

*NO COPY OF THIS TRANSCRIPT MAY BE MADE PRIOR TO JANUARY 30, 2019

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

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

1:16-md-02753-LM
October 23, 2018
2:04 p.m.

TRANSCRIPT OF STATUS CONFERENCE
BEFORE THE HONORABLE LANDYA B. McCAFFERTY

Appearances
Via Telephone:

For the Plaintiffs:

Jonathan D. Orent, Esq.
Motley Rice LLC

D. Todd Mathews, Esq.
Gori Julian & Associates PC

Russell F. Hilliard, Esq.
Susan A. Lowry, Esq.
Upton & Hatfield LLP

Adam M. Evans, Esq.
Hollis Law Firm PA

Anne W. Schiavone, Esq.
Holman Schiavone LLC

For the Defendants:

Enjoliqué D. Aytch, Esq.
Akerman LLP

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

Court Reporter:

Liza W. Dubois, RMR, CRR
Official Court Reporter
U.S. District Court
55 Pleasant Street
Concord, New Hampshire 03301
(603) 225-1442

1 P R O C E E D I N G S

2 THE COURT: Counsel?

3 MR. ORENT: Good afternoon, your Honor.

4 THE COURT: Good afternoon.

5 All right. Let me go ahead and just for the
6 record announce the name of the case.

7 It is In Re: Atrium Medical Corp., C-Qur Mesh
8 Products Liability Litigation, MDL docket number
9 16-md-02753-LM, all cases.

10 Let's do what we normally do. We'll go around
11 for counsel and start with plaintiffs' counsel. If you
12 could just state your name. At this point, everyone on
13 the call, our -- our court reporter is familiar with the
14 spelling of your names, so you don't need to spell your
15 name, but just announce that you are on the call and
16 then we'll move to defendants. And then just after
17 that, if you are speaking, just identify yourself
18 briefly before you begin to talk.

19 And I think that my judicial assistant, Gail
20 Adams, has asked everybody to mute their phone so we
21 don't hear background noise.

22 And then, as I always have reminded folks,
23 don't put the call on hold, because some of you have
24 Muzak that plays at a certain point while the phone call
25 is on hold.

1 So let's start with plaintiffs' counsel and
2 just announce who you are, your name, and then we'll go
3 to defense counsel.

4 MR. ORENT: Jonathan Orent, your Honor.

5 MS. LOWRY: Susan Lowry.

6 MR. HILLIARD: Russ Hilliard, your Honor.

7 MS. SCHIAVONE: Anne Schiavone.

8 MR. MATHEWS: Todd Mathews, your Honor.

9 MR. EVANS: Adam Evans, your Honor.

10 THE COURT: I think that's all of -- for
11 plaintiffs.

12 Mr. Selby is not joining the call today, as I
13 understand it.

14 Defense counsel?

15 MS. AYTCH: Good afternoon, Enjoliqué Aytch.

16 MR. CHABOT: Good afternoon, your Honor.

17 Pierre Chabot, and I'm here with John Friberg Sr.

18 THE COURT: Thank you, Counsel.

19 Okay. I'm going to go in order of the issues
20 as presented in the joint agenda, document 1006.

21 Issue number one is essentially just a summary
22 of the noticed depositions. I don't think there's any
23 issue with respect to issue number one, so I'm just
24 going to move to number 2, which is a disputed question
25 concerning historical exemplars. So -- and this relates

1 to litigation hold information relating to historical
2 mesh product exemplars.

3 So can somebody just explain to me in broad
4 strokes what historical mesh exemplars are?

5 MR. ORENT: Yes, your Honor. This is Jonathan
6 Orent for the plaintiffs.

7 Prior to the move to the current Atrium
8 facility in New Hampshire, defendants had another
9 facility in New Hampshire that was subject to what are
10 called 483 letters from the FDA, which are essentially a
11 series of citations related to the manufacturing
12 practices.

13 Some of the inspections revealed issues with
14 manufacturing that we believe resulted in contamination
15 of the products at issue in the case that were
16 manufactured at that facility.

17 As your Honor may recall during Science Day,
18 we did show you that there were some exemplars that we
19 found online so they are not authenticated, but
20 exemplars that we were able to purchase online that had
21 human hair trapped in them, consistent with some of the
22 complaints that had been noted by the Food and Drug
23 Administration's inspection process.

24 So the historical exemplars would be
25 manufactured products prior to the date of moving that

1 were actually manufactured under the conditions of the
2 old facility. So not just with contaminants, but some
3 of the other issues were moisture and humidity and
4 temperature control. And we believe that those
5 conditions in the facility had a deleterious effect upon
6 the plaintiffs who actually received those products.

7 And so we are interested in whether or not any
8 effort was made to preserve at the time of moving any of
9 the product that was manufactured in that prior
10 facility.

11 THE COURT: And the move date, again, remind
12 me. Is it 2015?

13 MR. ORENT: It is, your Honor.

14 THE COURT: Okay. But the -- the litigation,
15 the state litigation began in 2012; is that right?

16 MR. ORENT: That is correct.

17 THE COURT: Okay. So when you say historical
18 mesh exemplars, you're talking about product that was
19 manufactured that existed before the move from Hudson to
20 Merrimack?

21 MR. ORENT: That is correct.

22 THE COURT: Okay. So these are just -- this
23 is product -- this is not -- these are not materials
24 that were implanted; these are just exemplars that the
25 company would either retain or not as products that

1 they --

2 MR. ORENT: Correct.

3 THE COURT: -- had manufactured during a
4 certain time frame.

5 MR. ORENT: That is correct, your Honor.

6 THE COURT: Okay.

7 Attorney Aytch, if you want to add anything to
8 this, feel free, with respect to just what a historical
9 mesh exemplar is.

10 I wanted to ask why the date before March of
11 2006? What is -- why is the question -- all the
12 questions, why are they phrased with that particular
13 time frame? Since --

14 MS. AYTCH: Thank you, your Honor.

15 I'm sorry. Was -- was someone speaking?

16 THE COURT: You go ahead, Attorney Aytch.

17 MS. AYTCH: Oh, okay.

18 So with regard to the historical and kind of
19 that connotation of the mesh product, it's the reference
20 that it's noncurrent.

21 So some of the mesh, particularly the mesh
22 that would have been manufactured at some of the dates
23 that are requested would have been expired at this
24 point. And so, therefore, real probative information
25 that you're going to get from it, it wouldn't be an

1 exemplar that is -- is current insofar that it is not
2 already expired, given the generally three-year shelf
3 life.

4 With regard to your Honor's question regarding
5 the March 2006 date, that is the date that the FDA
6 cleared the secure to market, was in March 2006.

7 THE COURT: Ah, okay.

8 MR. ORENT: Your Honor, I'd like to just add
9 one further detail that I neglected to mention with
10 regard to the definition of historical product. And I
11 think I did include this in the letter.

