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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 \*  
\* \* \* \* \*

1:16-md-02753-LM  
December 14, 2017  
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
  
- David Selby, II, Esq.  
Bailey & Glasser LLP

Appearances Continued

For the Defendants:

Enjoliqué D. Aytch, Esq.  
Rebecca Ocariz, Esq.  
Hugh J. Turner Jr.  
Akerman LLP

Pierre A. Chabot, Esq.  
John E. Friberg, Esq.  
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Court Reporter:

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

2 THE COURT: Good afternoon, counsel. This is  
3 Judge McCafferty. I'm here with a court stenographer  
4 and my law clerk and intern.

5 And let me just state for the record this is  
6 MDL docket number 16-md-02753-LM. It is the MDL case.

7 And what I'd like for everybody to do is to  
8 identify themselves for the record and just play by the  
9 usual rules, which is that counsel that are part of the  
10 leadership team are permitted to speak at this telephone  
11 conference. Those who are not part of the team shall  
12 just mute their phones. And please do not put any --  
13 put us on hold at any time.

14 And if you do speak during this conference, if  
15 you could identify yourselves, even if you've already  
16 identified yourself once. It's just easier for our  
17 court reporter to take down what you're saying if she  
18 knows who's speaking and it just properly identifies the  
19 speaker for the record.

20 So let's start by just identifying who is on  
21 the phone for the defendants.

22 MS. AYTCH: Good afternoon, your Honor. For  
23 the defendant, this is Enjoliqué Aytch; A-y-t-c-h is the  
24 last name.

25 MS. OCARIZ: Rebecca Ocariz, O-c-a-r, as in

1 Robert, i-z, as in zebra.

2 THE COURT: I thought there were others on  
3 the --

4 MS. AYTCH: Jack and Pierre, you may go --

5 MR. CHABOT: Your Honor, Pierre Chabot,  
6 C-h-a-b-o-t, here for the defendants.

7 MR. FRIBERG: Jack Friberg, F-r-i-b-e-r-g, for  
8 the defendants.

9 THE COURT: And Attorney Turner is not on the  
10 line?

11 MS. AYTCH: He briefly stepped out, your  
12 Honor. He said to continue without him and he will  
13 resume, but he doesn't intend to speak, so the Court can  
14 continue. Thank you.

15 THE COURT: Okay. All right. And for  
16 plaintiffs?

17 MR. HILLIARD: This is Russ Hilliard, your  
18 Honor, plaintiffs' liaison counsel, H-i-l-l-i-a-r-d.

19 MS. LOWRY: And Susan Lowry --

20 MR. HILLIARD: Good afternoon, your Honor.  
21 Sorry, Susan.

22 MS. LOWRY: Oh, I'm sorry. This is Susan  
23 Lowry, L-o-w-r-y.

24 MR. ORENT: Good afternoon, your Honor.  
25 Jonathan Orent, O-r-e-n-t, plaintiffs' lead counsel.

1 THE COURT: All right.

2 MR. SELBY: David Selby, S-e-l-b-y.

3 MATHEWS: Todd Mathews, M-a-t-h-e-w-s.

4 MS. SCHIAVONE: Ann Schiavone,  
5 S-c-h-i-a-v-o-n-e.

6 MR. EVANS: Adam Evans, E-v-a-n-s, for the  
7 plaintiff.

8 THE COURT: Excellent. I think we've got  
9 everybody.

10 Let's -- let's just get right into the joint  
11 agenda. We'll start with the first few items. They  
12 look as though they may be fairly quick.

13 Number 1 -- Attorney Orent, would you like  
14 to --

15 MR. ORENT: Yes.

16 THE COURT: -- summarize number 1 and where  
17 you are?

18 MR. ORENT: Absolutely, your Honor.

19 With regard to the plaintiff profile form that  
20 this Court had previously entered as Exhibit 3G or Case  
21 Management Order 3G, we've collectively noticed that  
22 there's some logistical issues with it and -- for  
23 example, the instructions neglected to mention where to  
24 serve to the profile form, a couple of other minor  
25 issues.

1           And so we, along with the defendants,  
2 collectively amended that profile form to provide  
3 clarity to folks who -- who otherwise might have  
4 confusion on the issues, allow it to be more easily  
5 filled out.

6           And so we've submitted that to the Court as  
7 part of our agenda item today and we'd like the Court's  
8 blessing to replace the prior exhibit as part of Case  
9 Management Order 3G with this new Plaintiff Profile  
10 Form.

