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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 * 16-md-02753-LM
LITIGATION * December 20, 2018
* 2:45 p.m.
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TRANSCRIPT OF STATUS CONFERENCE
BEFORE THE HONORABLE LANDYA B. MCCAFFERTY

APPEARANCES:

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APPEARANCES CONTINUED:

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

2 THE COURT: Counsel, this is Judge McCafferty.
3 I'm going to go on the record now with our court
4 reporter and identify the case by name and docket
5 number.

6 In Re: Atrium Medical Corp. C-Qur Mesh
7 Products Liability Litigation, MDL number 2753-LM, all
8 cases.

9 And let's have counsel just introduce
10 themselves. At this point our court reporter is
11 familiar with last names, so I don't think you need to
12 spell them, but throughout the call if you would just
13 identify yourself right before you begin to speak, that
14 would be very helpful to our court reporter.

15 And additionally, limit speaking roles to the
16 lead counsel. You can just let me know who that's going
17 to be for whatever issue is on the agenda, and please do
18 not -- if you're not a lead counsel, just go ahead and
19 mute your phone, but do not put your phone on hold or
20 put us on hold. Thank you very much.

21 Let's go ahead and identify defense counsel
22 first.

23 MS. AYTCH: This is Enjolique Aytch for the
24 defendants.

25 MS. OCARIZ: Rebecca Ocariz for the

1 defendants.

2 MR. CHEFFO: Good afternoon, your Honor.

3 This is Mark Cheffo also for the defendants.

4 MR. FRIBERG: Jack Friberg also for the
5 defendants.

6 THE COURT: All right. Plaintiff's counsel.

7 MR. HILLIARD: Russ Hilliard, your Honor.

8 MR. ORENT: Jonathan Orent, your Honor.

9 MR. SELBY: David Selby, your Honor.

10 MR. MATHEWS: Todd Mathews, your Honor.

11 MS. LOWRY: Susan Lowry.

12 THE COURT: Okay. I think that might be
13 everybody for now. It looks like Attorney Evans may be
14 joining us at some point.

15 Okay. Let's start with the joint agenda, and
16 we'll go through the agenda item by item.

17 The discovery dispute is No. 4, so I'm going
18 to handle that last, but let's go through item by item.

19 Status of depositions. I've certainly looked
20 through that. Is there anything else anyone wants to
21 add to agenda item No. 1? Go ahead.

22 MR. ORENT: Jonathan Orent for the plaintiffs.

23 I was just going to add to this item that
24 yesterday we were given some dates for Mr. Carlton's
25 deposition on the 9th of January and Mr. Karwoski's

1 deposition on the 16th of January.

2 I've not yet had an opportunity to respond to
3 defendants. However, we will be accepting the date of
4 the 9th for Mr. Carlton's deposition.

5 We do need, due to other depositions on the
6 same date, an additional date for Mr. Karwoski.

7 Other than that, we have nothing else from the
8 plaintiffs on this issue.

9 THE COURT: Attorney Aytch.

10 MS. AYTCH: Attorney Orent said exactly what I
11 was going to say and also gave more information, so I
12 have nothing more on that, your Honor.

13 THE COURT: All right. Then we'll move to
14 agenda item No. 2, and I can shortcut this by telling
15 you that I'm going to approve this amendment and we will
16 add it to the Court's orders and we will mark it
17 accordingly. So No. 2 is taken care of.

18 No. 3 was alerting me that there is some sort
19 of dispute perhaps brewing but not yet ripe. Does
20 anything more need to be said on No. 3?

21 MR. ORENT: Your Honor, Jonathan Orent for the
22 plaintiffs.

23 No. The primary purpose of this is in light
24 of the ongoing briefing through to -- excuse me --
25 related to the motion to dismiss, these discovery items

1 which we discussed at the last hearing are directly
2 involved and may be dispositive of some of the issues in
3 that. And so we felt that it was important to alert the
4 Court that these issues were outstanding, but certainly
5 the substance is not yet ripe to address.

6 THE COURT: Okay. And these are items of
7 discovery that would affect the evidentiary hearing
8 potentially; is that right?

9 MR. ORENT: That is correct, your Honor. As
10 you may recall, at the last hearing it was just several
11 days after a shareholders' call was held by Getinge
12 where they announced the reservation of some
13 \$200 million for these cases as well as the sale --
14 subsequently through a press release the sale of the
15 mesh unit of Atrium.

16 So some of the information, for example, the
17 source of the \$200 million, is something that we have
18 yet to receive documentation on and is one of the items
19 that we're seeking through the meet and confer process.

20 So items like that which are directly relevant
21 to some of the elements involved are things that we are
22 currently discussing in the meet and confer process.

23 We're hopeful, but as yet we have not received
24 full satisfaction of our concerns as a result of
25 multiple meet and confer letters that have been sent and

1 gone back and forth on at this point.

2 THE COURT: Okay. So that really isn't an
3 issue ripe for discussion at this conference.

4 Would that be correct?

5 MR. ORENT: That's correct, your Honor. We
6 aren't at a point where we're ready for Court
7 intervention.

8 THE COURT: Okay. Anything further on that,
9 Attorney Aytch, or can we move on?

10 MS. AYTCH: No, we can move on from that.
11 It's not ripe yet. We're taking issue with some of the
12 characterizations, some that are presented here when
13 certain things were requested which were never requested
14 and read into the court record what those exact requests
15 are, but as Attorney Orent said, we are still in the
16 meet and confer process and hope that we're able to
17 resolve it, and if not, we will bring it through the
18 proper channels under CMO3.

19 THE COURT: Okay. All right. I'm going to
20 skip 4 for now.

21 5 is essentially mooted by the Court's order
22 of yesterday.

23 No. 6 would be the time frame and format for
24 an evidentiary hearing.

25 Okay. It's a little hard to hear, but I think

1 that noise has stopped.

