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UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

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

No. 16-md-02753-LM
February 14, 2019
2:09 p.m.

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TRANSCRIPT OF STATUS CONFERENCE

BEFORE THE HONORABLE LANDYA B. MCCAFFERTY

APPEARANCES:

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P R O C E E D I N G S

THE COURT: Hello, Counsel. This is Judge McCafferty. I am going to, for the benefit of the court reporter, state the name of the case and then have counsel identify themselves per usual.

This is In Re: Atrium Medical Corp. C-Qur Mesh Products Liability Litigation, MDL Number 2753. The full docket number is 16-md-02753-LM, all cases, and for today we are going to go through Document 1073, the Joint Agenda for this Valentine's Day status conference.

Let me have counsel identify themselves for the record, and let me remind everybody not to put your phones on hold, and as people beep into this call I will stop and just try to remind people do not put your call on hold, and if you are speaking, please just quickly identify yourself by last name for our court reporter.

So, go ahead, Defense Counsel.

MR. CHEFFO: Good afternoon, your Honor. This is Mark Cheffo.

MS. ARMSTRONG: Good afternoon, your Honor. This is Katherine Armstrong.

MS. OCARIZ: Good afternoon. Rebecca Ocariz.

MR. FRIBERG: Good afternoon. Jack Friberg.

THE COURT: All right. Plaintiffs counsel.

MR. HILLIARD: Your Honor, this is Russ Hilliard, plaintiffs' liaison counsel.

MR. ORENT: Good afternoon, Judge. Jonathan Orent for the plaintiffs.

MS. LOWRY: And Susan Lowry for the plaintiffs as well, your Honor.

THE COURT: Okay. And is that all we have for plaintiffs?

MR. HILLIARD: Yes.

THE COURT: All right. Okay. So, I think what I'll do is begin by going through the agenda. Certain of these issues don't really require any discussion.

So, Status of Plaintiffs' Noticed Depositions, Status of Defendants' Noticed Depositions, and then there is a Status of Scheduling Treating Physicians' Depositions. Anything we need to discuss with respect to those entries on the Joint Agenda?

MR. ORENT: Your Honor, for the plaintiffs this is Jonathan Orent. I was advised by case counsel in the Vanwezel case immediately before the call today that Mr. Vanwezel, who has been somewhat difficult to schedule, is considering dismissing his case. I do not know that that is final or not at this point, but I did want to, in the interest of being candid with the Court and with defense counsel, mention that. And we will certainly follow up with defendants as soon as possible, once we understand whether or not Mr. Vanwezel has made a final determination, and set a course for proceeding with defense counsel and see if we can reach some sort of agreement on that issue.

THE COURT: Okay. Anything else?

MR. ORENT: Not for the plaintiffs, your Honor.

MR. CHEFFO: Not for the defendants, your Honor.

THE COURT: All right. Okay. Now let's move, then, to the hearing on Getinge AB's Motion to Dismiss Based on Lack of Personal Jurisdiction. I think the parties were going to make a joint proposal, and I'm also prepared to issue a ruling orally now, and I'll issue it in writing as well briefly in the procedural order that I issue after this status conference, but on the pending Motion for Determination of Legal Standard, which is Document 1048, I am going to deny that motion. The legal standard that will be used is the likelihood standard as laid out in my prior order, which is Document Number 300. So, that may cabin the discussion with respect to this evidentiary hearing.

And do you have a suggested time frame and format?

MR. ORENT: Your Honor, this is Jonathan Orent again. Mr. Cheffo and his team have been in communication with us, and, quite frankly, we owe him a response to their latest proposal. I do think we're close on a proposal, and I think that what we are targeting is roughly that first week in June for the evidentiary hearing, and I believe that we expect that this would take somewhere in the order of two to perhaps bleed over into a third day but not much more than that.

THE COURT: Okay. So, two to three days?

MR. ORENT: That is our current anticipation, your Honor. The schedule that we are going to be sending a draft back on includes a variety of other dates within it for disclosure of exhibits and things of that ilk, and I think that we're close and should have an agreement in the near term.

THE COURT: Okay. All right. And you can submit that. Attorney Esposito is not in this week but will be in next week, and you can consult with her about dates for the hearing as well.

MR. ORENT: Thank you, your Honor. We will follow up with her.

THE COURT: Okay. All right. There are three issues, I think, that are in dispute. Hold on a second. Oh, I'm sorry. There's also another issue regarding the Case Management Order No. 2, Section 3, and I will make those changes and reissue that order as amended. All right. So, that takes care of amendment to Case Management Order No. 2.

Obviously, I took care of Motion to Clarify the Court's Standard.

There's also Extension of the Deadline for the Selection of Trial Pool Cases, and I will grant the requested extension of the deadline for selection of trial pool cases until April 1.

And, as I understand it, everybody's agreeing on that; is that correct? Let me just read --

MR. CHEFFO: Correct, your Honor.

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

THE COURT: Okay. And, "The parties will continue to meet and confer regarding whether other deadlines might require adjustment in light of that extension." All right. So, that takes care of the extension of that deadline.

So, now we can move to the outstanding disputes. All right. So, let's take them in order, the order that you presented them in.

The first is the order of questioning treating physicians. Let me ask just general questions, if I could, to both lead counsel here. How are depositions being noticed? I note -- I mean, I can see that you've listed noticed depositions, but typically when a party notices up a deposition that party conducts the deposition and starts the deposition. Is there a reason why you want to do it differently here? I mean, I understand the arguments, but why not just the party that notices the deposition go first?

MR. CHEFFO: Your Honor, this is Mark Cheffo, and that's a good question, and I can try to address that and maybe just briefly for the rest of our kind of argument. I think we are all creatures of our experience, you know, and to the extent there is no, I think, right or wrong way, in I think my experience and I think Mr. Orent's -- you know, we've had other MDLs with his firm and we're cooperative. I think, to answer your question, the reason why this is usually done by a CMO and agreement of order is to avoid this kind of, like, race to get orders out, right? Because one is a little bit of inequity. Sometimes we don't know who the doctors are, right, until we get authorizations, and then you have -- these are mostly doctors, right, and treating physicians? So, these are people that are independent, right, and what we don't want to do is have them sending out -- you know, we rush to get an order out and they rush to get an order out. So, this is really just to avoid essentially having a kind of unholy roar from the medical community, because then there's people fighting who sent it out first, you have issues of certification, that you do it, then we do it.