11           THE COURT: Okay. Assume there's nothing more  
12 to add to that, anything --

13           MS. AYTCH: Your Honor --

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

15           MS. AYTCH: I am so sorry, your Honor, for  
16 cutting you off.

17           I did want to add one thing and it is an error  
18 on the defendants' part, as we were the filer.

19           All of the authorizations that were in the  
20 original Exhibit A should also be in the amended profile  
21 form Exhibit A, but they were not contained in the  
22 exhibit that was attached to the agenda. So with the  
23 Court's indulgence following this conference, I would  
24 like to resubmit the amended profile form with all of  
25 the necessary authorizations that should have been in

1 there.

2 THE COURT: Okay. That is not a problem then.  
3 So I will wait and, upon receipt, I will then give you  
4 that approval and we will substitute Exhibit A and add  
5 that to Case Management Order 3G.

6 Okay. Now let's move to number 2. Let me  
7 just --

8 MR. ORENT: Your Honor, the --

9 THE COURT: Go ahead.

10 MR. ORENT: -- the parties in principle are in  
11 agreement with the concept of jointly correct --  
12 collecting medical records that will be used in the  
13 litigation.

14 The defendants have contracted with a  
15 particular provider, LMI Litigation Management, Inc.,  
16 and they have sent a contract to the plaintiffs for  
17 review and edit. We are in the process of obtaining  
18 comments from a variety of counsel and have edits that  
19 we're making and we have promised to get those to  
20 defendants by the 20th and are on schedule to do that.

21 So it's our hope that we will be able to get a  
22 joint collection agreement on the record certainly in  
23 advance of the next conference, but hopefully before  
24 that.

25 THE COURT: All right. You want to add

1 anything, Attorney Aytch?

2 MS. AYTCH: No. I just wanted to add that  
3 this vendor is already named as the collection's vendor.  
4 And, honestly, it's kind of on their behalf. They --  
5 upon the receipt of the initial plaintiffs' profile  
6 forms, they had begun collecting records. I believe  
7 numerous plaintiffs have gotten those notifications. So  
8 since they've already begun kind of providing the  
9 services, they've just been concerned, given the  
10 outstanding nature of the agreement, and wanted to have  
11 some movement on that.

12 But I've communicated with them the December  
13 20th date, which seems to be fine as long as there, I  
14 guess -- and we can talk it out at the time -- would not  
15 be too many substantive changes to the material terms,  
16 but since that is already ruled upon under Case  
17 Management Order 3G, it shouldn't be an issue.

18 THE COURT: All right. Good. Then let's go  
19 to the pathology protocol, agenda item number 3. It  
20 looks as though you had one issue, and you hoped to work  
21 through that issue prior to today.

22 MR. ORENT: That's correct, your Honor.  
23 We've -- we've reached, largely, agreement on the -- on  
24 the scope of the order and in the language of the  
25 attachments to the order with one minor difference and



1 we'd like your Honor to give us some guidance on that  
2 minor issue.

3           The issue is, briefly, as follows. When we  
4 send a letter to a facility under this agreement,  
5 plaintiffs are proposing that they use a particular  
6 preservative, a chemical called formalin, to preserve  
7 the pathology. The defendants, on the other hand, have  
8 requested that a -- that the facility use its own  
9 discretion in the fixative that -- that they are looking  
10 to use.

11           So that's the -- the minor issue and it's our  
12 hope that we would have -- on behalf of the plaintiffs,  
13 it's our request that the Court order that the letter  
14 request that the facility preserve the pathology in  
15 formalin.

16           And the reason for that, just briefly, your  
17 Honor, is severalfold. One, formalin is the most widely  
18 used preservative in the world. It is, by far, a  
19 standard practice in the field of pathology to use a  
20 formalin fixative.

21           Now, with regard to the variation between  
22 facilities, since most facilities will be using formalin  
23 anyway, it's important to plaintiffs that they be  
24 treated in a consistent manner from facility to  
25 facility. To the extent that experts are going to be

1 looking at large numbers of samples and drawing  
2 inferences or conclusions from the review of a large  
3 number of samples, we believe that adding an  
4 additional -- an additional variable is not helpful and  
5 that to the extent that there's any biases or anything  
6 like that drawn from the use of formalin as opposed to  
7 something else, it can be treated and controlled for in  
8 the process of -- the expert review and we get that  
9 benefit by abusing it conservatively and consistently  
10 throughout the processes.