2 And so maybe we'll also put No. 6 a little bit
3 on hold because I think this is something that the
4 parties are uniquely well-suited to resolve, but I'm
5 happy to weigh in on that and talk about a particular
6 time frame.

7 All right. No. 7 looks to put me on notice
8 that plaintiffs intend to file some sort of motion to
9 clarify with respect to the intermediate standard of
10 review on the motion to dismiss, and so again that's
11 probably not ripe for discussion today.

12 Am I right about that?

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

14 We will be filing that motion. My
15 understanding under the local rule, I think it was 7.1
16 or 71, was that we needed to give the other side notice
17 of our intention to file a sort of non-dispositive type
18 motion and get their position on it.

19 We added it to the agenda for largely notice
20 purposes, but we will certainly deal with the sum and
21 substance of that at some point when it's actually been
22 filed, and that may be as soon as this afternoon, your
23 Honor.

24 THE COURT: Okay. All right.

25 MR. CHEFFO: Your Honor, this is Mark Cheffo.

1 I agree with your Honor and Mr. Orent's
2 characterization. I think we obviously have a
3 difference of opinion as to whether reconsideration or
4 clarification would be appropriate here, but my
5 understanding of how the Court wants us to handle that
6 is to kind of address that in response to their
7 submission.

8 THE COURT: I think that's right. Obviously I
9 don't know what the request will be, but I think just
10 responding in writing, briefing the issue for me, and
11 then I can respond accordingly.

12 MR. CHEFFO: Thank you, your Honor.

13 THE COURT: Okay. No. 8 is an issue obviously
14 you continue to discuss as well, and it's regarding
15 plaintiffs' depositions.

16 Have you reached any agreement on that at all?

17 MR. ORENT: Your Honor, Jonathan Orent for the
18 plaintiffs.

19 I've had some productive discussions with Mr.
20 Cheffo over the last couple weeks relating to this
21 issue, and I believe that we have either a firm
22 agreement or close to an agreement.

23 What we have done -- what plaintiffs have done
24 is that we have sent defense counsel a list of proposed
25 dates for plaintiffs to be deposed along with sort of

1 geographic groupings, if you will.

2 So, for example, there are three individuals
3 from the state of South Carolina, and we would conduct
4 those depositions in the same week.

5 There are two individuals in Alabama. We
6 would conduct those depositions in close proximity.

7 And one of the issues is of course scheduling
8 doctor depositions as we need to take implanter and
9 explanter depositions in these cases.

10 And what I've submitted to Mr. Cheffo is that
11 we will work diligently to schedule the treating
12 depositions in as close proximity as much as possible.
13 Obviously that is a wild card with treating physicians,
14 but we will do everything that we can over the next
15 several weeks to schedule those treaters so that we can
16 minimize the number of trips to these areas and try and
17 maximize the efficiencies of having to travel in these
18 cases.

19 MR. CHEFFO: Your Honor, this is Mark Cheffo.

20 I really don't have much to add other than to
21 say I agree, and I appreciate Mr. Orent's, you know,
22 kind of cooperation and professionalism. I think we're
23 both trying to get to the same place, which is to
24 basically -- as I'm sure your Honor would want us to be,
25 as efficient as possible to make sure that we can use

1 all of our time and travel in a way.

2 So we're going to see if we can work with the
3 plaintiffs and also see if we could while we're in
4 particular jurisdictions, you know, take some doctor
5 depositions as well to the extent that that's
6 practicable.

7 So I don't think there's really anything in
8 dispute at this point. I think we're on the right
9 track, and this is probably, from my perspective at
10 least, more of a report. So I think we're in good
11 shape.

12 THE COURT: Okay. Good. All right.

13 That takes care then of No. 8.

14 So now let's head back to No. 4, and then we
15 can end with a discussion on anticipated time frame and
16 format for the evidentiary hearing.

17 MR. ORENT: Your Honor, this is Jonathan
18 Orent.

19 I'm going to just speak very briefly about
20 this issue before turning it over, to the extent your
21 Honor wants an item by item discussion, to Mr. Selby who
22 will be handling some of the bigger specifics, but I
23 wanted to just add a little bit of context to what this
24 discovery dispute is, and it is intertwined with some of
25 the motions that the Court has previously ruled on this

1 past week.

2 And in particular, this second set of requests
3 for production related to the documents used to compile
4 Reinhard Mayer's affidavit, which your Honor may recall
5 was affixed to the original motion to dismiss.

6 Mr. Mayer was the original 30(b)(6) deponent
7 prior to him coming down and being replaced with Mr.
8 Hjalmarsson.

9 This issue is of particular importance and has
10 dragged on for a while because, as your Honor is aware,
11 Mr. Mayer came and went and then we had Mr. Hjalmarsson
12 who submitted a largely identical affidavit who we
13 actually did get documents for and were able to
14 cross-examine him, but then since with the renewal of
15 the motion to dismiss there's been an almost identical
16 motion filed by Mr. Carlton that we moved to strike and
17 some additional affidavits that we feel are almost
18 identical to the issues sought in the second request for
19 production.

20 These affidavits are largely not based in our
21 belief upon personal information and in fact go as far
22 as saying that they are based on communication,
23 documents, and things other than the happenstance of the
24 individual, the knowledge of the individual plaintiff.

25 Our concern, as we outlined in our motion to

1 strike Mr. Carlton, was that the 30(b)(6) process is
2 designed to curb the bandying about of witnesses from
3 saying, for example, well, John Smith says that Roger
4 Clemens has the particular information, and Roger
5 Clemens says Pedro Martinez has it, and Pedro Martinez
6 says that Curt Schilling has it, and we never find out
7 what the source of the information is.