So, what we typically try to do is basically get a protocol in place that does two things: It resolves this issue in a kind of a humane, formalized way and professional way; it also then sets some parameters for scheduling so we can do things together. So, in other words, rather than me just running out and saying, "I want to have this doctor on that date," I can talk to Mr. Orent and his team and we agree, "Yes, you're available in South Carolina on this date." So, from a case-management process when you have this many cases, this many doctors, you know, the kind of traditional rules of if you notice it first -- I think the other issue here really is that the doctor is, I think we all agree, kind of many times an important witness for both sides. So, it's not like, you know, we might want the plaintiffs, they're not going to notice the plaintiff; they may want an executive, we're not going to notice that person. These are folks who are non-parties who have, you know, important fact information.

So, I think that's the predicate. I don't know if that answers your question, your Honor. I can tell you why I think we should go first, but I can stop there and see if you have other questions.

THE COURT: Well, sure. Thank you. Is it safe to presume that those cases on plaintiffs' bellwether list that plaintiffs' counsel has had *ex parte* contact with those doctors?

MR. ORENT: Your Honor, if I might answer this one?

THE COURT: Yes.

MR. ORENT: I would say no, your Honor. By and large, doctors are extremely busy creatures of habit and generally don't love lawyers. While we value and certainly do try and get time with most of these doctors, it is the seldom doctor that will actually sit down and talk with us and have an *ex parte* conversation.

As Mr. Cheffo's colleague can assert, we did a deposition yesterday, and the record reveals that the doctor spent less than 15 minutes talking to us, and, as the doctor testified, it was logistical. And that was a plaintiffs' pick. I think that that illustrates sort of this global issue.

And just to add on that, I would add that, even when we do have *ex parte* conversations, it's even rarer that we do them more than the day of or the day before a deposition. Usually, it's immediately before that deposition.

So, I'm not sure the advantage is as large as one might think, or, quite frankly, these doctors are bound by the truth anyway, and there's certainly no privilege that applies. So, I don't know that there's any prejudice from talking to the witness, certainly, and don't know that that should be presumed or weigh into the Court's deciding on this issue.

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

THE COURT: Somebody just beeped in. I just want to notice for the record that somebody just called in, and I would just ask that individual not to put this call on hold.

Go ahead, Attorney Cheffo.

MR. CHEFFO: Thank you, your Honor. Just briefly, and I really take Mr. Orent at his word, and I think that is likely to be the experience that he's had in these individual cases, but I think we're setting parameters for kind of going forward in the MDL, and that's not been my experience in many other MDLs like this. I mean, I agree sometimes a doctor doesn't want to talk, but often, frankly, they do. And even, frankly, that 10- or 15-minute conversation can't be underestimated.

This is the problem, I think, and I think when Mr. Orent, you know, put in his papers that this is unprecedented, I don't think it is. In fact, his firm was on the PSC with us in the Lipitor litigation, this is what happened, and I think this is exactly what's happening in the State Court litigation.

Obviously, your Honor is not bound by any of that, right, but it is instructive and it actually works well. And here's the main reason why I think those Courts and the better practice is to allow it. One is, remember, we all have our doctors, so the idea that even plaintiffs' lawyers -- there's a relationship, right? So, the plaintiff, him or herself, could actually talk to the doctor without anyone there, talk about whatever they are going to talk about, lawsuit. There is an access. Some do, some don't. There's an ability to talk to the doctor before the lawsuits are filed, if counsel determines to do that. Some do, some may not.

But certainly what I didn't hear Mr. Orent saying is that they will agree that they're not in any form or fashion going to talk to the doctors or the clients are not going to talk to the doctors about the litigation, right? If that was their position we might continue to meet and confer and see if we can reach something out. But I don't think it is. So, I think what, basically, they're suggesting is, you know, maybe it's only 10 or 15 minutes, but in all of the depositions that have taken place so far I did not hear counsel, who is very experienced in this, say, "We didn't try to talk to them." So, the idea would be, if the doctor gave them two hours, my guess is they would take the two hours.

So, the real issue here is the access, and it's very one-sided, right? We don't know anything about the doctors. There's no *ex parte* communications. All we have is limited, cold, hard records, and before we get to the depositions there's at least an opportunity -- and I'm not saying that there's anything pejorative or nefarious, but there's an opportunity for lots of different contact along the way, and in order to kind of right-size that, what I think the State Court, Judge Temple, did here and Judge Gergel did in Lipitor was to basically say, "You guys have all this opportunity, so I'm going to let the defendants go first." It doesn't mean that, obviously, the plaintiffs can't ask any questions. We've also agreed with Mr. Orent that there should be equal time, which I think is totally fair. In other words, if the doctor says, "I have four hours," we're not going to walk in and say, "Okay, we have three hours and 45 minutes; you have 15 minutes to do it." We would take two hours. So, I think those things we've been able to work out.

And I guess the last thing I would just highlight here --

THE COURT: I'm going to interrupt you and just ask you a quick question about what you just said.

MR. CHEFFO: Yes, your Honor.

THE COURT: Explain to me how going second harms you in that situation.

MR. CHEFFO: Well, here's how I think it potentially could harm, and I can only tell you from my experience, generally. There's a lot of cases, and I don't want to be selective about this case, because I haven't seen -- but typically think of a situation where the plaintiff can meet with the doctor a number of times, they can walk in and say, "Here's the records, here's the documents." They could show potentially internal documents of the company. "Did you know this? Did you know that? What were you told? Would you have done things differently?" Right? None of these rules would be, frankly, necessary, and I think we would have a different approach if nobody could talk to the doctor, right? But they could kind of walk into the doctor with their client and, basically -- you know, who has a relationship.

So, I think, basically, rather than having a situation where that testimony is -- I really want to be very careful not to be pejorative about this -- but where that testimony is rehearsed in a way, and then basically they have an opportunity to meet with the doctor as many times as they want, show them documents, talk to them, right? And some counsel I think, not these good counsel on the phone, but in my experience have stepped over the line, you know, and then we basically have a situation by the time we first get to talk to the doctor it's two hours into it, we've never met the person, they've already testified in a rehearsed kind of way based on some information, and it is very prejudicial to us, basically, having had no relationship, no ability.

So, I think what we're basically suggesting is that it's really our only opportunity and that Mr. Orent noted in his papers -- I don't know that I necessarily agree with this -- but his view is that it's most likely that the plaintiffs' picks will go first, and if that's true, again, I actually don't agree with that, but if it turns out to be true, then that's even more reason why we should have an opportunity to go first, because, while we recognize they have the burden of proof, this is an issue of getting to the truth, getting the doctor's unvarnished approach.