11 I would also add that the use of formalin is  
12 actually prescribed by Atrium, the company itself, as  
13 the manner in which it is to receive explants that are  
14 sent back to them as a company.

15 So when explant -- Atrium receives complaint  
16 files and the doctors actually send explanted mesh back  
17 to Atrium, Atrium's standard protocol and requirement is  
18 that the process -- that the -- that the products be  
19 placed in formalin. And so we believe that this is  
20 consistent with practices of Atrium; it's consistent  
21 with practices of pathology; and it provides for the  
22 standard -- for the creation of standard protocols for  
23 experts to go by and allow them to utilize the best  
24 science techniques going forward.

25 Just briefly, that's -- that's what plaintiffs

1 are seeking.

2 THE COURT: Attorney Aytch, do you want to add  
3 anything to that?

4 MS. AYTCH: Yes. Thank you, your Honor.

5 Mr. Orent did a good job kind of giving an  
6 overview of what the issue is. The language that would  
7 be in the letter to the facilities, defendants' proposed  
8 language asks them to preserve it in the manner  
9 customary with the facility's ordinary course of  
10 business, whereas Mr. Orent noted that plaintiffs are  
11 asking for ten percent formalin to be used.

12 As we know from Science Day and just other  
13 discussions with the plaintiffs, we know that one of  
14 their theories is that the polypropylene itself degrades  
15 in vivo and as will be, you know, litigated throughout  
16 and presented later, we have literature and other  
17 scientific literature that evinces the fact that it is  
18 not degrading in vivo, but actually the presence of  
19 absorbed protein formaldehyde coating, so here formalin,  
20 that allows for this degradation to appear and to take  
21 place.

22 So defendants are just not in a position that  
23 they can assent to the stipulation of the use of a  
24 material that is in contradiction with a theory of our  
25 case.

1           One of the issues, as we understood the whole  
2 reason for the exercise, in going through and amending  
3 the pathology protocol, was the plaintiffs' concern that  
4 the facilities would not be diligent in following our  
5 instructions; hence, the defendants' suggestion that we  
6 just have them preserve it in the manner that's  
7 customary and then we -- you know, inform us what that  
8 manner is as opposed to instructing them to do a  
9 particular thing, considering the original concern was  
10 that they would not be inclined to follow instructions.

11           So that's essentially the defendants' position  
12 and concern with that language.

13           MR. ORENT: Your Honor, if I might just  
14 respond for a moment.

15           My concern with -- is twofold. Again, as  
16 Ms. Aytch noted, the defendants' position is to leave it  
17 up to the facility. And by definition, most facilities  
18 are going to use formalin anyway. And what we're  
19 looking for is consistent treatment of the product, the  
20 mesh, as it's been explanted.

21           Now, there is going to be some disagreement as  
22 to the effect of formalin on the device. However, that  
23 can be handled in a number of other ways. For example,  
24 I know of at least one expert who has maintained  
25 pristine mesh in formalin for several years in the

1 vaginal mesh litigation as to prove that it doesn't  
2 result in degradation of the material and as an exterior  
3 control to the argument -- excuse me, as to the argument  
4 that mesh actually degrades because of formalin.

5           So I think that it can be dealt with. It's  
6 going to be something that we need to be dealing with  
7 anyway at an expert level, but if we have some product  
8 using formalin, some product not using formalin, now we  
9 don't have a consistent way to deal with it throughout  
10 the entire litigation and, quite frankly, we run the  
11 risk of some facilities not using any fixative, which  
12 will result in the robbing of the specimen itself.

13           So for those reasons, we think that the  
14 commonsense approach is the approach that Atrium itself  
15 recommends in its ordinary course of business in its  
16 standard operating procedures, which is to use formalin.

17           THE COURT: Attorney Aytch, do you want to say  
18 anything further on this one?

19           MS. AYTCH: The only thing further I would say  
20 is what Atrium uses in its, you know, more amicable  
21 setting of reviewing and evaluating mesh is different  
22 than what we would be stipulating here in a litigation  
23 setting.

24           And, moreover, again, it's really just the  
25 assent. The defendants cannot assent to particular

1 language that is in contradiction, which Attorney Orent  
2 has noted, is going to be a disputed issue in this -- in  
3 this litigation.

4 THE COURT: Okay. All right. So I think I  
5 understand and having heard the issue presented to me,  
6 you want me to resolve this. I resolve it in favor of  
7 plaintiffs on this one and it looks as though this is  
8 widely used in a standard protocol and I think reducing  
9 variables is a good result.