8 That's the point of a 30(b)(6) process, and
9 what we have here is phenomenally where the same
10 affidavit, or largely the same affidavit is being passed
11 from custodian to custodian affixing it, and we're never
12 actually nailing down precisely which documents are the
13 sum and substance of it. And we haven't been, quite
14 frankly, able to get the deposition of some of these
15 folks on the calendar before now.

16 So I think this context is important as we go
17 into what the actual substance is of the argument, and
18 with that I'll turn it over to Mr. Selby who is going to
19 address the specific items.

20 THE COURT: Okay. All right.

21 Let me just ask an overarching question with
22 respect to this second request for the production of
23 documents.

24 All of them deal with, as you just described,
25 Mayer's declaration and info regarding statements he

1 made in that declaration or affidavit.

2 Now, it appears that defendants agreed to give
3 plaintiffs the documents that Mayer relied on in
4 preparing his declaration.

5 Is that something that you have received,
6 Attorney Orent?

7 MR. ORENT: So my understanding is that on one
8 hand we do have the documents. On the other hand, we've
9 also got several million documents from the defendants.

10 What is equally important is to know which
11 ones. So providing the documents without an
12 identification as to what they are is a different story,
13 particularly when we're talking about witnesses who are
14 all roughly saying the same thing and who are not
15 relying on personal information for the purposes of the
16 affidavit, and we have not yet had the opportunity to
17 depose, you know, I think that all is subject to
18 credibility analysis when we look at the universe that
19 each of these people used to form the affidavit and
20 whether or not it's the same and will be an issue in
21 this evidentiary hearing.

22 THE COURT: And you took the deposition
23 already of the Mayer replacement?

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

25 And as far as Mr. Hjalmarsson is concerned, we

1 believe that we do have the identification of those
2 documents based on the binders produced at that
3 deposition. And so the concern is not so much with Mr.
4 Hjalmarsson as much as it is with Mr. Mayer, Mr.
5 Carlton, and I may be leaving one out as well.

6 THE COURT: And you're already scheduled to
7 depose Mr. Carlton?

8 MR. ORENT: We are, your Honor. That was just
9 scheduled yesterday.

10 THE COURT: Okay. All right.

11 Let me ask some specific questions then about
12 some of the requests for production.

13 If we could all go to questions 5 and 6 for
14 the moment. I should say requests 5 and 6.

15 What I'm wondering is -- 5 and 6, are these
16 facts even relevant? Is Getinge still using any of
17 these statements with respect to Datascope Corp.?

18 5 and 6, can somebody tell me how those are
19 relevant?

20 MS. OCARIZ: Sure. Rebecca -- I'm sorry, your
21 Honor. This is Rebecca Ocariz.

22 And with respect to 5 and 6, essentially this
23 just goes to the ownership chain. It just shows that
24 Atrium is owned by Datascope, which is owned by Getinge
25 Holding USA 2, which is owned by Getinge Holding, which

1 is ultimately owned by Getinge AB.

2 And so while we do not have a specific I guess
3 averment in a declaration or anything with respect to
4 that, I mean the main point is that all of these
5 entities are indirectly owned by Getinge AB.

6 THE COURT: And would this be something that
7 would have been inquired about with Mr. Hjalmarsson at
8 his deposition, these facts?

9 MS. OCARIZ: It certainly could have been. I
10 mean, essentially what our position is on 5 and 6 is
11 that we have already produced documents that show that
12 Atrium is a wholly owned subsidiary of Datascope.

13 For example, in No. 5 we produced a number of
14 consents of the sole stockholder of Atrium, which is a
15 formal corporate document which shows that Datascope is
16 the sole stockholder of Atrium.

17 With respect to No. 6, the same thing. We
18 have produced formal corporate documents that show that
19 Getinge Holding USA 2 owns a hundred percent of the
20 stock in Datascope.

21 And so really our position is what more do the
22 plaintiffs want. All of these requests have been
23 couched in terms of all documents.

24 THE COURT: Right.

25 MS. OCARIZ: And our position is, you know,

1 any additional documents that we could turn over to show
2 that Atrium is a hundred percent owned by Datascope is
3 just cumulative of what we've already produced.

4 THE COURT: Right. In fact, with respect to
5 No. 5, you indicate that your response to the request
6 for production No. 15 would be duplicative.

7 I don't think you have anything about No. 6
8 with respect to duplicative evidence, and No. 6 is one
9 of the few that I did actually -- your answer to it one
10 of the few, very few frankly, that I thought were truly
11 boilerplate oriented. Most of the boilerplate
12 allegations made by plaintiffs were not sustained by
13 what the parties produced for me to read before this
14 agenda.

15 I found even the first response, which is
16 dated back in April, I believe, the defendant's first
17 response had a number of specifics with respect to each
18 of these requests.

19 No. 6 though I didn't see much beyond
20 boilerplate, but I did -- I think I did see in your
21 letter perhaps, in your June letter, Attorney Ocariz,
22 that you did reference that you had already produced
23 certain documents and that if there were anymore you
24 would produce them within two weeks with respect to
25 No. 6.

1 MS. OCARIZ: So in preparing for the hearing,
2 you know, I did go back and I looked at what documents
3 were produced with respect and that relate to each
4 request, and there are at least two that were produced
5 in jurisdictional discovery.

6 And the first is an organizational chart that
7 shows the legal relationship between Getinge AB and its
8 subsidiaries, and so that shows in both a graphic form
9 and also in a list form what entity owns what entity and
10 the entire ownership chain from the subsidiary all of
11 the way up to Getinge AB.

12 And then also, as I mentioned with respect to
13 No. 6, we produced a formal document, it's an agreement
14 and plan of reorganization, and within that formal
15 corporate document it states that Getinge Holding USA 2
16 owns a hundred percent of the outstanding stock in
17 Datascope.