The last thing I'll say, your Honor, is anything I do, either I or my colleagues do in a deposition, showing documents, statements, conversations, it's all fully in front of the plaintiff, it's all on the record, there's no *ex parte*. So, if I show a document there's a chance for cross-examination. What happens in these situations is documents and other information can be presented in -- you know they're good advocates, right -- but in a one-sided way to a doctor, and the doctor doesn't have the other side, gets into a deposition and is asked all the same questions in a one-sided way off a document when there's no opportunity, there hasn't been an opportunity for cross-examination.

So, that, in a nutshell, your Honor, is what our concern is, and, frankly, avoids a lot of back and forth about this, and ultimately what we all want is, frankly, the truth and to find the cases that are the best bellwethers, and this is the best process to do that.

THE COURT: Attorney Orent, do you have anything else to say?

MR. ORENT: I do, your Honor. I want to start, first, with the State Court Order, because I think the State Court Order that was submitted this afternoon makes sort of my exact point. Judge Temple there recognized that in trial testimony that the plaintiffs need to go first, and while he did discuss that there is a discovery deposition process, that's the State Court process, where defendants get the opportunity to do a discovery deposition and go first, the plaintiffs go in the trial testimony. And above all, the Federal Rules don't recognize two different types of depositions, and we only have one opportunity with this particular witness. Plaintiffs have to at the time of the sole deposition conduct an examination of that treating physician, which ultimately will be the key testimony on several issues, because his words will ultimately be the end all, be all on certain issues, like learned intermediary.

THE COURT: Okay, but I'm just not understanding why going first is essential. If you've got equal time, that's an agreement between you and the other counsel. You've got equal time. I'm just not hearing why you need to go first, why this issue of who goes first is critical. I can see in your typical case where you talk to a doctor and you speak to the doctor *ex parte* and you put that doctor on your witness list, and I can see why a defendant then says, "Okay, I'm noticing up a deposition; I want to find out why this person is on your witness list," and that would be how it may work in the typical case.

This is, obviously, not typical, but here you are given at least access in theory, and I also issued an order earlier in this litigation which allowed you to show, if need be, confidential documents to these doctors. So, the access that plaintiffs have to the doctors is, obviously, broad, and so I'm somewhat sympathetic to the argument that for the deposition in essence defense counsel is in a position similar to that of the sort of run-of-the-mill case that I just described.

This doctor is somebody you've spoken with, even if only for a short moment, even if only a small amount of time.

You have a sense of the doctor and the witness, and particularly in those cases you've listed as bellwether cases it seems to me to make sense in terms of the posture of the case and the deposition that defendants would be effectively, if you will, noticing that deposition, and allowing them to go first just makes common sense to me.

In Lipitor the judge noted that plaintiffs could take a video trial deposition. Now, obviously, you would need the agreement of the witness to do that, but in situations where you need videotaped testimony and the doctor is out of your subpoena range, it seems to me that the judge in Lipitor made a compromised ruling giving defense counsel access first at these depositions but also leaving it open so that plaintiffs' counsel could in those cases where it was necessary ask for a formal video trial deposition. That seems like a fair result to me. I understand that it would be a ruling in favor of plaintiffs' request here, and you've, obviously, entered an objection to that, but it seems like a fair result to me, as it did to I think Judge Temple and as it did to the judge in the Lipitor case.

MR. ORENT: Your Honor, my concern is that these doctors -- we've been trying to schedule these doctors for months now, and we've had to extend this deadline already. The reality is, is that for most of these doctors this is it, this is their deposition and this is their trial testimony, and if defendants go first we don't have the opportunity of putting the witness on first, as we would in trial. And so --

(Call dropped)

MR. ORENT: -- almost as cold as the defendants, but even if we're not going in cold, if we show the defendants documents, under your prior order we have to tell the defendants what documents we've shown, we have to disclose the existence of the communications and provide other substantive information to level the playing field. And so, what the defendants are asking for is both the opportunity to frame the testimony and to know what we're doing in advance. That is a one-two punch, which effectively takes away our ability to question and effectively put forth a case that tells a narrative as one would in trial. There's a reason when you call a witness you get to go first at trial, and it's so that you can ask appropriate questions in a non-leading fashion and set the stage for the evidence that is pertinent to your case.

I can tell your Honor, from my experience, that the defendants ask a whole host of very different questions unrelated to many of the issues the plaintiffs are going to focus on, and it's not unusual for plaintiffs to conduct a 30- to 40-minute direct examination, where defendants conduct a two- or three-hour examination on that same individual.

So, the issue is in order for the Court to -- excuse me. Strike that. Mr. Cheffo's argument presumes that these doctors are altering their testimony or are not sophisticated enough to understand that we are advocates, which we certainly advise them on the front end, that any document or material we give them is going to alter the view of these individuals. The reality is, is that these individuals are going to testify under their oath, and they are going to tell the truth. And so, this is really an issue of the format of the testimony and usability of the testimony. And I would propose to your Honor that having us fly all over the country a second time at a schedule that is very difficult to set, and to get these individuals to even commit to a second deposition is extremely costly, it's time consuming, and it will be difficult and perhaps delay the trial of these matters, if that's the route we go down.

And so, I think that the better way is for us to conduct this as it would be done in the ordinary course, which would be the plaintiffs conduct an examination, a direct examination, using non-leading questions, laying appropriate foundation; the defendants then have their opportunity to cross-examination using leading questions; and then the parties have the appropriate opportunity to redirect and recross, if necessary, provided equal time and equal pay for the time of the doctor.

The reality is, is at the end of the day we're going to have to play a videotape to the jury, and if the defendant gets to play the -- if the defendant's voice comes on the screen first, the jury is going to be confused, and it's going to make no sense in the presentation of the evidence.

And so, the approach that we're advocating is to conduct this just as Mr. Cheffo said, in a truth-telling way or truth-seeking way, and I think that the *Rules of Evidence* plainly allow for that. There's clearly no privilege that allows any -- that attaches to any of the communications, and it will save the parties from flying all over the country yet another time and struggling to schedule these and avoid undue delay.

THE COURT: Are all of the depositions, discovery depos, are they all videotaped?

MR. ORENT: They've been videotaped, yes, and we've, as I said, your Honor, there's only, I believe, been one so far, and the intention was to videotape all of these, yes.

THE COURT: Okay. That was a persuasive argument.

Now let me hear from you, Mr. Cheffo.

(Pause)

THE COURT: Mr. Cheffo?