12 There was actually a change to the devices,
13 the thickness of coatings and -- so the product changed
14 as well, some of the product changed, moving from each
15 site. So it's not just the changed conditions, but some
16 of the product itself as well.

17 THE COURT: Okay. And if the product would
18 expire in three years, that would mean then that Atrium
19 would not market that product, but does -- does it mean
20 that the product is no longer useful as an exemplar?

21 MR. ORENT: From the plaintiffs' perspective,
22 we believe that all material is useful as an exemplar
23 for a whole variety of reasons that our experts are
24 interested in evaluating the material. And I can get
25 into those if the Court is curious, but -- but just to

1 give a short answer.

2 MS. AYTCH: And, your Honor, from the
3 defendants' perspective, no. We would say that it is
4 not useful as an exemplar because of the nature that a
5 physician would not implant it if it's an expired
6 product. That is not a reasonable use and it, indeed,
7 would be a misuse.

8 Any -- and I would want to furthermore talk
9 about the alleged change to the product. The product
10 itself was not changed when the -- just based upon the
11 move to the new facility from Hudson to Merrimack. And
12 furthermore, as our paper notes, any changes to the
13 design and the manufacturing specs of the product itself
14 would be noted in the number of discovery items that we
15 have provided in addition to the depositions.

16 So the exemplar itself, that would be expired
17 and would have no probative use for that purpose, would
18 not be probative and would not -- I'm sorry -- would not
19 be useful as an exemplar.

20 THE COURT: Well, if a doctor would not
21 prescribe it -- and that makes sense, it has a
22 three-year shelf life, so if it's too old, the doctor
23 may not recommend or use the mesh product -- but would
24 it still retain its basic properties such that it could
25 be looked at, for instance, by, you know, a layperson, a

1 juror, and studied in any way? It may not be implanted
2 in a body, but would it contain still remnants of the
3 product that would be relevant potentially?

4 MS. AYTCH: The product -- the characteristics
5 of the product that it would retain would be no
6 different than the characteristics of the product that
7 we actually provided, the exemplar mesh. Any of the
8 manufacturing, anything on -- in terms of one --
9 anything about any one piece of exemplar mesh that was
10 manufactured prior to 2015 would not be any different
11 than any one piece of manufactured mesh that is
12 manufactured and already provided to the plaintiffs as
13 exemplars for that use.

14 THE COURT: Okay. So another question that I
15 have factually about this is I recall from previous
16 status conferences and a previous dispute related to ESI
17 that plaintiffs were already aware of litigation holds
18 that had been issued, I believe one right after the
19 state court litigation began, one in 2013, and then
20 another in 2014 and then there was a more recent one in
21 2017. And as I recall, defendants provided plaintiffs
22 with the -- the names of -- and the corporate
23 departments where the litigation holds had been issued.

24 So there's an awareness of some litigation
25 holds in the case. So I'm curious about the need for

1 the questions in -- and the relevance of the questions
2 in dispute in --

3 MS. AYTCH: And, your Honor, I would add to
4 that that this particular issue, my April 19, 2017
5 letter to Josh Wages, that's an exhibit of plaintiff's
6 position paper, is one of the issues cited in the
7 hearing before your Honor that took place. I believe it
8 was the April hearing, when we discussed litigation
9 holds prior to.

10 So this is not a new issue, this is not a new
11 revelation, and plaintiffs have already argued for
12 getting at the content of our litigation holds,
13 particularly on the basis of this exemplar mesh in that
14 hearing, starting on page 45 of the transcript.

15 THE COURT: Let me do this. If you don't
16 mind, if I could just go through with you the
17 questions -- I should say the requests for admissions
18 that are in dispute are 4, 5, 6, 7, 8, and 9 in
19 Exhibit -- I should say document 1006-1, which is
20 attached to the plaintiff's letter brief.

21 If we could, and I'll ask Attorney Aytch just
22 to start, I'm going to start with number 4 and just ask
23 you, that -- for the record, number 4 -- asks Atrium to
24 admit that since March of 2006, you've had at least one
25 written protocol for handling litigation hold notices as

1 it relates to products liability claims related to one
2 or more Atrium C-Qur hernia mesh products.

3 Okay. Tell -- explain how that request for
4 admission would require you to reveal contents of a
5 litigation hold. And I'm just going to go through one
6 at a time so I can better understand the argument.

7 MS. AYTCH: It's getting at the nature of the
8 litigation, but this one, your Honor, does not get at
9 the content as much as some of the other ones. But it
10 still -- by asking -- let me --

11 THE COURT: It seems as though maybe you've
12 even answered this before, but I could be wrong. It
13 seems as though in the ESI dispute Atrium was willing
14 to disclose that there were litigation holds related to
15 the -- at least the state litigation and so I'm not sure
16 where answering number 4 causes heartache.

17 MS. AYTCH: Correct. This would be an
18 admission, your Honor.

19 THE COURT: Okay. All right. So that takes
20 care of number 4 then.

21 What about number 5; admit that since March of
22 2006, you've had at least one written protocol for
23 retaining historical exemplar hernia meshes.

24 MS. AYTCH: Because it's asking for the
25 content about whether or not we had something that

1 required the company to retain a historical exemplar
2 hernia mesh.

3 THE COURT: And so it makes you reveal -- it's
4 not making you reveal the content of your protocol; it's
5 just asking whether or not you had such a protocol. And
6 your objection is that it requires us to describe the
7 nature of the protocol?

8 MS. AYTCH: It requires us to describe the
9 content of our advice about whether we told them to --
10 whether counsel directed a protocol or lit hold to
11 retain historical -- historical exemplar meshes.

12 THE COURT: Is there any difference between
13 written protocol and a hold notice?

14 So it's asking Atrium, Atrium, since March of
15 2006, have you had at least one written protocol for
16 retaining historical exemplar hernia meshes.

17 Is that -- is a written protocol necessarily
18 coming from counsel?

19 MS. AYTCH: It definitely --

20 MR. ORENT: That --

21 MS. AYTCH: I'm sorry.

22 Definitely it could be in this context if it's
23 regarding the -- what this is getting, or the way this
24 is interpreted, the reason that you would have a
25 historical -- as plaintiffs posit, the reason you would

1 have a historical mesh is for these particular purposes.
2 Otherwise, a company would not be holding on to product
3 that it can't otherwise sell or do anything with. It
4 would be expired product. That product would be
5 discarded.

6 So asking whether or not that you are going to
7 hold on to any otherwise unusable product, either by
8 what is deemed a protocol or a litigation hold, is still
9 getting at the nature of the litigation content, which
10 would be the work product.

11 THE COURT: Is it your position, Attorney
12 Aytch, that the subject of a litigation hold notice is
13 itself privileged?

14 MS. AYTCH: The subject of a litigation --
15 the -- the existence of a litigation hold is not. The
16 subject of a litigation hold to the degree that it would
17 reveal counsel's advice in the face of litigation is.