10 So ultimately I'm going to resolve this one in  
11 favor of the instruction to the facility to use the  
12 formalin. So -- and I'm ordering that; thereby  
13 defendants are not agreeing to it.

14 All right. Number 4, status of discovery.

15 Anybody want to -- I know this one raises also  
16 your 30(b)(6) issue, but is there anything independent  
17 in status of discovery you want to talk about before we  
18 deal with the 30(b)(6) issue?

19 MR. ORENT: Your Honor, for the plaintiffs, I  
20 just want to mention that we were able to successfully  
21 narrow -- from a hundred and something requests for  
22 production that covered multiple entities, we were able  
23 to both narrow the number of entities that we were  
24 seeking documents from that are within the Gettinge  
25 family as well as the overall number, you know, almost

1 cut it not quite half; I think we're about 70 requests  
2 for production and we believe that those are all  
3 tailored.

4 The defendants will be responding and I'm sure  
5 may have concerns that continue, but we're willing to  
6 work and continue to work with defendants on that.

7 With regard to some of the other  
8 jurisdictional discovery that is going on, given the  
9 pace of where we are, Ms. Aytch and I and Ms. Ocariz  
10 this morning spoke and we believe that there may need to  
11 be some modification to some of the deadlines that the  
12 Court has set for jurisdictional motion practice and we  
13 are endeavoring to see if we can reach agreement on that  
14 so that we can accommodate the jurisdictional process,  
15 discovery process, in an orderly -- orderly fashion.  
16 Excuse me.

17 THE COURT: All right. Okay. Anything else  
18 on number 4, Attorney Aytch?

19 MS. AYTCH: No. Attorney Orent covered it.  
20 Thank you, your Honor.

21 THE COURT: Okay. Well, then, we will move to  
22 number 5, Plaintiffs' Motion to Amend Confidentiality  
23 Order and then we have the 30(b)(6) -- let's deal with  
24 30(b)(6) first. So if you don't mind, let's jump ahead  
25 to 6.

1           And I've read the agenda item and then I've  
2 read your submissions. And my take on this, frankly, is  
3 that you're asking me for an advisory opinion on  
4 something that's not quite ripe yet and at this point  
5 you both are rather in agreement as to what you should  
6 do if, in fact, an issue becomes ripe.

7           I appreciate you putting me on advance notice  
8 of the issue, but I'm not seeing a dispute that I need  
9 to resolve at this stage.

10           That's my take on number 6.

11           Anybody want to be heard on that before we  
12 move to number 5?

13           MR. ORENT: The plaintiffs don't have anything  
14 to add, your Honor.

15           MS. AYTCH: Your Honor, the defendants don't  
16 have anything to add, your Honor. We will bring the  
17 issue to the Court at a -- at the time that it's more  
18 ripe.

19           THE COURT: Okay. Thank you. All right.

20           So now we've got number 5 and I think that is  
21 our last issue for this agenda; am I correct?

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

23           THE COURT: Okay. All right. And this came  
24 up at our last status conference and I just wasn't  
25 prepared to give you any sense of -- of where I would --



1 I would go on this. And you both gave me letters --  
2 letter briefs, if you will, and cited case law.

3 I have read your letters and I have read the  
4 cases that you have cited and what I want to do is just  
5 give you any opportunity to make some sort of argument  
6 to me on the record now.

7 I also read the most recent submission in  
8 Judge Story's order out of Georgia that was recently  
9 filed as well.

10 So let me hear from plaintiffs and then I'll  
11 hear from Attorney Aytch or whoever is going to speak  
12 for the defendants.

13 Attorney Orent, are you the person who will be  
14 speaking for plaintiffs on this one?

15 MR. ORENT: Well, your Honor, it'll be a  
16 combination of me and Mr. Mathews.

17 THE COURT: Okay.

18 MR. ORENT: And, really, I think that the  
19 papers pretty much set forth our thinking on this issue,  
20 but, really, just to bottom line it, this issue -- and  
21 to refocus it, this issue started as a motion to amend  
22 the confidentiality order and has morphed into and taken  
23 on almost a life of itself relating to plaintiffs'  
24 *ex parte* communications which, in the words of the Court  
25 in *Vioxx* and in other courts, it would also be a

1 dereliction of plaintiffs' duty if we weren't having  
2 these conversations with -- with experts.