18 So again our position is anything else that we
19 could produce that would be responsive to this request
20 is simply cumulative of what we've already produced and
21 that, you know, given the request for all, which this
22 Court in a prior hearing has already recognized is
23 overbroad, you know, we would be arguably tasked with
24 looking at e-mails that say, oh, well, you know, this is
25 just a stray e-mail from one business person to another

1 that says that Datascope is a wholly owned subsidiary of
2 Getinge Holding USA 2. That document would be
3 responsive as all.

4 THE COURT: Right.

5 MS. OCARIZ: So again our position is just
6 we've produced documents that show this and we should
7 not be tasked with producing all.

8 THE COURT: All right. Let me hear from --
9 and just limit yourself, if you would, Mr. Selby, to No.
10 5 and No. 6, and tell me why the chart with the graphic
11 chart organization, as well as the list, in addition to
12 the plan of reorganization, why those aren't sufficient.

13 MR. SELBY: Well, your Honor, first I would
14 say as far as sufficient, and hearing Rebecca's
15 statement with regard to what has been produced and what
16 has been produced specifically with regards to each of
17 those two requests, we can certainly have further
18 discussion along that line.

19 And if that is -- if what they are saying is,
20 hey, this is all the documents that are responsive to
21 that request, here's what they are, and that's it, with
22 the understanding that there's also not a caveat that
23 that's it with the exception of we still maintain our
24 objection and maintain that objection as to overbroad,
25 et cetera, so we don't know are there documents not

1 being produced because of the remaining objection.

2 THE COURT: Okay. All right. Let's go to 27,
3 if you would jump ahead to that one.

4 That deals with trademark/service mark
5 application with the U.S. Patent and Trademark Office
6 filed by Getinge in March of 2017.

7 I could see that largely being attorney-client
8 privilege material. Tell me why that is relevant, Mr.
9 Selby.

10 MR. SELBY: Well, that is simply relevant just
11 to show the ownership of that trademark/service mark
12 application, you know, who was preparing it, you know,
13 what went into the process of preparing it, and why --
14 (call cuts out) -- Getinge.

15 THE COURT: Okay. But why is it relevant to
16 the jurisdictional question?

17 MR. SELBY: I'm sorry, your Honor. Say that
18 again.

19 THE COURT: Tell me why that is relevant to
20 the jurisdictional question.

21 MR. SELBY: Well, our position is it's
22 relevant to the jurisdictional question, again, just to
23 show specifically with regards to I guess the ownership
24 of it, if you will, and what went into that. If they
25 are truly "separate entities" for purposes of

1 jurisdiction, then what was done here in the United
2 States with the Patent and Trademark Office of Getinge
3 is relevant to that issue.

4 THE COURT: I'm not seeing that. Maybe you
5 could be a little -- back up a little bit and maybe be a
6 little bit more basic with respect to the facts.

7 How is this trademark application filed by
8 Getinge, how is that going to help me decide the
9 jurisdictional question?

10 MR. ORENT: Your Honor, this is Jonathan
11 Orent, if I might.

12 Basically it shows that Getinge is the actual
13 owner of the intellectual property related to the
14 product at issue in these cases, and that in assuming
15 and in actually performing the work, in preparing the
16 application and doing the due diligence that they are in
17 fact the brains of the Atrium operation, if you will,
18 your Honor.

19 So this all goes to our contention that Atrium
20 is a sham corporation and that Getinge AB is effectively
21 controlling and doing the work that results in the
22 underlying facts of this lawsuit.

23 THE COURT: And the trademark application
24 deals with C-Qur?

25 MR. ORENT: It includes the trademark and some

1 of the trademark and service for the labeling. So I
2 should say it's not just the patents but also the
3 trademarks of the products being used and sold.

4 So for example, right now it's my
5 understanding that the actual products sold in
6 magazines, the advertisements actually have the Getinge
7 name with the C-Qur device.

8 So there is intellectual property that is
9 owned related to those items that is directly relevant
10 to whether or not Getinge is here availing itself in the
11 jurisdiction as well as some of the other issues.

12 So if your Honor looks actually back at No.
13 26, which is General Surgery News.

14 THE COURT: Yes.

15 MR. ORENT: In General Surgery News the
16 advertisement is for Getinge C-Qur mesh. We believe
17 that there was likely a patent trademark application
18 filed by Getinge AB in March of 2017 relating to the
19 surgical and other types of intellectual property that
20 were developed and utilized in things like that.

21 And so that's specifically what we are looking
22 for is a recognition that Getinge is the designer, that
23 they are the real brains, if you will, of the operation
24 and again controlling the individual actions of Atrium.

25 THE COURT: All right.

1 MS. OCARIZ: Your Honor, if I may.

2 THE COURT: Go ahead. You may.

3 MS. OCARIZ: So the issue of who filed the
4 trademark and whose trademark it is is not in dispute.

5 The plaintiffs filed a set of requests for
6 admissions, and one of the admissions was to admit that
7 in March 2017 Getinge AB filed a trademark/service mark
8 application with the U.S. Patent and Trademark Office
9 for the following mark, and there is a picture of the
10 Getinge mark and that was admitted.

11 There was another admission that asked for a
12 document attached to as Exhibit 1, admit that it's a
13 true and correct copy of the trademark and service mark
14 application with the U.S. Patent and Trademark Office
15 filed by Getinge AB in March 2017. That was also
16 admitted.

17 These trademark applications do not deal with
18 C-Qur. They deal with Getinge, and the labeling on the
19 C-Qur product is still C-Qur. It is not Getinge.

20 Mr. Orent mentioned some advertising in
21 General Surgery News and that does have the Getinge
22 trademark on it, but it also mentions Atrium, albeit in
23 the fine print.

24 But to the extent that plaintiffs want to make
25 the argument that, you know, there is no Atrium, it's

1 all Getinge, they can -- they're able to make that
2 argument and have made that argument based on the
3 request for admissions.