MR. CHEFFO: I'm sorry. I put it on mute, your Honor, I apologize. I'm going to be brief. Mr. Orent is a zealous advocate and a good one. I'll try and address a few points, because I think we're hearing a little bit of a parade of horribles. As I said, and I was directly involved in the

Lipitor litigation, I can assure you this worked perfectly fine, and I think this idea that we're going to have to keep flying all over the country, that's not the way that it's worked, right, in the sense of your order? Your order basically says, you know, this funnel principle that many Courts use. You have a lot of cases. You do some discovery on others. Then you winnow it down. So, at the end of the day, if there had to be another deposition or two for trial-pick cases, that's what we're talking about. I mean, we're all spending lots of time. So, that's I think a little bit of a red herring. To the extent that the plaintiffs need to have and can have a trial, that's the way these Courts have determined it's equitable.

On the one hand, right, to the extent saying it doesn't matter, we just want the truth, you've heard a lot of argument why it's really, really important, apparently, to the plaintiffs, because, again, they basically have all of this opportunity, and, frankly, it's an equity principle, and I think it also avoids having canned testimony.

The second point of my three, I think, the idea of hearing the defendants first, I'm not sure I fully understand that. I mean, they basically could say, "Hello, Doctor, my name is Mr. Orent." You know, they could start their testimony when they play the -- in the beginning. They can choose how they cut the videotape, right? They don't have to play it with me or my colleagues on the video. So, I don't think that is really an issue.

I also think that what you haven't heard is that they're not going to talk to the doctors, and the idea that they have to show documents, again, that's fully within their strategic -- they only have to give us the documents if they decide to use them, right, with the doctors? They can decide not to. They can decide to have other conversations. And, frankly, even if they give us the documents, your Honor well knows sometimes they're lengthy, and what they say, what they told the doctor, how much time they spent, we don't know any of that until perhaps maybe we get to the deposition and find it out.

So, I think this is fully consistent with I think more kind of recent practice in MDLs for the reasons that you've said, is that judges try to find a balance. They say, Look, we understand that these people have a relationship with the lawyers, they have a relationship certainly with their patients, for the most part, and we also recognize that it's important to basically balance that scale because we're going in cold, and that's I think the most important part here.

There really is no prejudice. These are important cases, and if someone needs to be -- I have a 45-minute video direct. To the extent that they don't get it on their first time around, which typically, frankly, they do or we do, we go back in those two or three cases and take those hour-or-two depositions.

THE COURT: All right. I'm going to just go off the record for a moment, maybe a few minutes, and I will be back with you shortly.

(Off the record)

THE COURT: Okay, Counsel. I've considered this. I find both sides of this argument somewhat compelling, I think as you can tell. Ultimately, I come down on the side of this is plaintiffs' burden of proof in every instance, and ultimately Mr. Orent makes a compelling argument with respect to the likelihood that this videotaped deposition will likely be their testimony. And so, ultimately, I weigh everything and come down in favor of plaintiffs and, thus, conclude that plaintiffs shall go first in all cases. All right.

So, the second issue -- now, again, this is informal, and I remind everybody that my rulings are on an informal basis, as you know, pursuant to our Case Management Orders. To the extent you want formal litigation, this gives you certainly a sense of the way I would likely rule on that formal litigation, but you have a right always to file a formal motion and ask for formal ruling.

All right. But that's the way I balance everything on the first agenda item.

The second agenda item deals with the defendants' profile forms, and I think I need just a little bit of help on that with respect to -- if you could describe the utility of these documents to me, how are you using them. And I know that Attorney Orent mentioned in his letter brief that you want defendants to continue to produce these DPFs because it is helpful and necessary to select future trial cases. So, my guess is that you think, Attorney Orent, that some of these bellwether cases could get knocked off the list, and that you would need to go back and pick out new cases, and that you would be doing this maybe even on somewhat of a rolling basis in this discovery phase.

But let me get a sense from you about these documents, their utility, and because this is your request, Attorney Cheffo, go ahead and begin by trying to explain to me how you view these documents and why you think it is that we can essentially stop producing these.

MR. CHEFFO: Absolutely, your Honor. Thank you.

So, as the Court knows, I'm relatively new to this litigation and a perception I don't want to create and wouldn't be true that I've kind of come in and said, "Well, let's kind of change everything." But I think there are some things that, when you look at them, Courts like your Honor and other Courts want to balance discovery, right, in terms of what is efficient and what really needs to be done and what is kind of jugular, kind of going for the capillary, right? And when you basically talk about the incredible burden that this is placing -- I mean, you saw some of the numbers -- that's an extraordinary amount of money.

So, two things. One is, again, very unusual to have this type of -- usually we are doing fact sheets when there's the bellwether cases, there's already been discovery. So, to have an extremely kind of burdensome, costly -- I've kind of looked at it now and tracked it -- the type of information, even to your Honor's point if we got to a point of selecting new bellwethers we've done -- I think that there was over 700 of these, right? So, there's a lot of them that have been done already. So, it's not a situation where we're saying, you know, let's completely change it.

But the utility of them -- say if there were in some regards -- I'm not going to suggest to you that there's no information that a good lawyer like Mr. Orent or one of his colleagues can't make an argument as to why they would like that information, just like we would like tons more information to make our decisions.

So, it's really I think a balancing and efficiency and a case management for your Honor, and we're basically highlighting what I think are two positions. One is, at this point there's been a huge amount of work, probably millions of dollars, literally, spent just on these forms, which is kind of an extraordinary amount, and then we have a huge basis if we do need to pick cases of these 700. Frankly, to the extent that other cases were picked without that, I don't think you would hear an objection from us, that if we followed a case we'd give more information, right, on that? It's just a matter of kind of going forward.

And the last thing I'll say, your Honor, is I don't want to kind of argue against our position here, but we've tried to be judicious in kind of what we're asking for on these issues. There are some range even within the cost of kind of these forms, so it's not an all or nothing, there are something things that we've been able to say cost 40- or 50,000, there is 25.

So, we think we've picked the areas that would achieve great efficiency. Again, I'm not going to argue that no one can make an argument these are relevant, but I think what we would say is, having done all of this work -- and you saw some of things we have to do. We have to go find information about the manufacturing process and other patients. It's an extraordinary amount -- I have not seen that level of kind of detail, particularly at this stage. Typically, that's the kind of work that is done once you have a bellwether and workup. And hearing kind of the arguments from counsel that it would be really hard and burdensome to go out and re-depose someone, a doctor, twice for bellwether, what we're doing is spending an enormous amount of time that really for the vast majority of these cases, right, is never going to come to fruition, most likely.

So, that's where I think -- we're just asking your Honor to kind of weigh in and help us -- we've identified something, trying to be selective and judicious that -- you know, our client is really bearing a huge expense to the communal benefit, and we'd ask for some relief from that, your Honor.