3 But that really isn't the purpose of this  
4 motion. The purpose of this motion is to amend the  
5 confidentiality order to allow us to show documents to  
6 these witnesses, just like any other witness that we  
7 would prepare in the course of litigation. And that  
8 really is where we think the focus of this should be.

9 The purpose of the confidentiality order is  
10 best served and the protection of, quite frankly,  
11 defendants' documents from being widely distributed are  
12 best served by modifications to the confidentiality  
13 order. It will save the plaintiffs significant time and  
14 expense as well as the defendants and the court  
15 resources by allowing us to not have to go into the same  
16 number of motions to decertify documents as confidential  
17 and de-designate those documents.

18 So, in sum, that's the issue and I just wanted  
19 to refocus the Court on it. I don't know if Mr. Mathews  
20 has any substantive items that he wants to follow up  
21 with related to that, but, otherwise, we'll rest on our  
22 papers.

23 THE COURT: Okay. I -- I just have one  
24 question or point of clarification.

25 So I'm looking at the protective order. I'm

1 looking at paragraph 7 and particularly looking at 7b8,  
2 which is entitled Others by Consent.

3 Are you with me?

4 MR. ORENT: Yes, your Honor.

5 THE COURT: Okay. And that subparagraph of  
6 the protective order contemplates that if the parties  
7 cannot agree and give consent with respect to categories  
8 of people who can be shown the confidential documents,  
9 then the other option is upon order of the Court and on  
10 such conditions as may be agreed or ordered.

11 And so the protective order contemplates that  
12 if the parties can't consent, which appears to be the  
13 case, then the Court -- the other option is that the  
14 Court order -- issue an order.

15 And so I'm not seeing where you need to modify  
16 or change the protective order. Certainly if I were to  
17 allow this, it would be -- I would issue an order, I  
18 guess I would call it a 7b8 order, and I would attach it  
19 to Case Management Order No. 3E.

20 So I'm not -- I'm not seeing this really. I  
21 know both -- both parties really, particularly  
22 plaintiffs, pursued this as a modification of the  
23 protective order and I'm just not seeing it technically  
24 as fitting in to a modification which would require a  
25 showing of good cause, et cetera.

1           It seems to me that the protective order  
2 actually contemplates just -- just this situation and  
3 that the Court would resolve it.

4           MR. ORENT: We are basically in agreement. I  
5 just -- I was looking at paragraph 15 is the trigger,  
6 though you're absolutely correct, your Honor, and so we  
7 are looking for an order from the Court relative to the  
8 protective order.

9           And I guess my overriding concern was that I  
10 was a little concerned that this issue had morphed into  
11 an issue relating to *ex parte* contact as opposed to an  
12 issue relative to the confidentiality order.

13           THE COURT: Okay. All right.

14           And, Attorney Mathews, did you want to be  
15 heard on this? I --

16           MR. MATHEWS: Thank you, your Honor. I think  
17 Mr. Orent's covered it fairly well. I think the  
18 overarching issue here is what we're running into as  
19 we're getting through the documents, so many of the  
20 documents are marked confidential that are really public  
21 domain documents already that even just showing those  
22 documents to the treating physicians becomes burdensome  
23 with the confidentiality mark on them.

24           And so I think that this was an attempt to  
25 alleviate that issue and not having to bring numerous,

1 numerous documents through the court, process more from  
2 an efficiency issue than anything, but I certainly  
3 understand and appreciate where the Court's coming from.  
4 And so other than that, I have nothing further to add.

5 THE COURT: Okay. All right. Okay. Let me  
6 then move to Attorney Aytch. Will you be lead counsel  
7 on this in terms of the argument?

8 MS. AYTCH: I will, your Honor.

9 THE COURT: Okay. All right.

10 Let me ask you this. If, in fact, I were to  
11 informally resolve this against you, what would -- what  
12 would be the conditions that you would want me to order?  
13 Let's presume that you lose on the merits. What would  
14 you want to propose by way of conditions?

15 And I'll give you some examples. Obviously  
16 Judge Story wasn't dealing precisely with the issue  
17 that -- that the parties here are dealing with; in fact,  
18 I didn't see many of the cases that were dealing just  
19 precisely with the issue of confidential documents. But  
20 what would your -- what would you propose by way of  
21 conditions? And I would give you some examples.

22 The -- the -- hold on one second.

23 MS. AYTCH: I'm sorry, your Honor. Are you  
24 giving me examples first or are you asking me for  
25 suggestions first? I'm sorry.