4 Getting the actual application and all of the
5 communications between Getinge and outside counsel in
6 preparing this would be an extremely laborious task that
7 would result in an extremely large privilege log.

8 And so our position is that the plaintiffs
9 have what they need through their requests for
10 admissions, and that to the extent that it is relevant
11 to the jurisdictional inquiry it's only tangentially
12 relevant. The process that we would have to go through
13 is not proportional to the limited evidentiary benefit
14 that the plaintiffs would receive since they already
15 have this same information through their RSAs.

16 THE COURT: Okay.

17 MR. ORENT: Your Honor, just one quick
18 response.

19 We're not asking for the attorney-client
20 information here or the communications with patent
21 counsel.

22 That being said, I mean really what we're
23 looking at here are internal documents and the internal
24 thinking, but other than that I don't think we really
25 have anything else to add on this or on this particular

1 item.

2 THE COURT: Your question asks for all
3 documents and information relied upon by defendants in
4 preparing the trademark application. So that does seem
5 to ask for everything that the defendants used in
6 preparing for that trademark application, and that would
7 seem to me to include a large portion of attorney-client
8 privilege information.

9 Anybody else want to be heard on 27?

10 MS. OCARIZ: Your Honor, if I might just on
11 one final point.

12 Part of the problem that we had with this
13 entire document request is the fact that, you know, a
14 number -- well, all of the requests ask for all, and
15 there hasn't been any meaningful effort to try to narrow
16 the scope of any of these.

17 In our last communication to the plaintiffs we
18 repeatedly offered to participate in a meaningful
19 conferral to try to narrow the scope and just to make
20 sure that we weren't talking past each other, you know,
21 in the event that we were misapprehending the basis of
22 the plaintiffs' claim to the entitlement of these
23 documents.

24 And that letter that we sent on November 16th
25 followed on the heels of a meet and confer that we had

1 with Attorney Schiavone on November the 1st which after
2 the exchange of a few letters and communications was a
3 hundred percent successful. We resolved every discovery
4 dispute. We gave some. She gave some. You haven't
5 heard anything about that.

6 So that was just kind of an overarching issue
7 that we've had. I mean we're not unreasonable. We just
8 quite frankly don't understand some of these requests
9 and particularly the breadth of many of these requests
10 in light of the fact that we have already produced
11 documents.

12 You know, a lot of these requests just ask for
13 a finite data point, you know, who are the officers and
14 directors, for example, of Atrium. Once you get that
15 from one source, you know, our position is it's not
16 necessary to get it from every source. This is not a
17 situation where, you know, you need to know who knew
18 what when. It's basically, you know, what temperature
19 is it today, and we told you.

20 THE COURT: I want to move to request 18 and
21 19 if you would. 18 and 19 appear again to ask for
22 everything in broad language, but it seems to me 18 is
23 asking for a federal tax return and 19 is asking for a
24 state tax return.

25 Are those -- just those returns, first of all,

1 I guess are they still relevant, and secondly, could the
2 defendants just provide those if they are relevant, 18
3 and 19?

4 MR. ORENT: Your Honor, if I might just make
5 some of this easier. With the exception of these tax
6 return items, if I'm hearing Ms. Ocariz correctly that
7 she wishes to reengage in the meet and confer process,
8 we would support that and would be happy to deal with
9 that.

10 The two items that we are most particularly
11 interested in and are pinpoint documents that we have
12 not received are those tax returns.

13 THE COURT: Okay. So let me cut to the chase.

14 18 and 19. Let me ask Attorney Ocariz. Can
15 you provide those tax returns narrowing 18 and 19,
16 narrowing the scope significantly, just those documents?

17 MS. OCARIZ: Well, I mean, I guess a couple of
18 things is that, you know, the request is asking for, you
19 know, all documents and information, and again this
20 was --

21 THE COURT: I understand the request says
22 that, but right now they're willing to limit that in a
23 manner that I'm suggesting, which would just be handing
24 over the tax returns. So it would be the federal tax
25 return referenced in 18 and the state tax return

1 referenced in 19.

2 Is that something you could do?

3 MS. OCARIZ: Well, your Honor, it's our
4 position that these requests are no longer relevant.

5 THE COURT: Okay.

6 MS. OCARIZ: They related to an averment in
7 the declaration of Reinhard Mayer. That again was, you
8 know, a declaration in support of a motion to dismiss
9 that was denied.

10 In filing our renewed motion, you know, we
11 looked at the facts that we needed and decided that
12 these were not facts that we needed to set forth in
13 order to show that there is no personal jurisdiction
14 over Getinge, and so the production of these tax returns
15 is not going to go one way or another to any issue in
16 resolving the alterego allegations and theory or the
17 agency theory. It's no longer relevant.

18 It is a little bit more than just a tax
19 return. It's tax returns since the acquisition, which
20 is 2011.

21 And 19 deals with state returns, and it's my
22 understanding that there's more than one state. You
23 know, this isn't a personal return. It's a corporate
24 return.

25 And so I understand that these are also

1 voluminous documents, and part of the reason why we
2 didn't include this in the renewed motion is because
3 these are particularly sensitive documents. So we
4 didn't include it, it's no longer relevant, and our
5 position is that we should not be required to turn them
6 over.

7 THE COURT: Okay. Let me hear from Attorney
8 Selby on just the relevance, or Attorney Orent.

9 MR. ORENT: Your Honor, Jonathan Orent.

10 The simple issue is that Getinge -- excuse
11 me -- Atrium has been selling every unit of product that
12 they make at a financial loss. Roughly 35 percent. So
13 they make a product that costs them a dollar. They sell
14 it for 65 cents.