18 THE COURT: Okay. So I need to understand how
19 number 5 would require revealing counsel's advice.

20 And you're suggesting if there is such a
21 protocol, counsel would have told Atrium to have such a
22 protocol for litigation reasons.

23 MS. AYTCH: That's the suggestion, because
24 there would be no other stated purpose to hold on to
25 unusable and expired mesh.

1 THE COURT: Okay. All right. Let's go to
2 number 6.

3 Admit that since March of 2006, you've
4 received one or more litigation hold notices related to
5 the claims. I'm just going to call it the C-Qur hernia
6 mesh product liability claims.

7 So this would be -- from your perspective,
8 this would be asking Atrium to admit that their lawyers
9 have told them, hold on to -- or at least have issued
10 some sort of litigation hold related to the Atrium C-Qur
11 products.

12 MS. AYTCH: Correct, your Honor. I'm sorry;
13 I'm just rereading this and parts of the language. But
14 this is one that we can admit. This, I feel like, is in
15 the nature of request number 4.

16 THE COURT: Okay. All right. And take your
17 time on these. I'm fine with that.

18 Okay. So number 7: Admit that since March of
19 2006, at the time you have received each litigation hold
20 notice related to product liability claims, you were in
21 possession of exemplars related to the specific C-Qur
22 mesh products.

23 Okay.

24 MS. AYTCH: So --

25 THE COURT: Go ahead.

1 MS. AYTCH: -- this one -- I'm sorry, your
2 Honor.

3 THE COURT: You go ahead.

4 MS. AYTCH: I was going to say this one
5 presupposes and assumes at the time that you received
6 each litigation hold notice -- I'm sorry -- presumes
7 that what the content of the litigation hold notice is.

8 THE COURT: Now, doesn't -- hasn't there
9 already been some admission that there were litigation
10 hold notices issued related to the C-Qur line of
11 products?

12 MS. AYTCH: Yes, because we produced the
13 information concerning the dissemination of those
14 litigation hold notices.

15 THE COURT: And so this is asking your --
16 you know, your client to admit that at the time they
17 received, for instance, the 2012, the 2014, the 2017
18 litigation hold notices that they were actually in
19 possession of exemplars that would have related to that
20 litigation?

21 MS. AYTCH: And it's also the formation of
22 the request, your Honor, insofar as possession of
23 exemplars related to the specific C-Qur hernia mesh
24 product.

25 At that point, if it's not expired, it's not

1 possession of exemplars; it's just possession of
2 product. By the nature that we sell the product, we
3 would have been in possession of this product.

4 Here I -- the interpretation, it becomes
5 exemplars. It becomes something in the nature of a
6 litigation context at the point that it's otherwise not
7 being sold or otherwise discarded because of its expired
8 nature. So it's not exemplars when we would have had it
9 in our possession due -- in the normal course of
10 business.

11 THE COURT: So it's really the word exemplars
12 that is causing the concern because the word exemplars
13 has a particular meaning, which --

14 MS. AYTCH: The way that we interpret it --
15 this, correct, your Honor.

16 THE COURT: Okay.

17 MS. AYTCH: Otherwise, definitely since the
18 time of March 2006 when the product was cleared to
19 market, we would have had that kind of product to put on
20 the market.

21 THE COURT: So --

22 MS. AYTCH: It's the nature of the request in
23 terms of the exemplar.

24 THE COURT: So if Atrium is holding on to
25 exemplar product, Atrium would only hold on to exemplar

1 if Atrium had been told to do that by an attorney,
2 saying -- concerned about litigation; is that right?

3 MS. AYTCH: Correct.

4 THE COURT: Okay.

5 All right. And just, again, I'm just going to
6 have you walk me through these. But number 8: Admit
7 that since March of 2006, some exemplar -- and there's
8 that word again -- some exemplar hernia mesh products
9 that were the subject of a litigation hold notice left
10 your possession, custody, or control.

11 What -- explain -- walk me through this one.
12 Is it again the same issue, that it's asking you whether
13 or not --

14 MS. AYTCH: Here it's twofold, your Honor.
15 Oh, I'm sorry. I didn't mean to cut you off.

16 THE COURT: No, go ahead.

17 MS. AYTCH: Here it's twofold. And this is
18 since March -- some exemplar hernia mesh, that word, the
19 subject of a litigation hold notice. So you're asking
20 me to admit the content of my litigation hold notice,
21 assuming that it was, and then that it left our
22 possession, custody, and control and then just --

23 THE COURT: I missed the last part of that.
24 Can you just repeat that? I think nobody heard that.
25 For some reason, we lost contact with you for a second.

1 So what was number 2?

2 MS. AYTCH: I'm sorry. The number 2 was going
3 back to it being described as exemplar mesh products.
4 So the same as number 7, but coupled this time with the
5 assumption if we were to admit that -- assuming what is
6 the content and asking us to admit the content by the
7 phrasing were the subject of a litigation hold notice.

8 THE COURT: Okay. And then number 9: Admit
9 that on one or more occasions after receiving a
10 litigation hold notice related to the C-Qur mesh
11 products, you did not retain exemplars related to the
12 specific hernia mesh products that were the subject of
13 the litigation hold notices.

14 MS. AYTCH: The same two issues in number 9
15 that are in number 8.

16 THE COURT: Okay. All right.

17 So, Attorney Orent, we've got number 5, number
18 7, 8, and 9. And let's start with 8 and 9, if you
19 would.

20 Why -- I know that the content of litigation
21 holds is generally just not discoverable unless there's
22 evidence of spoliation. Obviously I'm oversimplifying
23 this, but that's the general principle.

24 So you are in -- let's look at number 8.
25 You're asking Atrium to admit that their lawyer had

1 placed a litigation hold regarding exemplar hernia mesh
2 products. And I --

3 MR. ORENT: That's correct, your Honor.

4 THE COURT: And I believe that Attorney
5 Aytch's argument is that's requiring her to admit the
6 content of a litigation hold.

7 MR. ORENT: I certainly disagree with that
8 assertion.

9 Your Honor, starting with the term exemplar --
10 and I think that we first introduced the word exemplar
11 in number 5. So the -- the idea is that with each
12 litigation hold, the defendant is actually told to
13 preserve some material, making it an exemplar.

14 And then the -- the course of these requests
15 is ultimately for the defendant to admit that they do
16 not have historical product and that they willfully
17 destroyed it or ignored advice to the contrary, such
18 that the plaintiffs are now at a disadvantage.

19 And so if -- if your Honor, as your Honor has
20 done over the last series of questions to Ms. Aytch, has
21 left -- these are a series of requests for admissions
22 that builds one on top of the other for the precise --
23 answering the precise question, which is what happened
24 to these and why aren't we able to ultimately get a copy
25 of these historical materials so that our scientists,

1 our material experts, or plastic experts, and our
2 biomaterials and our physicians, why aren't they able to
3 actually look at the products built and designed and
4 manufactured the way that our plaintiffs had them put
5 into them.