THE COURT: All right. So, there have been 700 completed thus far?

MR. CHEFFO: That's my understanding. My colleagues are on the phone, or Katherine's on the phone, Ms. Armstrong. That's my understanding. Jonathan may know more, but that's the number I have. I'm only hesitating because I didn't specifically -- I think that's what we put in our letter, but that's my understanding.

THE COURT: And there are just over 1,000 cases right now, there are 1,095, so essentially got about 400 more cases.

MR. CHEFFO: And any new-filed, you know, cases.

THE COURT: Right, right.

MR. CHEFFO: And one last thing, your Honor, I would say, to the extent that we've got -- that we ever needed to get beyond, right, in picking the 700 or others, there's also an element of just, you know, you'd have to kind of update things if this goes on for years and the cases are remanded or new cases are filed, so it's just really not a practical solution to be doing all of this right now.

THE COURT: Okay. And is all of this, as you describe it -- one of my first questions was explain to me what all of this is. Is this solely useful, is its utility limited to determining just your discovery cases, your trial cases? Well, let me repeat that and rephrase it, and I'll do it this way, because I'm concerned about whether or not any individual litigant, individual plaintiff, would be at some form of disadvantage if they were not given this documentation early on in this massive MDL.

MR. CHEFFO: Mr. Orent may speak to that, so I'll just tell you this, and, again, at the risk of being surprised, I would be surprised if, you know, the plaintiffs, any plaintiff, sent this type of information to their client. It's not leading to additional discovery. They have all of the discovery. Again, you know, that's why I'm candid with the Court. Could someone make an argument that, yeah, you'd like to know this information just about our client pool, but I don't think, frankly, that they need to have an extra 400 and ongoing in order to understand what their inventory is about, and to the extent that this is information that we have that is about their specific doctors, they can get that. That's typically done once the case is going to the bellwether. We really don't have any objection. We are not trying to keep information from them. We're basically just giving truckloads of kind of stuff on the front end, which is unusual, as opposed to doing it more in a winnowed way that the bellwether process works, and that's what we're just asking for, is that -- and I don't know that it was kind of recognized how much work that this was, but now that we've had a chance to look back and actually quantify it, that's the relief that we're seeking.

THE COURT: And let me ask you, the DPFs, would that also -- you're talking also about the factual statements, or no?

MR. CHEFFO: So, like, there is the defense fact sheets and the profile forms. What I'm speaking to really only is the profile forms. So, we would give information, and we could, frankly, agree to give even additional information for bellwethers. What we're basically suggesting is -- the way it works right now is the case gets filed, the plaintiffs have to do a fact sheet within I think it's 60 days. Then, that triggers this very kind of comprehensive, burdensome defense profile form that we have to give, and largely that's going to sit there for a period of time if those cases are not picked, and then, once a case is picked, then we do a fact sheet. So, I'm basically suggesting the profile form is where we're spending lots and lots of money and time on many cases that are not likely to be as part of the bellwether pool.

But, even having said that, even if someone is to disagree and say, "Well, which are important?," I guess my answer would be, "But you have 700 of them already."

THE COURT: Okay. And can you give me a sense of the different info? I mean, obviously, it's attached in your exhibits to Case Management Order 3G, but can you just describe in simple terms the difference between these two forms?

MR. CHEFFO: Yeah. I think -- well, I mean, I think in our kind of, you know, in our letter, and I always kind refer to that, and so it basically, it's actually much more involved, and so it requires defendants to determine whether any employees have ever had contact with the plaintiffs' identified physician, to provide the details of such conduct, to disclose information regarding defendant's individual employees, we have to track down and disclose manufacturing, shipping, purchasing data for individual items and associated lots, requires us to search databases, which is a lot of the time and effort, and other sources for reference to the plaintiff, of plaintiff's treating physician and any other patient of a plaintiff's treating physician. I mean, so this is a --

THE COURT: Gotcha.

MR. CHEFFO: -- incredibly Herculean effort before we even find out whether we're going to take that person's deposition in a lawsuit.

THE COURT: Okay. Go ahead.

MS. ARMSTRONG: Oh, your Honor, this is Katherine Armstrong. I think there is overlap between the forms. For example, they both seek information about contact with physicians, both seek manufacturing information, and I think our point is that, while we think that information is appropriate in the defendant's fact sheet which is going to the bellwether plaintiff, it's premature in the profile form.

THE COURT: Okay. Well, obviously, this is something that the parties agreed to early on in the case, this is how we structured things, and obviously I approved that and issued an order. So, what you would be -- if you were litigating this formally, it would be in the form of a motion to amend that order. And so, I think, essentially, you're saying this is just too burdensome.

Let me hear from Attorney Orent, because I know you do not agree with this work stoppage. Go ahead.

MR. ORENT: Thank you, your Honor. You're absolutely correct. I do not agree. And at the outset, let me just say that my offer to defendants, which is to be flexible with the extensions to assist them if there is a logistical burden, would remain out there. And, in fact, there are lots of cases, there are recent cases where I've just given 60-day extensions on some of these. So, I'm not unsympathetic to the human-resource toll, but I think that this is information that is important and that we're entitled to and was agreed upon.

So, let me start off just by way of background and explain how this process unfolded. Your Honor, years ago, probably five to ten years ago, these profile forms, the plaintiff profile form and defendant profile form, were really not in vogue. Each side would do a lengthy plaintiff fact sheet, and then the defendants would do a lengthy defendant fact sheet for each and every case. As time sort of moved on, there was this thought that a lot of the information was excessive, why plaintiffs have to fill out large volumes of form discovery that will only need to be updated. And so, as the years sort of moved on it became more of a standard practice to have this profile form process, which is a more limited form for both parties, and the idea behind this was that there would be parity between the burden that the defendants have and the burden, quite frankly, that the plaintiffs have. Each plaintiff is expected to fill out a lengthy questionnaire that is a profile form, and they have done so, and provide certain documentation to defendants at the outset of their case. This is the other half of that responsibility. So, every time and, in fact, in order to even have a requirement to do one of these forms, the defendant tees their due date off of when the plaintiff serves theirs. So, the plaintiff has already fulfilled their obligation and already undertaken and completed the burdens and task of completing this information.

So, this is a process that has emerged in not just this tort but in other MDLs. For example, most recently there is a Bard MDL that I am aware of that is in Ohio that has entered and utilized a similar defendant profile form process.

So, what is the information and the overlap? That's the first issue I want to talk about. So, this form was actually designed and negotiated to have overlap. So, that's actually not a negative thing; it's a positive thing. One of the points is that the defendant doesn't certify the defendant profile form. It's intended to give us information so that we can use it in our case but without being burdensome to the corporate representative. The fields were in our mind data-mapped so that the material could be transferred simply and then updated from the defendant profile form ultimately to a fact sheet.