15 As a matter of loss, to avoid committing tax
16 fraud, they have to account for it in some way. So
17 through a -- the way in which they declare it on their
18 tax forms, the way in which their consolidated
19 financials are prepared ultimately shows how the
20 siphoning off of money can occur in a legal way and how
21 the profits -- because ultimately that widget that they
22 sold for 65 cents is being sold not to the world but to
23 another Getinge company. And so there is a profit made
24 ultimately when the Getinge entity sells it to a
25 hospital or a doctor or wherever. And so what happens

1 is that money needs to be accounted for so as to not
2 commit tax fraud because it is the corporate
3 relationship between the two.

4 So this all has to do with whether or not
5 Atrium is being undercapitalized, whether or not they're
6 appropriately accounting for this money, and how the
7 money is being pulled from one entity to another.

8 It's also relevant to show how Getinge --
9 excuse me -- Atrium accounts for what they call group --
10 I can't think of the term offhand, but essentially group
11 contributions. So they receive money from the parent
12 company Getinge to cover certain items where they might
13 have contributed some amount to the work.

14 There is another factor, which is all of the
15 sort of administrative type services, the HR, the legal,
16 the whatever are outsourced to Getinge at a 3 percent
17 profit margin to Getinge. It's another way that we
18 think that these types of things might show up on the
19 tax returns because there's business being done between
20 entities.

21 And so the real way, in addition to the profit
22 and loss statements that we have, to really understand
23 what's going on is to actually get into these tax
24 returns and financials.

25 THE COURT: Okay. Attorney Ocariz, go ahead.

1 MS. OCARIZ: Thank you, your Honor.

2 So I guess, as an initial matter, we
3 completely disagree with the characterization of the
4 product being sold at a loss. We submitted a
5 declaration with our reply that explains that the
6 product is not sold at a loss, but that being said, I
7 understand that that's plaintiffs' position and that is
8 what it is.

9 But with the -- I guess we would just disagree
10 that it is relevant because the plaintiffs have already
11 been provided with all of the relevant financial
12 information for Atrium. They have the P&Ls, they have
13 the balance sheets, and so they are well aware of
14 Atrium's financial position.

15 They have also been provided with any payments
16 from Getinge AB to Atrium, any payments from Atrium to
17 Getinge AB. They've been provided with intercompany
18 loans between Atrium and some of the Getinge AB
19 affiliated entities. They have been provided with
20 documentation that shows capital contributions to
21 Atrium. They've been provided with documents that show
22 distributions from Atrium to its immediate parent
23 Datascope.

24 They have a substantial amount of financial
25 information that bears on the issues of adequate

1 capitalization, and this is just a fishing expedition.
2 The issue of tax fraud is not an issue that is going
3 to have any relevance as to the jurisdictional question
4 that's before the Court.

5 And also I guess -- the other point, the other
6 overarching point that I just wanted to raise is just
7 the timing of this motion to compel is that, you know,
8 our responses were served way back in April, and
9 plaintiffs have already served their objection to our
10 motion to dismiss. And in that objection they've taken
11 the position that the evidence that they have to date is
12 adequate to demonstrate a likelihood of each element of
13 personal jurisdiction. So quite frankly anything that
14 we turn over at this point is simply cumulative of their
15 position and is not proportional given just the limited
16 jurisdictional inquiry and the limited jurisdictional
17 discovery that a litigant is entitled to.

18 THE COURT: All right.

19 MR. ORENT: Your Honor, if I could just deal
20 with a couple of the issues raised.

21 Number one, this issue received new importance
22 because of this \$200 million set-aside as well as the
23 sale of the mesh units.

24 We, quite frankly, are unable to look at the
25 balance sheets and identify where this \$200 million is

1 coming from, and that is a very important issue
2 ultimately to determine whether Atrium was capitalized
3 or undercapitalized because we have a statement from the
4 company asserting essentially what their liability is
5 for this item only.

6 Additionally, it is received for your import
7 because the affidavit of Mr. Carlton was submitted with
8 that motion.

9 And so it is true that we do feel confident in
10 the evidence as it exists now. However, we think that
11 the fact evidence, some very powerful evidence, is in
12 the tax treatments and in the way that the return was
13 filed. And we believe that there is no other source
14 that duplicates the type of information that may be
15 contained in the tax records.

16 So we think that that information may quite
17 frankly be dispositive of the issue in and of itself or
18 at the theoretical level has that power, and so we're
19 not talking --

20 THE COURT: What's the time frame that you're
21 seeking?

22 MR. ORENT: If we could have it from 2009
23 through to the present, the most recent tax information,
24 that would give us two years of the base as well as
25 several years under the old method in which Getinge

1 controlled the subsidiaries. So prior to about 2015 or
2 so, 2014-2015 Getinge executed its control over its
3 subsidiaries in one manner. And then beginning in 2015,
4 transitioning to 2016, and then full year 2017, it
5 really executed control of its subsidiaries in a
6 different way.

7 And so having this snapshot of these three
8 different timelines around this ten-year period is
9 ideally what we would look for.

10 THE COURT: Okay. Let me ask about request
11 Nos. 23, 24 and 25.

12 MS. OCARIZ: Your Honor, may I just make two
13 points on the last issue? I understand that you want to
14 move on, but they are quite important.

15 The first thing, that the tax returns will not
16 show the source of the \$200 million reserve. And also
17 to the extent that the plaintiffs have any confusion
18 about the balance sheet or the P&Ls, they had noticed
19 the deposition of the Atrium 30(b)(6) deponent, and one
20 of the topics was the balance sheet and the P&Ls.

21 And the Getinge AB corporate representative
22 was only testifying as to the figures as they appeared
23 on the P&L and on the balance sheet. So to the extent
24 that plaintiffs wanted to get behind any of the numbers,
25 they had the opportunity and they decided not to pursue

1 it.