6 These products are supposed to last a lifetime
7 with these plaintiffs. They're supposed to be a
8 permanent implant. And so we are unable to pull why
9 don't we have those there. And so that is the basis of
10 this stream.

11 Now, we also have -- through the course of
12 depositions, there are a large -- or there are a number
13 of individuals who we deposed who have testified on the
14 record that they did not receive any litigation holds
15 whatsoever related to C-Qur product liability claims. I
16 believe it was Mr. Harris who testified that he had been
17 subject to a litigation holds related to sexual
18 harassment claims and the company's -- a lawsuit not
19 having to do with him necessarily, but having to do with
20 the company, and was given a preservation notice there.

21 So there's a disconnect. And I think that we
22 are entitled to understand and get a clean admission
23 about whether or not -- not seeking the contents of the
24 advice that the defendants were given, but whether --
25 whether or not after receiving advice, the defendants

1 willfully allowed this material to be destroyed, such
2 that the plaintiffs are unable to conduct the necessary
3 testing that we deem appropriate for the conduct of our
4 case.

5 THE COURT: And is -- the broad question in
6 terms of the dates, since March of 2006 -- that in and
7 of itself is relevant, Mr. Orent? I -- and let me
8 ask -- I can shorten this, ask Attorney Aytch.

9 Do you have any objection to the question
10 going back to March of 2006?

11 MS. AYTCH: Well, the question is overbroad
12 because at the point of March 2006, we didn't have any
13 litigation.

14 So, again, just the nature of, one, it being
15 an exemplar; two, being in the litigation context; and,
16 three, even what I believe is a spoliation claim that
17 Mr. Orent is trying to assert, although, again, this is
18 not the evidence itself. March 2006 would be too broad
19 because that is -- there would have been no litigation
20 at that point.

21 THE COURT: And, Mr. Orent, are you asking
22 since March 2006 because there has been mesh product
23 since March 2006 that has been implanted in some of the
24 plaintiffs in the case?

25 MR. ORENT: I am asking since March 2006

1 because there is the potential -- because this is a MDL
2 and I represent a large number of plaintiffs, we know
3 that there are some plaintiffs that have been implanted
4 earlier; there are some plaintiffs that have been -- at
5 all periods of time, I should say.

6 So it is important for us to -- to get that
7 understanding as to when the litigation hold was -- was
8 issued and, quite frankly, when it was disregarded.

9 However, I would say there is also the
10 question of when the prospect of litigation actually
11 emerged. Because clearly it wasn't March of 2006, but
12 in -- as the complaints started mounting in the FDA
13 database and the company started getting emails and
14 correspondence and letters from lawyers related to the
15 cases, we don't have a firm date. We know that it was
16 before the state court litigation began in 2012 and we
17 have reasons to believe that it backdates at least a
18 year or two beyond that, but I can't put my thumb on a
19 particular date.

20 And so there were a series of manufacturing
21 changes and process changes that resulted in differences
22 in thicknesses of the mesh -- excuse me, thickness of
23 the coating of the mesh and some other changes that we
24 feel are material such that we want to ensure that when
25 litigation hold notices were issued, the question is did

1 Atrium wholesale disregard those and were they given
2 plenty of advance notice prior to destroying these
3 exemplars such that a spoliation claim does exist, which
4 is the situation we find ourselves in now, unable to
5 test appropriately the material that would have been
6 implanted into our plaintiffs.

7 THE COURT: Let's say Atrium admits to 5, 7,
8 8, and 9, where do you go from there?

9 MR. ORENT: Your Honor, at that point we
10 would -- presumably we would seek more information in
11 terms of the content of some of the litigation hold
12 notices and perhaps have your Honor review them in
13 camera to see if there is reason to believe that
14 spoliation did occur.

15 And if the defendants were given plenty of
16 ample notice and willfully or wantonly destroyed or
17 allowed the destruction of material evidence in this
18 case with plenty of notice that spoliation would be the
19 result and that a spoliation claim might exist were they
20 not to retain a sample.

21 But what we've tried to do, your Honor, is to
22 pursue this methodically and to make sure and evaluate
23 each step of the way what the evidence is so that we are
24 not raising any of these issues prematurely before the
25 Court and that -- that we are following the appropriate

1 protocols as we go and taking us where the evidence
2 brings us.

3 THE COURT: Do you already have evidence --
4 because you have an admission that when they moved from
5 Hudson to Merrimack, the exemplar product was destroyed.
6 Do you -- do you -- don't you already have evidence
7 there were litigation holds pre-2015? Wouldn't you
8 already have in many ways an admission that there has
9 been -- I don't know if it's spoliation, but there was
10 destruction of exemplar product?

11 MR. ORENT: So we do have the evidence based
12 on the request for production where they -- the
13 defendants produced product that the product is no
14 longer in existence.

15 The question remains whether or not spoliation
16 occurred. That is, was the mens rea necessary for
17 spoliation or was the conduct and the mental awareness
18 sufficient to meet the legal definition. That, in our
19 minds at this point, is an open question and is the type
20 of question that is worthy of discovery.

21 And, again, that is why we asked these
22 particular requests in this measured way such that we
23 did not seek the -- the content of the notices, because
24 if the defendants -- if the defendants answered that no
25 litigation hold was issued relative to preserving the

1 product, that would bring a different course of action
2 than perhaps saying that one existed and the inference
3 that they disregarded it if there were admissions to all
4 nine of these.

5 So the -- the next step is -- and whether
6 relief is sought to view the work product or have your
7 Honor in camera review, the litigation holds would be
8 a -- a measured step depending upon how these admissions
9 go.

10 THE COURT: I don't see -- I just don't see
11 right now practically how looking at the litigation hold
12 is going to tell me whether or not spoliation occurred
13 because it could be an act of pure negligence on the
14 part of Atrium. And, you know, maybe negligence would
15 suffice under these circumstances. I don't know the law
16 on that. But --

17 MR. ORENT: If I may, your Honor, one of the
18 issues is that we still have not received an exact list
19 of the identities of the individuals who received the
20 litigation hold notices. So it's more than that.

21 And when we had started taking these
22 depositions, as I indicated, we're learning that some of
23 the key figures, vice-presidents of various departments,
24 haven't received litigation hold notices at all,
25 according to their testimony.

1 So there is a -- this is one piece of
2 evidence. And I think that the litigation hold that's
3 subject of the litigation hold notice, the information
4 contained within it, would certainly be fairly
5 dispositive of that issue, were we even to get to that
6 step.

7 But I think at this early step, I think that
8 we are entitled to know, given that we know that
9 evidence is destroyed, whether or not the defendant had
10 an understanding and was forewarned -- or I shouldn't
11 say forewarned, but was told that these materials were
12 subject of a litigation hold notice in advance.