And so, to suggest that the information is different or would need to be redone isn't really true. It would need to be transferred over. So, then the question really turns on we have this agreed-upon form; why is it useful and how is it useful? So, it's useful certainly in the selection of trial cases. That is probably the biggest factor.

And, your Honor, I am a pessimist in life, and seeing how this litigation is moving, I would be surprised if we don't select another pool, and, quite frankly, I think that we probably as a group, and I had floated this idea to defendants, we need to start thinking sooner rather than later of a follow-up process to the initial bellwether pool and selecting another group of plaintiffs.

So, that is the first aspect of this, because after the currently scheduled bellwether process ends there's really no plan, and I think that we need to have a plan in place. So, that's the first point.

But, specifically the data and how is it useful, the data that's on the profile form includes things like the name of the doctor and the medical facility, it includes information like the sales representative at Atrium, and it contains information about the regulatory process, whether a complaint was filed in this case for this complaint or not, and finally it includes information on the lot information, what was done with the lot.

Starting backwards, I'm going to start with the lot information. Lot information is important, because it allows us to see the big picture of what's going on. The FDA process is a flawed process for complaints. It requires voluntary submission of complaints and is often under-reported. And so, if we, as plaintiffs, want to see if there is a pattern with a particular lot for our claims, one of the ways to do it is to look and see based on the filed claims out there. It's an easy piece of information. We provide actually the lot information, and the defendants just have to kick out the manufacturer information based on the sticker that we provide them. So, that's the first point.

Second, the complaint file. FDA cited the defendants for their lack of -- for complaint handling. We are entitled and each of our plaintiffs is entitled to know whether their particular complaint was filed and whether it was adequately handled.

Third, with regard to the defendants' position, a plaintiff is entitled to know whether or not a particular physician was paid for or paid to consult with defendant, whether there's some sort of ongoing fiduciary relationship between defendant and their treating physician. That's some basic information. These are plaintiffs who are sick and injured and have a right to know whether or not they're going to go back to a doctor who has a conflict of interest that is not required in any other setting to be disclosed.

And then, fourth and finally, the sales representative --

(Call dropped)

MR. ORENT: -- that we're going to be telling is what was told to whom and when, particularly with regard to the contacts with doctors. Finding and identifying individuals who were the primary points of contact is an important fact-witness element.

The information that we seek here is actually akin to the Rule 26 general-disclosure-type requirement. As your Honor recalls, again, we looked at that general Rule 26 requirement in favor of this form.

So, when you look at all the factors you have a useful document with information that the plaintiff is entitled to know, both because it may affect their personal decision-making; it also allows us to see at a 10,000-foot view, like, what's going on; and finally, it was agreed to, and the plaintiffs have already fulfilled their burden.

So, for those reasons, your Honor, we believe that the process ought to continue as is, and I'd answer any questions that your Honor might have.

THE COURT: In the 1,095 cases filed thus far, obviously the ones that have been filed today and in the last week perhaps you can exclude, but in those cases how many plaintiffs' profile forms have been filed?

MR. ORENT: I don't have a number for you, but what I would say is that I had not seen deficiencies, so I would say that pretty much all within the amount of time, and I can't remember, honestly, whether it's 60 days or 45 days from filing that they're due. But the plaintiffs by and large have been very timely in answering them, so it would just be a matter of backing out the number of days we are now from where we are.

Again, your Honor, just to reiterate, I understand that there may be a logistical obstacle with everything else going on, and we are not inflexible to giving defendants case-by-case extensions, and we are amenable to that, but the information is essential and necessary, and we wish to continue the process.

THE COURT: All right. Attorney Cheffo.

MR. CHEFFO: May I respond, your Honor?

THE COURT: Sure.

MR. CHEFFO: Thanks, your Honor. A few things. I think I would just say that some of the arguments were made about essentially are these relevant, are they things that are ultimately discoverable, and I think I've said very clearly up front that's not kind of the issue for us. I think, and your Honor is certainly aware of them, whether it's MDL -- and these Federal Rules, that one of the kind of -- MDLs are great, I'm a big fan, right? But one of the things that kind of companies and the judiciary and others and the parties, they find it extremely expensive and often wasteful, and I think all of us are charged with trying to find ways that are efficient. And, yes, someone -- if my client made a decision and determined that this -- it was agreed to, so I'm not going to in any way say that that didn't happen. We've actually been doing it for 700 of these. The point really now is, you know, we're not basically -- we have an ability to kind of look back and find what's most efficient.

And I think, again, what you've heard -- and I have a different view of how these evolved. I think it's a very different view. Basically, when you look at two different things, the fact sheets -- it's not like the fact sheets are done with some voluntary from the plaintiffs kind of gesture. The reason why fact sheets first came into being, it was because what happened was in normal litigation the defendants would serve interrogatories, document requests, requests for admission, and the plaintiffs were like, "Oh, my gosh, we have a thousand cases. We can't do it." So, there was an agreement to get a modicum of information or sometimes more than a modicum from the plaintiffs to lessen the load. So, that was basically an accommodation to get information, and then they had to typically provide some documents and authorizations.

The flip side has always been like -- this I have to tell you, your Honor, is a very unusual situation -- is that the flip side is they actually -- it's not like the defendants get a pass. What the defendants do is they produce millions of pages of documents in response to document requests and discovery and depositions. So, that's where kind of the rubber hits the road in level of a parity. And then all of the points about, you know, my client has a right to know this or that, we're actually not disagreeing that ultimately they do, right, which is why we said, and I think Ms. Armstrong highlighted the point, it's a matter of if the cases get picked for a bellwether, right?

Remember, we don't know hardly anything about these plaintiffs, right? We take the deposition, we get some medical records, then we'll pick a doctor. We haven't taken any family members, we haven't gotten a whole host of the type of discovery that we're going to get, but we then have to make those decisions. So, the idea that they basically need every possible piece of information about a doctor and what they may have gotten in a sales rep, I think it's just not the way that the process needs to work, and I think really what we're saying is they can get all of that at the appropriate time, but you just heard about a case we're hearing for the first time.

Again, I'm not being pejorative about this, but someone said, "Well, they're going to be dismissed." Well, like that, and there's probably going to be others like that. You have to spend a lot of time and effort and work on that case. It kind of went into the bellwether process, and there's going to be probably other people.

