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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

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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.

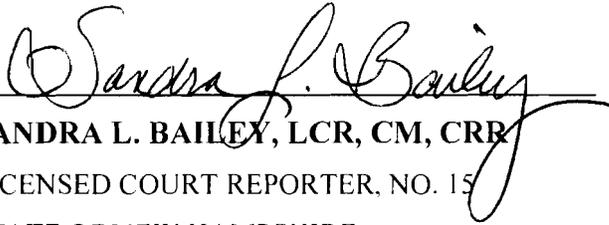
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THE COURT: All right. We are adjourned then.  
Thank you.  
(Hearing concluded at 10:25 a.m.)

C E R T I F I C A T E

I, Sandra L. Bailey, 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: 11/22/2017

  
SANDRA L. BAILEY, LCR, CM, CRR  
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