1 THE COURT: I'm giving you some examples --

2 MS. AYTCH: Okay.

3 THE COURT: -- so that you can then tell me  
4 what you would prefer.

5 For instance, what would the two of you, you  
6 and Attorney Orent, if you were negotiating an  
7 agreement, what would you be looking for? And Judge  
8 Story, I think, required that at least a certain time  
9 frame prior to the treating physician's deposition that  
10 the plaintiffs would provide the defendants with the  
11 identity of all the documents that would be marked as  
12 confidential provided to that treating physician during  
13 this -- this communication.

14 So prior to the deposition, the identity of  
15 the documents would be revealed; the date of -- of the  
16 communication; the -- the length of time, the duration  
17 and participants in the communication with the treating  
18 physician; and then obviously, you know, plaintiffs  
19 would comply with the protective order, paragraph 7 of  
20 the Case Management Order 3E with respect to any of  
21 these documents.

22 So those are examples of the types of provisos  
23 or conditions and I'm wondering what you would be  
24 looking for by way of such conditions.

25 And we'll get to the merits in a moment. I

1 just want to hear your ideas with respect to appropriate  
2 conditions.

3 MS. AYTCH: Thank you, your Honor.

4 Ideally, if we were to lose on the merits  
5 here, as a condition I would ask just for the portions  
6 of the conversation with the treater concerning the  
7 confidential documents, that we be allowed to be a --  
8 you know, a party to that conversation. We wouldn't  
9 have to have a speaking role, but we'd at least be  
10 listening in on only the portion that deals with our  
11 confidential documents.

12 I'm sorry? Okay.

13 Also as a condition, because of that, I would  
14 ask -- so not a time frame prior to the deposition,  
15 because at that point you're, you know, also  
16 meaningfully preparing for a deposition, not just kind  
17 of reviewing just the documents that plaintiff may have  
18 discussed with the physician in an *ex parte* setting, but  
19 we be notified of what confidential documents would be  
20 dealt with at these discussions prior to the *ex parte*  
21 confidential -- I meant the *ex parte* communication, not  
22 just prior to the deposition.

23 And then the other conditions are just the  
24 ones that the Court read -- or just the ones that the  
25 Court read in the order from Judge Story.

1 THE COURT: Okay. All right.

2 Now, let me ask Attorney Orent; Attorney Aytch  
3 proposes two additional conditions on top of the four  
4 that I proposed or threw out by way of example. Would  
5 you object to those two conditions, two additional  
6 conditions?

7 MR. ORENT: We would, your Honor, and there  
8 are some issues with each of them.

9 With regard to being a party to the  
10 conversation, first of all, this is a -- we -- let me  
11 strike that and start over.

12 Being a party to the conversation creates a  
13 number of issues for plaintiffs. First of all, we have  
14 a right to speak with the doctors and have a free and  
15 candid conversation with them. The defendants are able,  
16 during the course of the deposition, to ask them,  
17 certainly, about the subject matter of the conversation,  
18 but having an additional party at the deposition is  
19 likely to freeze the free flow of information back and  
20 forth about the case and about all manner of things  
21 related to this.

22 I would add that Judge Story considered this;  
23 the same argument was raised by the defendants in the  
24 Ethicon Physiomesh matter and the judge declined with  
25 this condition on that.



1           We think that similar to the way that  
2 Judge Story at least indicated or as we argued to him in  
3 chambers there that the -- if we have to go about  
4 scheduling and including defendants in a schedule,  
5 seeking to find a mutually convenient time, then working  
6 with the doctor -- the doctors are now more likely to  
7 get their own lawyers if they're finding out that there  
8 are going to be multiple lawyers sitting in. The  
9 doctors are more likely to decline, quite frankly, to  
10 participate and also, quite frankly, I do again,  
11 moreover, I really do feel like it's going to chill the  
12 conversation.

13           With regard to condition B, what I took it to  
14 mean was that the scheduling would be somewhat  
15 restricted as to when we could have these conversations.  
16 We, by its very nature and the nature of the mass tort,  
17 are necessarily going to be talking to these folks in  
18 the period immediately before their depositions. There  
19 are so many of them and, quite frankly, doctors'  
20 schedules and there is sometimes a reluctance to meet  
21 with us for any significant period of time before the  
22 deposition or before depositions are noticed.