So, what we're really asking for is for the Court to exercise its discretion here and basically say in this type of litigation, which is very expensive and burdensome, you could basically relieve us of literally a million dollars or more a year of costs that really does not have to be spent across this MDL right now. It can be done in a more efficient way when the cases are selected as bellwethers.

THE COURT: Anything further, Attorney Orent?

MR. ORENT: I would just say, your Honor, one thing, and my argument I think stands on its own, but for an individual plaintiff who may or may not go back to a particular doctor, I think that getting this information right away is extremely urgent and extremely timely, so they can make real-life treatment decisions on whether or not they want to go to someone who has a conflict of interest, and there's nothing that can fix that or un-ring that bell once that plaintiff goes to someone, because it's a matter of trust, it's a matter of personal safety and conflict.

And so, again, your Honor, I just want to highlight that in addition to my other arguments.

THE COURT: Okay.

MR. CHEFFO: The only thing I would say, your Honor, is you, you know, have you ever had any examples of where, you know, trust today, and to the extent a patient wants to ask his or her doctor if they have that -- I mean they also have, in general, information in the course of discovery about this. So, in creating this burden for this one hypothetical situation where someone finds that there may have been, I don't know what it is, some kind of presentation or something, it just seems to be overkill for what we need to be doing right now.

THE COURT: All right. Having carefully considered this on an informal basis, I am not persuaded to amend the order to remove or relieve the defendants from their requirement to file profile forms for, frankly, all the reasons that Attorney Orent listed in his argument.

So, let's move to the final issue, which is the discovery dispute concerning the virtual data room. So, I think I just want to begin by asking Attorney Orent what you do with -- let's say you get everything from the virtual data room. Let's just hypothesize for a moment. All the motions in the jurisdictional litigation, all those motions are ripe. We're going to schedule an evidentiary hearing. What are you doing with this evidence at this late point in terms of the jurisdictional discovery question? Do you see the logic of my question?

MR. ORENT: Your Honor, absolutely, and I would preface this by saying we do not intend to move the date based on this. That June date, whatever it ends up ultimately being, we do not want this to drag on and on and on. What we intend to do, and, your Honor, plaintiffs have retained several experts, as you are well aware. Defendants disclosed experts at the end of discovery. We moved to strike them as a result of what we thought was untimely, and your Honor concluded otherwise. So, we have retained experts that are going to rebut some of the things that defendants are saying. We've scheduled defendants' expert depositions and within the regular course provide testimony -- excuse me -- provide reports of our experts if they move the ball along. We don't intend on putting out expert reports that don't move the ball forward in our opinion.

Principally, there are a number of issues that have come up, and as your Honor is well aware, we had a hearing on October 22nd. The Agreement, the Asset Purchase Agreement, was actually dated October 17, 2018. We didn't learn about the existence of the data room till the documents were produced some time later. So, the first time this issue was ripe for even dealing with it was really in January, and this is the first opportunity we've had to argue it.

So, the simple answer is, your Honor, is that we believe that this data room is essential to piercing the corporate veil or at least essential to providing essential information relating to piercing the veil, particularly in several material respects relating to the bookkeeping practices and the separation between different entities as well as some of the other observances of formality.

First of all, we believe that this is relevant to the four categories that we had agreed upon with defendants at that October hearing, because right in the Agreement on several pages, for example, "Disclosed information," Page 5 of the agreement, "shall mean the documents disclosed to the buyer and its representatives and advisors containing *inter alia* commercial accounting, financial, legal and other information relating to the business in the virtual data room provided by the seller in respect of Project Star as of 5:00 p.m. on the day prior to execution of the agreement." And the actual executed version of the agreement, the cover page said the 17th, so I'm presuming that means the day before that, the 16th of October. There are some other passages and references to this.

But here's at a practical level why it's important: First of all, we believe that the books and the figures used to justify the purchase price were calculated using not just Atrium books.

So, if I might take a step back, your Honor, the way Atrium -- and we learned this from the 30(b)(6) -- the way that Atrium conducted business, beginning about in the mid-2011 to '15 time frame they started moving from a position where they sold all of their products to the outside world when they were Atrium to a process where they sold all of their products exclusively to other Getinge affiliates, and what they did is they actually sold them at a loss, so as the value of the price went up, of the products went up, the purchase price that they sold it for went down, and effectively what we believe they were doing is syphoning off cash to undercapitalize the entity.

Now, fast forward several years later. Atrium is now trying to sell the business. So, in an arm's length transaction Atrium would not have access to the sales data of this outside world of that next-level sale to the rest of the world. We believe that Atrium, in valuing the mesh business, utilized proprietary data of those other corporate entities for purposes of valuing the business, and that in the process of doing so they utilized outside data that Atrium would not as an independent company have transaction-level data for. And, in fact, when they talked about sales, we believe that they most likely talked about sales in terms of that next-level sale to the outside world after they sold to the Atrium entity. So, that's one first major, major point.

The second point, your Honor, is that along with this agreement there are numerous contracts that were between none -- that were not between Atrium and some other entity but were, in fact, other subsidiaries of Getinge, so, for example, employment contracts and the like. Employment contracts of non-Atrium employees were sold along with the mesh business. In an arm's length transaction, if only Atrium was selling it, how is it selling the employment contracts of Maquet? There's got to be oversight.

So, that's the second thing, is that with regard to some of these contracts, we need to know what is being considered and how is this business being syphoned off and categorized as, quote, unquote the "mesh unit?" What is in there? How are they taking these outside pieces, outside sales, all of these things that are outside to what defendant claims is a properly walled company, how are they selling these things with the mesh business? That information is contained in the data room.

There's further information in terms of the permissions and the structure of the deal and the communications with Lockridge Financial. Lockridge Financial was the independent broker, and we've been attempting to serve a subpoena on them, a third-party subpoena, that we learned about through this deal and the transaction, and that based on the information that we've learned it was actually Getinge corporate representatives and other Maquet representatives that were the ones that hired Lockridge, the broker of the deal. So, we know that corporate folks even know that these board meeting minutes nominally show for 15 minutes that Gary Sufat and Chad Carlton appeared and voted on this, but what we do know is that it was other individuals from outside in the company that are having these communications that are choosing that it's the right time to do this, to choose not to reinvest in the mesh product after 2012.

So, these are the types of things that we believe are in the data vault here.

Now, the only reason not to give us this information would be burden, and I would tell your Honor, number one, there is absolutely no legal privilege that applies to these documents, there's no third-party privilege that I'm selling my business and the people I'm selling it to have a free right to look at this stuff before anything is consummated and there is a privilege that attaches. There's no such privilege.