13 And so this is an important detail along the
14 way to ultimately meeting what will be a difficult
15 burden for anyone to prove a spoliation case, but it is
16 a serious issue. It is an issue that, quite frankly,
17 has handicapped the plaintiffs significantly.

18 Infection is one of the huge issues in these
19 cases, as is the humidity at which these devices were
20 manufactured. We know that internally Atrium employees
21 joked around about this product, calling it a seasonal
22 product because it used to -- the fish oil used to come
23 off on the packages and come off in the manufacturing
24 facility.

25 We don't have the product that was

1 manufactured under those conditions to see, you know,
2 why they called it and have our experts look at it from
3 a molecular standpoint and why it was called a seasonal
4 product jokingly, internally. We don't have that
5 ability. We've been materially prejudiced by the lack
6 of evidence. And what seems clear is that the folks at
7 Atrium knew that their product was under a potential
8 litigation and we still -- you know, this is my putting
9 the pieces together, but that's not evidence. And I
10 think that we are entitled to probe.

11 And at this point, again, we're not seeking
12 the content of the litigation hold notices. We're
13 seeking the information about whether or not, as these
14 questions were phrased and stacked upon each other,
15 ultimately whether or not on more than one occasion or
16 one occasion after receiving a litigation hold notice
17 related to products liability claims, related to the
18 C-Qur hernia mesh products, that they did not retain
19 exemplars related to the specific hernia mesh products
20 that were subject of the litigation hold notice.

21 So right now that's -- that's specifically
22 what we're seeking and we have never been given that
23 clear answer as a straight admission so that we can
24 evaluate this in light of all of the other evidence that
25 we've received to understand, before we raise such a

1 serious issue as spoliation, whether or not there's --
2 there's grounds to pursue it further or whether or not
3 this is one of those circumstances where -- where the
4 road leads us to a place where that's the end of things.

5 THE COURT: Attorney Aytch, do you want to add
6 anything further?

7 MS. AYTCH: I do, your Honor, a number of
8 things.

9 I first take issue with some of the
10 characterization of the testimony and of the -- of the
11 product, but just to hit a couple of things.

12 In this case, the exemplars are not the
13 evidence. And I think that that's an issue that's being
14 kind of glossed over. To say that, you know, none of
15 the plaintiffs were ever supplied with the mesh as it
16 was manufactured at that time, I mean, just belies
17 reality because they were -- because they were implanted
18 during those dates. So they actually did receive the
19 mesh as it was manufactured at that time. It was
20 implanted in them. And that is the evidence of each
21 individual plaintiff's case.

22 To the degree that that evidence was preserved
23 in anticipation of litigation and we have that, there is
24 going to be pathologists, I'm sure, that plaintiffs are
25 going to disclose that's going to want to talk about all

1 types of the molecular being of the mesh.

2 Furthermore, what -- the one change that
3 Attorney Orent continues to talk about is the thickness
4 of the coating on the mesh. And then at another point
5 he mentions that the mesh is supposed to be a permanent
6 implant.

7 Yes, it is, but not the coating. And the
8 coating is not supposed to be permanent and is not
9 supposed to last into duration. It is one of the bases
10 for the expiration.

11 So, again, to try to test, based on a coating
12 issue, an expired product would be unfairly prejudicial
13 to the defendants and, therefore, it's not probative and
14 not evidence of the case.

15 And, lastly, with regard to wanting to test it
16 because of what it will do in high humidity, when the
17 mesh would adhere to the packaging itself, that would be
18 noted from the packaging. It is not something that you
19 would otherwise have to test. It would be on there
20 itself. Not all samples or lots of the product had that
21 issue, which is why product manufactured at this time
22 that was not adhered to the packaging ended up being
23 implanted in a number of the plaintiffs.

24 So I think that there is just kind of a
25 conflation here as we start to move down, which sounds

1 like it may potentially at some day maybe be a
2 spoliation claim exactly what the evidence is.

3 But more to the point of this particular
4 matter, why we're here before the Court on these
5 particular responses, at least a number of these, 8, 9,
6 and I believe 5 and 7, do get at the content of the
7 litigation hold. What Attorney Orent is seeking is
8 whether or not there were ever litigation holds and
9 whether or not the product is no longer in existence due
10 to it being sold or what may have you prior to the move.
11 That part is known. And he does not need -- and
12 plaintiffs do not need and, therefore, it's their burden
13 to show, you know, to get at our attorney work product
14 and what is the content of our advice to the client with
15 regard to what would only be exemplar mesh and not the
16 evidence itself.

17 THE COURT: Okay. Attorney Orent, do you want
18 to say anything further? If not --

19 MR. ORENT: Just one quick response, your
20 Honor, to the scientific value of -- of the coatings and
21 other components of this.

22 We disagree with that. Our experts disagree
23 with that. I -- I'm not going to make a detailed
24 argument as to specifically why that is unless the Court
25 wishes to entertain it, but we -- we disagree about the

1 evidentiary value of this. We think that there is
2 significant information, again, the thickness changed
3 over time as well as some other -- other material
4 features, and the way in which -- the presence of
5 contaminants would be an item that is binary; that is --
6 doesn't change over time. It's a contaminant that's a
7 contaminant and there's physical evidence left of
8 contaminants, whether it be human hair or other
9 microbial contaminants, things that -- of that ilk.

10 So we believe that this information is highly
11 relevant and -- and we designed these as carefully as we
12 could to avoid getting into the content.

13 THE COURT: Okay. I'm going to mute the call
14 for a moment, take a very brief recess, and we'll be off
15 the record for the moment. And then we will adjourn --
16 we will be back on the record in a very short amount of
17 time.

18 (Off-the-record discussion.)

19 THE COURT: Counsel, back on the record.

20 With respect to this first question, which is
21 actually issue number 2 in the joint agenda, document
22 1006, my ruling would be in favor of the plaintiffs on
23 this. And I would -- at this point, as an informal
24 ruling based on what I've read in the letter briefs,
25 what I've heard today, and based on my understanding of

1 the law, I would informally require the defendant to
2 answer the request for admission.

3 I would find it's not protected by the
4 attorney-client privilege or the work product doctrine.
5 And I do find it is relevant, although I would not go
6 back as far as March of 2006. Based on everything I've
7 heard, the farthest I would go back would be January of
8 2010, which would be two years prior to the institution
9 of the C-Qur litigation.

10 And so my ruling would be in favor of
11 plaintiffs, but I would narrow the time frame and the
12 time frame would only begin as of January 2010.

13 So that's my informal ruling. And as we do
14 this, I think you're both familiar, I would require --
15 because I'm ruling in favor of plaintiffs, require
16 Attorney Aytch just to notify Donna Esposito if, in
17 fact, you want to go forward with formal litigation on
18 this question. And ultimately this would be, I believe,
19 a motion to compel. So the first motion would be
20 technically filed by plaintiffs.