23           I think that we can certainly, to the extent  
24 that the deposition meeting -- the predeposition meeting  
25 with the physician is going to encroach on time or sort

1 of get closer to the defendants' time, I have no  
2 objection to providing documents certainly in the time  
3 as the Court identified in Judge Story's order. That  
4 should give more than sufficient time for the defendants  
5 to prep and, really, when the meeting occurs, even as  
6 material as the fact that the defendants have the  
7 documents, the identity of the documents, then the other  
8 information that's provided so that they can ask  
9 appropriate questions as to what the conversation was  
10 about.

11 So we don't think that -- that that is  
12 practical, that that condition is necessary, in light of  
13 1 through 4 and we would be supportive of 1 through 4.

14 THE COURT: Okay. I thought that  
15 Attorney Aytch was proposing that they simply be  
16 notified exactly what documents you were proposing to  
17 converse with the doctor about prior to the conversation  
18 with the doctor. That's what I thought she was saying  
19 as opposed to putting some sort of time limit.

20 MR. ORENT: I'm sorry; then I misunderstood.  
21 And, you know, I don't -- I don't know that there's  
22 going to be much difference other than my concern is  
23 what -- what is the defendant going to do with that  
24 information. You know, is it going to create more  
25 motion practice, are there going to be objections to it,

1 are we going to have to -- every time are we going to  
2 create a new layer of motion practice by doing that.

3 Practically speaking, we don't see that  
4 there's any difference between showing the doctors the  
5 documents and identifying the documents that get shown.  
6 It also will reveal some of our thinking. If we show  
7 the defendants a list of proposed documents and then we  
8 don't actually use some of them, we're now giving away  
9 our work product as to what our mental impressions are  
10 for a particular meeting and there's strategic value  
11 that is lost there.

12 So if I'm meeting with a doctor and he says X,  
13 I might show him one document; if he says Y, I might  
14 show him another. If he says he's not interested in  
15 seeing documents, I'm not going to show him anything, at  
16 which point all of the research through defendants'  
17 files that we've done that work product, the fruits of  
18 that and the benefit are now being shared with the  
19 defendants unnecessarily.

20 So that's our -- our driving concern there is  
21 that our mental impressions could be gleaned from it.

22 THE COURT: All right. Did I -- did I  
23 understand you correctly, Attorney Aytch, with respect  
24 to the second condition you were proposing?

25 MS. AYTCH: You did understand me correctly,

1 your Honor, that we were asking for, you know, notice  
2 prior to the meeting as opposed to just days prior to  
3 the deposition when the defendants are also preparing  
4 for the deposition.

5 And I just want to also mention one other  
6 thing that was stated at the beginning of the discussion  
7 on this topic.

8 The treating physicians here are fact  
9 witnesses. They are not plaintiffs. They are not, to  
10 my knowledge and although that is premature, the  
11 plaintiffs' experts. So the idea that these witnesses  
12 need to be prepared in any way goes exactly to the  
13 concern that the defendants have here.

14 They're -- what information needs to be  
15 gleaned from them, of course, needs to be gleaned by  
16 both parties, but they are fact witnesses here, not, you  
17 know, invested parties whom either side needs to prepare  
18 on any level.

19 So -- but to answer your question, yes, you  
20 also had my second point correct.

21 THE COURT: Okay. All right. Well, let's go  
22 back to essentially the merits and plaintiffs have  
23 rested on their letter. I've read their letter.

24 Is there anything that you would like to add  
25 on the merits, Attorney Aytch, with respect to your

1 argument that is laid out in your letter to the Court  
2 dated November 20th? It's Attorney Turner's letter, I  
3 believe.

4 Do you want to --

5 MS. AYTCH: I --

6 THE COURT: Do you want to just bring anything  
7 else to my attention, make any other arguments, cite any  
8 other case law?

9 MS. AYTCH: No, your Honor. Again, I mean,  
10 just as -- after looking at both of the parties' moving  
11 papers and essentially the -- the information that they  
12 would want to glean is still information that can be  
13 determined and had at a deposition.

14 Again, the plaintiff -- the defendants are not  
15 trying to restrict the plaintiffs' access to or even  
16 having *ex parte* discussions with the treating  
17 physicians. It is limited to showing confidential  
18 documents in a context where the defendants are unaware.  
19 And although we can ask about that in deposition, we  
20 also have to do, you know, a fact-seeking portion. And  
21 if the half of our, you know, seven-hour time limit or  
22 whatever is imposed is essentially rehabilitating or  
23 providing context after getting a list only ten days  
24 before of what documents were shown, that really hinders  
25 and prejudices our ability to get factual discovery in a

1 deposition context if this framework is used. And  
2 that's all that the defendants have to say.

