered around we haven't downloaded documents
16 is just not true. Although the last one we may not have
17 actually downloaded because we've sent that to the new
18 vendor.

19 But I didn't even get a response to that email
20 that said other than we're checking into it, and then,
21 you know, inevitably what happens is I have to
22 follow-up. This is not, and I don't dispute that things
23 take time and that there's a lot of work, but I know
24 that other MDL's have produced a lot more documents in a
25 lot shorter time. We have MDL's that I've been a part

1 of that have produced tens of millions of pages of
2 documents in, you know, half the time that these guys
3 have produced one million pages. And so, you know, it
4 may be a lot for this particular defendant. It may be a
5 lot for the law firm. But there are many law firms out
6 there who have produced far greater volumes of data,
7 Ethicon being one of them, and the Physiomesb is about
8 to give 2.5 terabytes of data over to the plaintiffs in
9 that litigation in less than six months. We have, I
10 think we're less than a terabyte at this point. And so
11 just to give you a sense of parallel tracks, Ethicon is
12 going to do something far faster. And TVM, Ethicon
13 Boston Scientific, Bard, produced documents much faster
14 than this. A million documents in the scale of this
15 litigation where we're talking hundreds and into the
16 potentially thousands of plaintiffs is not a significant
17 amount of documents. I would expect to get four
18 8-million pages of documents.

19 And so for the defendants to justify that over
20 three years of state court litigation they produced a
21 million pages and to argue to this Court and to us today
22 that they've done a lot, rings rather hollow in the
23 scope of what is traditionally done in these kind of
24 litigations.

25 MR. CHABOT: It was just the last five months.

1 MR. ORENT: Regardless. We often see tens of
2 millions of pages produced in discovery at a far quicker
3 pace than this. There's no reason that these things
4 have to go linearly. The process that Mr. Hersh just
5 described is a linear track as opposed to -- the world
6 doesn't work linearly. You don't do one task and then
7 move on to the next. We don't finish discovery on one
8 item and then start discovery on the next. In
9 litigation you have multiple tracks. Some people do
10 corporate discovery on certain issues, liability
11 discovery, scientific discovery, all of these things go
12 on at once. But what the defendant is trying to do is
13 trying to orchestrate this discovery process through
14 controlling the depositions, through controlling what
15 discovery we can serve when by making us wait for this
16 TAR production until after they do this other production
17 that's been preexisting for a long time. They're trying
18 to sequence things into a linear fashion, and that's
19 just not how every other litigation that I've been a
20 part of works.

21 The defendants work for a very large law firm.
22 This is a multinational corporation that settles
23 millions and millions and millions of dollars if not
24 billions of dollars of medical devices a year. Talking
25 about hundreds upon hundreds of lawsuits and likely into

1 the thousands. And they're producing almost nothing in
2 documents. They should be allowing us to work on these
3 multiple paths. We should not be working in a linear
4 way. There's no reason that I should have to wait to
5 get dates for deposition 16 days and still not know
6 whether I'm getting dates for deposition. That's just
7 not how things normally work in litigation. And for me
8 to have to send emails upon emails to get responses on
9 things, that's just not what I've seen in the past.

10 And so I do take issue of it and I'm glad we
11 have that explanation, but that, quite frankly, doesn't
12 explain to me how Bard and how American Medical Systems
13 and how Ethicon and all these other defendants in cases
14 that I've worked on are able to produce far more
15 documents in a far faster way using less technology
16 without a reading room provision. I mean, keeping in
17 mind, your Honor, this defendant is utilizing the
18 reading room provision, so they don't need to manually
19 go through any of the documents. They should be
20 producing them to us as soon as they go through their
21 system. There's no reason we shouldn't have started to
22 see a rolling production by now.

23 When we started this whole process we started
24 on a list of custodians, because those are the
25 custodians that they had already collected. They had

1 already collected these people before we even began. We
2 know that they needed to supplement based on date for
3 the last couple years, but there's no reason we couldn't
4 have got a TAR production from people that they've been
5 sitting on for years.

6 So, I think it rings very hollow that they are
7 now telling us that we need to go through this entire
8 linear process, that we have to finish with the state
9 court production, then we can get the TAR production,
10 then we can get deposition dates, then we can do
11 corporate discovery. At that rate we're going to be
12 looking for bellwethers in three years. I mean, there's
13 no reason we can't set a trial in 18 months. There's no
14 reason the defendant can't put adequate resources on
15 this to start producing documents next month.