21 But for purposes of informal ruling, that --
22 that is -- that's my ruling informally on agenda item
23 number 2.

24 So let's go to agenda item number 3.

25 And I'll issue a written order just briefly

1 summarizing my informal rulings and giving you dates by
2 which you need to let us know if you want formal
3 litigation.

4 Issue number 3 in the agenda deals with the
5 deposition of the 30(b)(6) deponent Hjalmarson and the
6 objection is to the nature of the privilege log which is
7 at docket 1006-2.

8 And so my question would be to -- is Attorney
9 Schiavone going to argue this one?

10 MS. SCHIAVONE: I am, your Honor.

11 THE COURT: Okay. My question would -- would
12 be explain to me how column 3 could be improved upon in
13 terms of giving you a description that would better
14 enable you to understand why they're privileged.

15 My understanding is deposition prep sessions
16 are generally privileged. Obviously there are specific
17 issues and specific items that may be discoverable, but
18 generally the content of deposition prep sessions with
19 an attorney are privileged.

20 And so I'm just wondering, under that
21 circumstance, where we know that this gentleman is being
22 prepared by his counsel for a deposition and they
23 haven't deleted the names of the attorneys or people who
24 are present while he's writing his notes and they are
25 generally describing that these are just notes that

1 contain communications with counsel, what -- what's an
2 example of something that could -- could give you more
3 information, just so I have a handle on that?

4 MS. SCHIAVONE: Of course, your Honor. Thank
5 you.

6 Specifically just for -- starting with the
7 first column, that is the spiral bound notebook redacted
8 for privilege. With respect to that, it was our
9 understanding, based on the testimony of the corporate
10 representative, that he had had discussions prior to his
11 deposition not only with counsel, but because he was the
12 corporate rep, had consulted with and talked with
13 various individuals within the organization and various
14 organizations to gather some information that he may
15 need in order to be able to accurately and thoroughly
16 testify on the topics that were listed in this 30(b)(6)
17 notice.

18 And we spent about a -- it must have been over
19 an hour as he talked about all the various individuals
20 who he talked with in preparation for the deposition,
21 many of which who were not attorneys. He also went on
22 to state that he had made notes regarding conversations
23 with people that he had gotten information from.

24 And so during the deposition, he later
25 testified that he had looked over those documents in an

1 effort to refresh his recollection any of the notes that
2 he had made and that he had looked over them
3 approximately the day before.

4 And when we asked him what happened to the
5 notes, he said he threw them out and that he had thrown
6 them out in a trash can. And as the testimony went on,
7 he'd actually thrown them out in the attorney's office
8 prior to his deposition.

9 They were able to locate the notes and the
10 next day, on part two of the deposition, day two of the
11 deposition, we received approximately 300 pages of
12 documents that constituted these notes that he had
13 referred to and which he had said he had looked at in an
14 effort to refresh his recollection prior to testifying.

15 With regards to the notes he made, and
16 specifically that first column that refers to the spiral
17 bound notebook redacted for privilege, I think that as
18 far as it goes with respect to being more specific,
19 there was no information regarding specifically who he
20 communicated with, whether or not they were in-person
21 communication, phone communication, email communication,
22 and the dates of the communication.

23 There has been testimony essentially that he
24 had had multiple phone conversations and additionally
25 in-person even, but again he had also testified that he

1 had made notes that were part of conversations he had
2 had with other people.

3 So I think for us to fully determine whether
4 or not those spiral notebooks are, in fact, privileged
5 documents, we would need more specifics.

6 And, as your Honor notes, there are several
7 firms involved in this litigation and so also who
8 actually was present for the conversation.

9 So it's our position that the items dealing
10 with the attorney-client assertion regarding any of his
11 notes would more specifically be the first block,
12 second, third, fourth, fifth, and sixth, your Honor,
13 could provide more detail as it relates to the method of
14 communication, the dates of the communication, and the
15 specific firms involved.

16 THE COURT: How would that help you determine
17 whether or not it's privileged, just knowing dates,
18 knowing the -- obviously the person, if it's an
19 attorney, but how is that going to assist -- my
20 understanding is this was produced overnight and it was
21 produced after they made a search for this notebook or a
22 set of notes. They were able to -- counsel was able to
23 find them and they handed them over to you the next day
24 with redactions that were made that night.

25 Is that accurate?

1 MS. SCHIAVONE: It is, your Honor, but the
2 portion that stood out to plaintiffs, of course, was the
3 fact that the notes were thrown away in counsel's
4 office. And when we asked specifically, who was present
5 when you threw away these notes, he was instructed not
6 to answer who was present with him when he threw away
7 these notes.

8 Then we asked, you know, if the trash has not
9 already been taken out, please go look for these notes.
10 They did. They were able to find them before they were
11 thrown away and then they produced them the next morning
12 and it was approximately 300 pages of documents that
13 were these notes that were provided to us.

14 THE COURT: So he was instructed not to answer
15 the question who was with you when you threw the notes
16 away?

17 MS. SCHIAVONE: Correct, your Honor. Because
18 we had asked him, and I believe we provided the
19 transcript, but he had said that -- we had asked, did
20 you use these to refresh your recollection, these notes
21 that you're referring to, and he stated in the
22 affirmative that he had.

23 And we said, we think we're entitled to those
24 if he used them to refresh his recollection. And the
25 witness then said essentially, that's going to be a

1 problem, I don't have the notes --

2 THE COURT: Oh, I read that and I'm aware of
3 the general factual scenario and circumstances, but my
4 understanding was that the deponent had thrown these
5 away. There was no -- I didn't see a suggestion that
6 his lawyers had helped him throw them away. To the
7 contrary, the suggestion was the lawyers went back
8 looking for them, discovered them, turned them over to
9 you with redactions.

10 So they weren't completely blotted out; am I
11 correct? There were -- there were notes that were
12 provided to you. There were certain pages that had
13 redactions. Is that right?

14 MS. SCHIAVONE: All of the pages in the spiral
15 notebook were redacted.

16 And with respect, your Honor, to the portion
17 about the notes being destroyed, he had testified -- and
18 this is in the portion of the deposition transcript that
19 we provided to the Court -- but it says later, on page,
20 I believe, 309 -- he talks about having destroyed the
21 documents.

22 And then on page 309, line 10, Mr. Orent said:
23 And my final question of the night is earlier today you
24 testified that you had taken some notes that you took
25 and you -- that you looked at in preparation for your

1 testimony. Do you recall that?

2 Answer: Yes.

3 Question: And you also testified that you had
4 destroyed those notes. Do you remember that?

5 They objected to the form; the witness
6 answered: That -- that is correct.

7 And then Mr. Orent said: Who was present in
8 the room when you destroyed those notes?

9 And the answer was -- they objected to form.
10 Mr. Chabot said: We've located the notes. Did you hear
11 that, counsel says, and we said, yes, we did hear that.
12 And then we go on to say -- they'll produce a copy of
13 it.

14 And then he says, Mr. Orent, on page 310, your
15 Honor, line 12: He still hasn't answered the question
16 about when the documents were destroyed initially, who
17 was present.