2 MR. ORENT: We disagree with that assertion.

3 With regard to some of the other items I
4 think, your Honor, specifically the items that you were
5 asking about, number --

6 THE COURT: 23, 24 and 25.

7 What I'm going to ask is whether or not these
8 could be limited. And again, this might have been
9 something you would have been able to meet and confer
10 about with the defendants, but what I'm wondering with
11 respect to 23, 24 and 25 is whether or not defendants
12 would be willing to provide plaintiffs simply with
13 citations to the specific provisions and a very brief
14 statement with respect to the theory that those statutes
15 prohibit you from turning over or producing certain
16 documents and information.

17 So it would simply severely limit what's being
18 requested in 23, 24 and 25, and I don't think it would
19 be seeking, you know, any of the attorney-client
20 information that you reference in your objections to
21 those.

22 So let me just shortcut that by asking
23 Attorney Ocariz whether or not that's something you
24 could do by way of answering 23, 24 and 25.

25 MS. OCARIZ: I guess the trouble with that is

1 that that would require us to create a document, which
2 is not typically what we do, you know, in responding to
3 a document request.

4 I mean this is seeking discovery on discovery.
5 If the plaintiffs want to compel documents where a
6 privacy objection has been lodged, they can move to
7 compel the documents and test the objection.

8 (Someone puts phone on hold and music is playing)

9 Hello?

10 THE COURT: Somebody just needs to put their
11 phone not on hold.

12 Is there any way you can find out whose phone
13 is on hold here, because I'm going to have to cut
14 everybody off and have everybody redial.

15 (Music continues)

16 Okay. What I'm going to do is have everybody
17 call back in using the same method, and then we'll get
18 you back on the phone. I would like to find out who put
19 their phone on hold so I can deal appropriately with
20 that individual.

21 All right. So everybody call back in.

22 (RECESS)

23 THE COURT: All right. Counsel, we're going
24 to start fresh here, and I need you to just state who
25 you are so we know who is on part two of this status

1 conference hearing.

2 We'll start with defense counsel.

3 MR. CHEFFO: Mark Cheffo is on.

4 MS. AYTCH: Enjolique Aytch for the
5 defendants.

6 MS. OCARIZ: Rebecca Ocariz for the
7 defendants.

8 MR. FRIBERG: Jack Friberg for the defendants.

9 THE COURT: Okay. Plaintiff's counsel.

10 MR. ORENT: Jonathan Orent.

11 MR. HILLIARD: Russ Hilliard.

12 MS. LOWRY: Susan Lowry.

13 THE COURT: Any other plaintiff's counsel?
14 I've got Attorney Orent, Attorney Lowry and Attorney
15 Hilliard.

16 MR. SELBY: And David Selby, your Honor.

17 THE COURT: Okay. All right. So the only
18 plaintiffs' counsel on the call are Attorney Orent,
19 Attorney Selby, Lowry and Hilliard?

20 MR. ORENT: That's correct.

21 THE COURT: Okay. All right.

22 And I've got for defense counsel Attorney
23 Aytch, Ocariz, Friberg and Cheffo. Is that correct?

24 MR. CHEFFO: Yes, your Honor.

25 MR. AYTCH: Yes. That's correct, your Honor.

1 THE COURT: I was told I had eleven so I'm
2 short three people, but no matter.

3 We've got the court reporter still here, and I
4 have no idea who was the individual who put their phone
5 on hold. It's happened multiple times for these status
6 conferences, and I can tell you that before the next
7 status conference I am going to warn counsel that if
8 they put their phone on hold and I'm able to detect
9 whose phone it is, hopefully that person would tell me,
10 they will receive a fine, a personal fine of \$250 if
11 this happens again.

12 Now, I got -- I learned from Attorney Esposito
13 that counsel were just willing to meet and confer. What
14 I would like to do rather than have you continue to meet
15 and confer -- because one of the things that I need to
16 do for this case is keep the case on track and not have
17 it go off the rails, and I would say April to December
18 on a motion to compel is somewhat off the rails in terms
19 of timing.

20 And so what I would like to do I think is to
21 give you a sense of where I was headed with an informal
22 ruling on this in light of the fact that the parties are
23 willing to meet and confer. What I'm going to do is
24 just summarize for you where I was headed, and I want to
25 make it clear what requests I was willing to compel

1 answers to. I was obviously going to make an informal
2 ruling based on everything that I've read in the party's
3 position papers, and obviously if formal litigation was
4 desired, then formal litigation would be had with
5 respect to any disagreements with an informal ruling.

6 But I just want to make clear for the record
7 that I was headed toward an informal denial of the
8 motion to compel with respect to the overwhelming bulk
9 of it, and I was inclined to grant only request Nos. 18
10 and 19, with obviously a protective order and just the
11 tax returns being produced 2009 to present, and so those
12 two I was inclined to grant with those limitations.

13 Numbers 23, 24 and 25, while I understand
14 Attorney Ocariz's point that these are requests for
15 production and you're asking us to produce a document,
16 my way of limiting Nos. 23, 24, 25 was essentially to
17 have you provide a document, create a document as you
18 would if you were creating, you know, a privilege log,
19 but a document that would simply answer for plaintiffs
20 what provisions are being violated and what the theory
21 is that producing documents would violate those
22 provisions.

23 So in essence I was inclined to grant 18 and
24 19, and then, with the narrowing that I was proposing,
25 Nos. 23, 24 and 25.

1 I can tell you that what influenced me -- and
2 I read everything that counsel attached, every letter
3 that was attached. The timing of the motion to compel
4 in light of really this jurisdictional dispute and the
5 motion to dismiss which the Court needs to rule on, I'm
6 troubled by the length of time that there was back and
7 forth between plaintiffs and defense.

8 I find that defendant's original response to
9 the request, which was I believe provided in April, that
10 that original request contains a number of specific
11 objections and that plaintiffs could have picked up the
12 phone and really in a meaningful way tried to narrow
13 some of the requests along the lines of the objections.