16 THE COURT: Okay. Do you want to say
17 anything?

18 MS. AYTCH: I was going to say if the Court
19 wants a response, we have it. We also can clear up any
20 inaccuracies. But if the Court would like a response,
21 the defendant can give a response, but I don't think
22 that one is necessary as to the issue which was the
23 status of the ESI. And the Court has noted that we've
24 gone through the status. I believe we haven't heard
25 objection to the December or January date, so I wasn't

1 going to respond and just let this lie, but if the Court
2 would like a response, I can give one.

3 THE COURT: I am -- I just don't -- I'm
4 concerned obviously Attorney Orent is frustrated,
5 frustrated with what he views as a lack of
6 communication.

7 Are you communicating via telephone once a
8 week? I know we set that up early on.

9 MR. ORENT: We have not been, and I would be
10 open to resuming that, your Honor.

11 THE COURT: All right. I'm going to order
12 that.

13 MS. AYTCH: Okay.

14 THE COURT: So, Attorney Aytch, would you be
15 amenable to that --

16 MS. AYTCH: That's fine.

17 THE COURT: -- once a week conversation with
18 Attorney Orent so that more issues can be put on the
19 table so that you're aware of his frustrations with
20 whomever else he's been communicating with involving ESI
21 or discovery in the case. He could bring it to your
22 attention at least on the phone and feel as though he's
23 voiced his concerns, and then you could address them
24 with him over the telephone or get back to him, et
25 cetera.

1 MS. AYTCH: We are open to that, your Honor.
2 What I ask is if we can also amend that order to have
3 the plaintiffs the day before or not even a full
4 24 hours, just let us know what issues that they would
5 like to discuss so that I can be either appropriately
6 apprised myself or have the appropriate people there.
7 So if we can get an agenda 24 hours ahead of this weekly
8 call, that would be helpful.

9 THE COURT: Is that fine, you could do that
10 via email with Attorney Aytch?

11 MR. ORENT: Absolutely. Anything that will
12 move this process along we are open to. We want to find
13 solutions to these issues. I mean, quite frankly, I'm a
14 little embarrassed that we had to address this with the
15 Court, but I think the good result of it is that we're
16 going to get these calls again. So, I think it's a
17 great idea.

18 THE COURT: All right. Well, I am completely
19 in favor of that and so I order it once a week and we'll
20 keep doing that until we get deeper into this.

21 I -- what I have in front of me is sort of a
22 generalized frustration, I would say, on Attorney
23 Orent's part. I'm not seeing, based on everything I've
24 read and everything I've heard, I'm not seeing what I
25 would call undo delay. I am seeing, as far as I can

1 tell, the production, ongoing production of documents.
2 You know more about the case, you're in the weeds on the
3 case, than I do. But based on what I have, I'm not
4 seeing undo delay and it's hard for me to deal with
5 generalized frustration other than to say I think more
6 communication would be helpful. So, I'm certainly going
7 to order that.

8 I don't see anything else that I need to do
9 with respect to paragraph two. And I think with respect
10 to this agenda we've gone through each item. Is there
11 anything else that you want to bring to my attention
12 now?

13 MS. AYTCH: Not for the defendants, your
14 Honor.

15 THE COURT: Okay. Anything else, Attorney
16 Orent?

17 MR. ORENT: No, your Honor. I just want to
18 thank the Court for accommodating my son's birthday
19 today by moving the hearing earlier. I do personally
20 greatly appreciate that, so thank you.

21 THE COURT: That is not a problem at all.
22 Anything else? Okay. Excellent.

23 Anyone on the phone would like to say anything
24 before we close?

25 MR. HERSH: No thank you, your Honor.

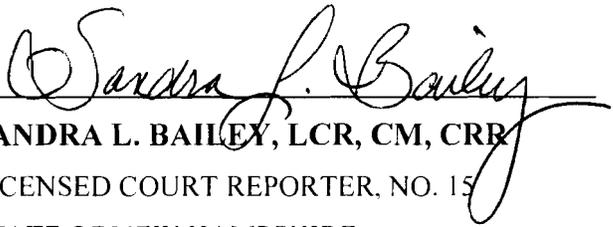
1 THE COURT: All right. We are adjourned then.
2 Thank you.

3 (Hearing concluded at 10:25 a.m.)
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14 C E R T I F I C A T E

15
16 I, Sandra L. Bailey, do hereby certify that
17 the foregoing transcript is a true and accurate
18 transcription of the within proceedings, to the best of
19 my knowledge, skill, ability and belief.
20

21
22 Submitted: 11/22/2017


SANDRA L. BAILEY, LCR, CM, CRR
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