18 Defense counsel object, form; I mean, we just
19 explained that the notes have been located.

20 Plaintiff's counsel: No, I understand that.
21 I'm still entitled to know.

22 And defense counsel responds: You're not
23 going to answer that question.

24 And the witness said okay.

25 Mr. Orent, are you instructing him not to

1 answer?

2 And Ms. Ocariz said: I --

3 THE COURT: Hello?

4 MS. SCHIAVONE: Hello? Can you hear me, your
5 Honor?

6 THE COURT: I can hear you fine. Somebody
7 else just got on the line, I think.

8 Go ahead.

9 MS. SCHIAVONE: And, thereafter, your Honor,
10 at the beginning of page 11, after -- 311, after the
11 witness is instructed not to answer as to who was
12 present when he threw the notes away at counsel's
13 office, Mr. Orent said: And are you going to follow
14 your counsel's advice?

15 And he said -- the witness said: I am.

16 And so we never did come to learn what lawyer
17 was present when he threw away his notes at counsel's
18 office.

19 THE COURT: Okay. And on what basis -- all
20 right. I guess I'm just going to ask Attorney Aytch
21 what basis was there to prevent the deponent from
22 answering that question?

23 Just telling him who's present, the fact that
24 there were attorneys there, would not be privileged
25 unless I'm -- you'd have to cite some case to me. But,

1 in fact, that would be something that would be in a
2 privilege log, typically.

3 So on what basis did they refuse to answer
4 that question?

5 MS. AYTCH: Your Honor, the question was who
6 was present with you when you destroyed the notes. The
7 objection -- and I think that the basis was due to the
8 harassing nature of the question because it kept
9 assuming that the notes were destroyed. There was
10 objections to form.

11 Ms. Schiavone started to read all of it, but
12 there was still the issue that the notes have been
13 located; therefore, they have not been destroyed.

14 So to continue to ask the witness at the end
15 of the day, the very last question, after having been
16 testifying for this amount of time, flying in from
17 Sweden, who was there with you when you destroyed the
18 notes was harassing because, one, they were not
19 destroyed, and, two, it presupposes that anyone was
20 there because the attorney, when they learned about
21 this, found the notes at plaintiff's request and we
22 learned that they were in counsel's office and provided
23 those notes.

24 So this was just interposed to harass because
25 all of the notes were provided. And the spiral bound

1 notebook, my understanding, is 12 pages of notes, not
2 the hundreds of pages that Ms. Schiavone is discussing,
3 which were also the nature of this privilege log, a lot
4 of which was not redacted that shows the dates of his
5 notes, that shows who was there.

6 So in order to understand whether or not the
7 contents of the notes is something that is privileged
8 and that they have entitlement to see is there in the
9 unredacted portions of the notes as well as with the
10 privilege log. It is not necessarily with regard to the
11 answer to this question.

12 THE COURT: Okay. I do see them as separate
13 issues and I -- I had read through very quickly the
14 exhibit, but had not noticed the reference to who was in
15 the room. And there was no sort of harassment objection
16 made and there was no request to rephrase the question
17 and clearly the gist of the question was who was in the
18 room with you when you threw out your notes.

19 At that point Mr. Orent was told the notes
20 existed, so clearly they weren't destroyed. So his
21 question was going toward who was present in the room
22 with you when you threw the notes away. And had there
23 been a specific objection to the harassment and the
24 nature of his question, I could see perhaps telling your
25 client, well, don't answer that, that's harassing.

1 But ultimately not asking Attorney Orent to
2 rephrase the question to make it clear why you're
3 instructing your client not to answer a factual question
4 that is not privileged seems to me to be bordering on
5 improper. So that, to me, is concerning.

6 With respect to the privilege log, however,
7 which I see as a separate issue, I am -- and in light of
8 the unique circumstances of the case where this is
9 prepared overnight and prepared as the defendant is
10 giving plaintiffs all of the notes with redactions --
11 now, clearly, some of them contained -- all pages had
12 been redacted, but it seems to me that the reason for
13 the redactions -- so long as the names of the people who
14 are present are clear so that, you know, counsel can
15 tell that these are conversations that counsel for
16 defendants are having with their 30(b)(6) deponent in an
17 effort to prepare that person for a deposition, it seems
18 to me that it would almost be asking defendants to tell
19 plaintiffs the content of what it was they were talking
20 about as to -- in terms of getting into more detail.

21 So I'm not as offended by the privilege log in
22 light of the circumstances of this deposition and in
23 light of the way the descriptions are general. They'd
24 be too general for your -- I think a typical privilege
25 log, but when you're preparing a deponent for a

1 deposition, it seems to me that attorney communications
2 about the deposition and what documents to study, all of
3 that gets into work product and gets into
4 attorney-client privilege issues.

5 So my inclination is to rule in favor --
6 informally rule in favor of the defendants on this
7 privilege log dispute, but I can tell you that if the
8 issue of -- if the issue of whether or not you're
9 entitled to know who was present in the room when this
10 gentleman decided to throw out his notes, the answer to
11 that would be yes. And to the extent that were -- that
12 question were before me separately, I would certainly
13 rule in favor of the plaintiffs. That question is not
14 really before me and wasn't presented to me in that way.
15 And I see the privilege log issue as separate and
16 distinct from that question.

17 So that's my informal resolution of issue
18 number 3.

19 With respect to issue number 4, this is more
20 of a question that defendants are presenting to the
21 Court and based on my reading of issue number 4, I think
22 it's early enough in the case that I would suggest that
23 the defendants' proposal to substitute another
24 bellwether plaintiff for one that has been dismissed,
25 assuming that it otherwise qualifies, makes the most

1 sense at this early stage.

2 And then with respect to you know, any sort of
3 voluntary dismissal that would happen on the eve of a
4 trial, I would want to reserve my -- you know, I would
5 want to reserve the discretion to -- and the power to
6 figure out if we need to reweigh things by adding
7 certain types of bellwether trials to our trial case
8 list.

9 But at this point I think I'm comfortable with
10 the option that both parties, actually, seem to propose,
11 which is that the defendants would simply substitute at
12 this early stage. I don't think I'm going to be in
13 favor at this stage of defendants just picking -- I'm
14 sorry -- just picking one of the plaintiffs to dismiss.
15 But I think a substitution is the fairest resolution of
16 issue number 4.

17 Issue number 5 was a little bit confusing to
18 me in terms of how it was worded, but I think what I'm
19 going to do is I'm going to reserve a decision on
20 whether we need oral argument until I read the briefs.
21 And if oral argument -- if you think it's going to be
22 helpful to me, then I certainly will schedule oral
23 argument. I'm going to wait, however, till I receive
24 the briefs on that to make a decision.

25 So I'm not sure what more you need from me on

1 issue number 5.