14 And many of the objections lay out documents
15 that have already been produced, and to the extent
16 plaintiffs aren't clear on what documents those are,
17 plaintiffs could have asked for that information from
18 the defendants.

19 My impression from reading every document in
20 this case is that meet and confer -- the defendants were
21 being reasonable in terms of meeting and conferring and
22 trying to make clear what their position was with
23 respect to each request and that plaintiffs simply
24 wouldn't move from their position, which was you must
25 respond within 30 days to these requests.

1 You did not in any way attempt to compromise
2 or limit your requests in a way that would be reasonable
3 so that this case doesn't languish in terms of its
4 timing, and some of these could have been resolved I
5 think well before December 2018. So that really
6 influenced strongly my take on this discovery dispute.

7 The characterization of the defendant's
8 objections as boilerplate in containing no information,
9 no specifics, just was not borne out by the defendant's
10 actual responses. That was overstatement and hyperbole
11 and very unfortunate I think in terms of trying to
12 resolve a legitimate discovery dispute.

13 And each request deals with a declaration of
14 Mayer, who is no longer involved in the case, and the
15 defendants have agreed and supplied documents relied on
16 by Mayer. And it seems to me that what I've read is an
17 effort on the part of defendants to narrow -- have
18 plaintiffs narrow their objections and very reasonably
19 so. And so I was prepared, with the exception of 18,
20 19, 23, 24, and 25, to deny the motion to compel as to
21 every other request for all the reasons and objections
22 that the defendants offered.

23 So that's where I would have been with respect
24 to an informal ruling, and I do not want the parties to
25 continue to meet and confer where frankly meeting and

1 conferring hasn't moved the case at all, and I want to
2 see the meet and confer process be meaningful. It's
3 very important in this kind of case that that happen.

4 So going forward I anticipate that the meet
5 and confer process will be much more meaningful than
6 what I'm reading in all the different letters back and
7 forth between plaintiffs and defendants.

8 Obviously this is one discovery dispute, I'm
9 sure there are others, but this one in this case, the
10 defendant's responses called for meaningful responses
11 and compromises from plaintiffs, and that didn't happen
12 as far as I can tell, and I don't want that to continue.
13 I really do not want meet and confer that's not
14 meaningful to continue.

15 So that's my piece with respect to the request
16 for production of documents.

17 I'm also obviously influenced by the fact that
18 it's the second request, and the first request involved
19 74 separate requests and generated hundreds of
20 documents.

21 In any event, I know counsel are willing to
22 come together and propose jointly a schedule with
23 respect to the evidentiary hearing on the motion to
24 dismiss and a format for that evidentiary hearing, and I
25 would welcome the parties to present that jointly to me.

1 I think as long as it's reasonable the Court is inclined
2 probably simply to grant what you come up with by way of
3 time frame and format.

4 So that covers all items in the agenda.

5 If you can do a little investigation and find
6 out who is the person who put their phone on hold during
7 that call, you don't have to report that person to me,
8 but I would like that person to be warned and told
9 specifically by lead counsel that is not happening
10 again. That is not happening again, and that person
11 will be fined if it does happen in the future.

12 So I think we've covered the status conference
13 and joint agenda for today's conference.

14 Is there anything further, Attorney Orent?

15 MR. ORENT: There is not, your Honor.

16 Although one logistical issue. I believe the
17 parties had agreed, if it's okay with the Court, for a
18 January 2nd deadline for the surreply on the motion to
19 dismiss.

20 THE COURT: That sounds fine.

21 MR. ORENT: In light of the holidays.

22 THE COURT: That sounds fine.

23 Is that okay with you, Attorney Aytch?

24 MS. AYTCH: Yes. I was going to just chime in
25 and say, your Honor, yes, that we agreed to that

1 deadline and that is fine with us.

2 We hope everyone enjoys their holiday.

3 MS. LOWRY: I'm sorry. This is Attorney
4 Lowry.

5 Before we go setting that date, Jonathan, I
6 was calling you earlier before this call, I do want to
7 talk to you about this January 2nd date. We may have
8 some issues with a conventional filing because it's
9 going to be under seal. We may need to talk about that
10 before we can file that motion.

11 MR. ORENT: Okay.

12 MS. AYTCH: I will just state that defendants
13 will be reasonable with any further extension in light
14 of that. So if Susan or Jonathan give us an e-mail, we
15 can work that out.

16 MS. LOWRY: Perfect.

17 THE COURT: Sounds good.

18 MR. HILLIARD: Your Honor, this is Russ
19 Hilliard. I just want to make an observation.

20 I'm wondering -- we don't know who put the
21 call on hold, but I'm wondering if it's happening
22 because someone is joining the call after it initially
23 begins and don't hear the warning from the Court not to
24 do it.

25 And maybe we just need to somehow give

1 advance -- just raise some advance notice to people: If
2 you're joining this call, do not ever put your phone on
3 hold. They may just be missing that warning at the
4 beginning.

5 THE COURT: That's what I assumed happened.

6 I think counsel may know who that party was
7 and maybe you can speak to that party as well, but I
8 have warned at the beginning of every status conference
9 I think since the first time it happened that people
10 should not put their phones on hold.

11 But I will tell you that I am so motivated
12 that this not happen again that the next time we get
13 somebody who comes on late I'm going to have that person
14 introduce themselves and I'm going to warn them.

15 So that's how I'm going to handle it if it's
16 okay with you.

17 MR. HILLIARD: Okay. Thank you.

18 THE COURT: All right. Anything further?

19 MR. HILLIARD: All set. Thank you.

20 MR. ORENT: No, your Honor. Thank you.

21 THE COURT: All right. Court is adjourned.

22 Happy holidays.

23 (Conclusion of conference at 4:09 p.m.)

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C E R T I F I C A T E

I, Susan M. Bateman, 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: 4-8-19


SUSAN M. BATEMAN, LCR, RPR, CRR
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