3 THE COURT: Okay. All right. Anybody else  
4 want to be heard on agenda item 5? And I'll certainly  
5 tell you informally how I will resolve this.

6 Anybody else want to be heard?

7 Okay. All right. Let me just start with  
8 paragraph 7b8, which we were just talking about.

9 7b8 of the protective order provides that  
10 confidential information may be shared with persons not  
11 specifically delineated "Only by written consent of the  
12 producing party or upon order of the Court and on such  
13 conditions as may be agreed or ordered."

14 Now, although the parties frame the issue in  
15 terms of whether modification or amendment of the  
16 protective order is warranted, it seems more that this  
17 exact situation is contemplated by the existing language  
18 in the protective order that the parties may seek a  
19 separate court order allowing them to share confidential  
20 information with individuals not specified in the  
21 protective order.

22 I've read your letter briefs and done some  
23 independent research and it seems there's a fairly even  
24 split of case law on both sides. Here, given the issues  
25 raised in this case and the defenses the defendants

1 intend to offer, my feeling is that plaintiffs should be  
2 able to share certain confidential information with  
3 their treating physicians.

4           Yesterday plaintiff submitted an additional  
5 letter that attached a decision from the Northern  
6 District of Georgia which allowed plaintiffs to have  
7 *ex parte* communications with treating physicians subject  
8 to certain safeguards for defendants. Frankly, that  
9 order was in line with what I had planned to say to you  
10 on this call, even before receiving plaintiffs' letter  
11 yesterday.

12           Based on my review of your original letters  
13 and my own research, my feeling is that plaintiffs  
14 should be permitted to share confidential information  
15 with their treating physicians subject to some  
16 restrictions.

17           Now, I've listened to the two additional  
18 restrictions proffered by Attorney Aytch and the  
19 defendants and I am -- I'm not going to impose those two  
20 additional conditions. However, the conditions I am  
21 going to -- I would impose, at least by way of informal  
22 resolution, are as follows:

23           At least two weeks prior to a treating  
24 physician's deposition, plaintiffs must provide  
25 defendants with, A, the identity of all documents marked

1 as confidential provided to the treating physician  
2 during such *ex parte* communications; B, the date of such  
3 communications; C, the duration of and participants in  
4 the communications; and, D, plaintiff shall comply with  
5 the protective order paragraph 7 with respect to any  
6 such documents.

7           The provisions of Case Management Order No. 3  
8 that set forth the informal discovery dispute resolution  
9 process, that's actually paragraph 5, which is document  
10 number 39, that contemplates formal motions in the event  
11 the dispute cannot be worked out informally with the  
12 assistance of the Court.

13           So as not to prejudice defendants, I will  
14 allow them to file a formal motion on this issue if they  
15 want to and I will resolve such motion in an expedited  
16 fashion, but I can tell you now that what I've said  
17 today is how I would expect to rule on such a formal  
18 motion.

19           So that -- that's my informal resolution of  
20 this dispute after I'd say very careful, close  
21 consideration of the issues you've all raised and -- and  
22 so that's the -- that's how I would resolve agenda item  
23 number 5.

24           Okay. That takes care, frankly, of our joint  
25 agenda for this scheduled conference. I'm very glad to



1 see that, frankly, you all agreed to appear via  
2 telephone. I think it -- I think it does save money and  
3 I think it is an efficient way to handle things  
4 hopefully from here on.

5 Is there anything further to accomplish with  
6 respect to this status conference?

7 MR. ORENT: Not on behalf of the plaintiffs,  
8 your Honor.

9 THE COURT: Attorney Aytch?

10 MS. AYTCH: Not on behalf of the defendants,  
11 your Honor.

12 THE COURT: Okay. All right. Well, then,  
13 unless I hear from you in the meantime -- I certainly  
14 have a pending motion I'm still working on and I'll try  
15 to get that out as soon as I can. And I appreciate the  
16 manner in which counsel continue to resolve most of  
17 these issues without Court intervention.

18 So thank you all very much and have a happy  
19 holiday. Take care.

20 MR. ORENT: You as well, your Honor.

21 MR. MATHEWS: Thank you, Judge.

22 MS. AYTCH: Thank you, your Honor.

23 THE COURT: Court's adjourned.

24 (Proceedings concluded at 2:47 p.m.)  
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: 12/29/17

Liza W. Dubois  
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Licensed Court Reporter No. 104  
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