2 MR. ORENT: Your Honor, this is Jonathan Orent
3 for the plaintiffs.

4 That's all we really wanted to -- to alert you
5 to --

6 THE COURT: Okay.

7 MR. ORENT: -- was that there were these
8 issues outstanding and that they -- they were linked. I
9 think, though, that this issue may in some ways go away
10 or be alleviated by the -- the issue that is -- was
11 subject to my letter and subsequent discussion with
12 Ms. Aytch and an agreement that we reached informally.
13 So --

14 THE COURT: Okay. That's wonderful.

15 MR. ORENT: -- I want to --

16 THE COURT: Why don't you go ahead and jump to
17 that.

18 MR. ORENT: By way of a background, and -- I
19 hope, your Honor -- and Ms. Aytch and I've discussed
20 this morning that this issue has arisen very quickly and
21 could not in some ways be at a worse time in our
22 briefing schedule as over the weekend, plaintiffs
23 learned that Atrium's hernia mesh division, which is the
24 division that makes C-Qur, is being sold off for about
25 \$154 million. At the same point we learned that last

1 week Gettinge has reserved or bought between somewhere
2 between 180 and \$200 million of liabilities related to
3 C-Qur mesh litigation.

4 We believe that who owns the liabilities as a
5 result of this sale as well as the -- the documentation
6 showing that Gettinge AB is reserving money for a
7 liability is -- could be dispositive in favor of
8 plaintiffs.

9 So prior to sending that letter last night, I
10 sent Ms. Aytch and her colleagues an informal request
11 for four particular items and Ms. Aytch and I were able
12 to agree that the defendants would produce those items,
13 starting on November 6th -- excuse me -- starting on
14 Friday and ending November 6th and if the Court was
15 agreeable to this, extending the briefing deadlines so
16 that we could evaluate the information and take in those
17 documents.

18 So, for the record, I'm just going to read
19 the four requests that I had made last night and that
20 Ms. Aytch on the phone had agreed today to produce
21 within two weeks. And then I'll circle back with the
22 briefing schedule and then allow Ms. Aytch, if she has
23 any commentary or additions to what I understood the
24 agreement to be, to put that on the record as well.

25 THE COURT: Go ahead.

1 MR. ORENT: So the four -- the four items that
2 we requested are as follows:

3 Number one, the purchase and sale agreement of
4 Atrium's hernia mesh business; number two, all documents
5 reflecting the retention of liabilities related to C-Qur
6 mesh; number three, all documents related to the
7 decision to reserve approximately \$180 million for
8 liabilities and defense costs related to C-Qur hernia
9 devices --

10 THE COURT: 180 million? Did you say reserve
11 180 million?

12 MR. ORENT: Correct.

13 THE COURT: Okay. Go ahead.

14 MR. ORENT: For liability -- for liabilities
15 and defense costs related to C-Qur hernia devices.

16 Number 4, all board meeting minutes related to
17 the proposed sale; and -- and I misnumbered this in my
18 email; I misnumbered it as number 4 also -- but all
19 documents used to prepare the press releases and
20 presentations related to the above numbers 1 through 4.

21 So my understanding by agreement with
22 Ms. Aytch is that the defendant will voluntarily produce
23 that material starting with the purchase and sale
24 agreement on this coming Friday and the balance of the
25 material by November 6th.

1 The plaintiffs will then, if the Court is
2 agreeable, have two weeks to respond to the outstanding
3 motion to dismiss, giving us a due date of
4 November 10th -- November 20th. That because of the
5 Thanksgiving holiday and the extension that the
6 defendants' due date would be December 7th for a reply,
7 if the Court is agreeable to that. That's a Monday.

8 THE COURT: That is agreeable to the Court
9 and, in fact, my notes after reading your letter reflect
10 something similar, that I was going to propose to extend
11 your deadlines for your objection, extend the --
12 obviously extend the deadline for the reply and perhaps
13 allow parties -- to the extent you agree on such things,
14 of course, the Court will be amenable -- but to the
15 extent you need page limits to be exceeded -- it seems
16 to me a reply might require more than I think the
17 current page limit for a reply under these
18 circumstances -- but obviously to the extent the parties
19 agree, just file an assented-to request and I'll grant
20 such a request.

21 So that all seems reasonable to me and I
22 will --

23 MS. AYTCH: Your Honor --

24 THE COURT: Yeah, go ahead, Attorney Aytch.

25 MS. AYTCH: I'm so sorry. Do you mind if I

1 just put a couple of things on the record --

2 THE COURT: Not at all.

3 MS. AYTCH: -- with regard to this?

4 THE COURT: Go ahead.

5 MS. AYTCH: I just wanted to clarify. And I
6 may have misheard Jonathan. This isn't to cast
7 aspersions.

8 But I believe that the sale price that you
9 mentioned was a good bit higher than the sale price.
10 While I don't know that that's germane and if that issue
11 does become germane during discovery it would be out,
12 but I don't want to go without correcting that the sale
13 was not 454 million, to my understanding.

14 And also just wanted to note that the
15 agreement is to consider the request that Mr. Orent read
16 into the record as the request for production pursuant
17 to the rule. However, as we discussed, that the
18 responses would be truncated. We will start getting the
19 documents out that we can on the U.S. side, as Mr. Orent
20 noted, by the 6th -- by this Friday, I'm sorry -- but
21 all of the documents and the responses, since we're
22 going to do written responses as well, will be in
23 plaintiffs' possession by November 6th.

24 And then as he mentioned, their response would
25 be due two weeks after that and then our reply on

1 December 7th.

2 THE COURT: Okay. All right. That sounds
3 reasonable to the Court. And I think with respect to
4 that, I think I can include those details in the next
5 procedural order that I issue after this status
6 conference and spare you the time it would take to file
7 a joint assented-to request to extend this briefing
8 schedule. I'll try to go ahead and articulate that in
9 the order.

10 And then I'll also let you know in the
11 order -- I'll just summarize briefly what we discussed
12 and what my informal resolutions were and then give you
13 a date by which you need to notify Attorney Esposito
14 that you actually want formal litigation.

15 I think that covers the agenda for today's
16 status conference.

17 Is there anything else that needs to be
18 discussed?

19 MR. ORENT: Not from the plaintiffs, your
20 Honor.

21 THE COURT: Attorney Aytch?

22 MS. AYTCH: Not in the -- not from the
23 defendants, your Honor.

24 THE COURT: All right. Then our status
25 conference has concluded and Court is adjourned. Thank

1 you, Counsel.

2 MS. AYTCH: Thank you.

3 MR. ORENT: Thank you, your Honor.

4 (Proceedings concluded at 3:25 p.m.)

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

C E R T I F I C A T E

I, Liza W. Dubois, do hereby certify that the foregoing transcript is a true and accurate transcription of the within proceedings, to the best of my knowledge, skill, ability and belief.

Submitted: 11/1/18

Liza W. Dubois
Liza Dubois, RMR, CRR
Licensed Court Reporter No. 104
State of New Hampshire