And, second, all they have to do -- this is a pre-existing data room. All they have to do is give us a password and a log-in. In fact, my law firm would gladly pay the price of that additional access to that file center. The information is already culled, it's readily available. It is literally as simple as giving us a log-in and a password to download this information.

So, on one hand you look at the burden to the defendants, which is nominal, and the benefit to the plaintiffs, so when you weigh the proportionality the proportionality is well in favor of us. Again, there is no privilege, relatively no cost, and it's an essential issue in this case.

So, for those reasons, your Honor, I would say that this information is essential to underlying -- to finding the underlying truth of the matter once and for all as to some of these issues.

THE COURT: Go ahead, Mr. Cheffo.

MS. ARMSTRONG: Your Honor, this is Katherine Armstrong. I'll be responding to this issue.

THE COURT: Go ahead. Sorry.

MS. ARMSTRONG: So, with respect to -- one of the things that I did not hear Mr. Orent say is what requests for production outstanding to us these are responsive to and how our prior responses to those outstanding requests for production were deficient. They want to tie it to their request for the Purchase and Sale Agreement of Atrium's hernia mesh business, but they did not seek all documents related to the sale of the mesh business. They sought a specific category of documents, a specific document, the Purchase and Sale Agreement. That's been produced, and they've described these requests, there are four categories, as particular items. At the conference with the Court they characterized them as narrow requests that they wanted to obtain from us, and we agreed to treat them as requests for production and respond to them based upon that representation, and now they're trying to make it much larger.

What the data room is, it is a subset of company documents. These are not documents that are produced in the ordinary course of business. When purchasers come to purchase either a part of a company business, either a subsidiary, or here it's an asset sale, or an asset of a company, you collect a subset of the company's documents into a data room so that can review while they're doing due diligence and they can produce them.

Now, Mr. Orent has a lot of theories about what documents are in these data rooms, but what he hasn't done is he hasn't gone through his request for production and say, "They didn't give us what there is in response," and we've responded to these four categories of requests that he identified at the conference and that we agreed to treat as a third request for production. They propounded hundreds of jurisdictional requests for production and duces tecum to 30(b)(6) witnesses, and we produced 30(b)(6) witnesses, and we have responded to all of that, and when we responded to all of that we went through the original company files to identify what the documents were that were responsive subject to our objections and respond to those requests, and we produced all of those. And we're not here arguing about the deficiency in our responses to those requests, yet the plaintiffs have not raised that issue. They just identified this other set of documents that's a collection of, you know, duplicates of company documents. There are no original documents in there. But it's mostly you collect documents and you just gather them together in a place.

So, he hasn't identified any way we haven't responded to the discovery that was actually propounded on jurisdiction that these would somehow be responsive to. He hasn't identified those deficiencies. And we can argue about those deficiencies, and we could respond to those deficiencies, but that's not what is being identified here. They are just pointing to the data room and saying, "We want that."

His argument -- so, first of all, we do have objections on relevancy, we do have objections on responsiveness. The data room isn't collected -- to collect documents that are responsive to requests for production in this litigation. So, there's very likely documents in there that are not responsive to any outstanding requests and to which we would have relevancy objections.

So, it's not just a matter of just handing them the password and letting them go through the data room and review whatever they want. We would have to review this voluminous set of documents for responsiveness, for confidentiality, and we would also have to review it for privilege, because we are aware that there are some privileged documents that have been placed in the data room because potential buyers want to understand the particular liability associated with this litigation. And there is case law we cited in our paper to you that says, because there is a reasonable expectation that if you're selling a product line that both the seller and the buyer may be involved in litigation over that product line, that they have a common interest in defending that litigation, and, therefore, there is a common-interest protection of the attorney-client and work-product privilege. So, all of that review would have to be done, and it would have to be done and that burden would have to be undertaken when they haven't said, "Here is our request for production, and here is why their response to it has been deficient."

THE COURT: Let me ask you this question.

MS. ARMSTRONG: "We think there may be other things in the data room," but that's speculation on their part.

THE COURT: Are there documents in the data room that are responsive to any of plaintiffs' discovery requests that have not been produced previously?

MS. ARMSTRONG: We would have to go through and undertake this burden in order to answer that with any kind of 100 percent certainty. What we did is we went through the original documents and there's no reason to believe that that -- they haven't identified any reason to believe that search wasn't sufficient.

But let me give you an example. So, there's a request for --

THE COURT: Let me just interrupt you for a second. That virtual data room is in your control. That virtual data room is something that you know about and that Attorney Orent came to know about only because he saw it referenced in the Purchase and Sale document. That room, however, is a room that is in your possession, custody and control. So, if there are documents in that data room that are responsive to any of his or plaintiffs' discovery requests and you haven't produced those documents, that would be something that you would have been required to do previously.

MS. ARMSTRONG: Your Honor, that would require us to undertake what we do believe would be an unreasonable burden. For example --

THE COURT: Well, can you answer my question? Do you know if there are any documents in the data room that would be responsive to any of the prior discovery requests?

MS. ARMSTRONG: Yes. To give you an example, we think there's going to be a large set of duplication, and that's why it would be burdensome. To give you an example, there is a request to us for all of the instructions for use, and we produced those. We produced those from the original company files. We believe those also exist in the data room, that those were also one of the things that were used to populate the data room. To have to go through and search this other voluminous set of documents when we've already searched the original company files would be burdensome.

And I also want to correct that they've only recently learned about the data room. They've known about it. It was identified by documents produced in our document production since January 2018.

THE COURT: Attorney Orent, can you point to discovery requests to address her initial argument?

MR. ORENT: I can, your Honor, but just as a preface I want to lay out again the background. This was agreed-upon production at the October 22nd hearing. I do feel like, while I do think that in form we do -- have done this, this is really a form over substance, almost an "I got ya" moment, your Honor. This is a deal that was sprung on us at the very last moment. After the close of discovery we learned two very important facts, that Getinge is claiming that they've reserved $200 million for this litigation. So, the parent who is claiming no liability publicly says that they are retaining liability for it in contravention of the position that's been taken in Court.

And then the second thing on the same timeline is that the defendants announced the sale of the mesh unit of Atrium, and that we believe that they calculated information specifically for the sale. The sale document itself that we didn't get until January -- excuse me -- November or December or somewhere in there, specifically says Project Star as of 5:00 p.m. on the day prior to the execution.

So, I'm a little bit at a loss in terms of the defendants' requirement that we do a formal discovery request, because this happened after the close of discovery and would be a severe prejudice to the plaintiffs if that were the standard.

Notwithstanding that, though, the defendants agreed on October 22nd to produce the sale document. This is specifically referenced in the sale document, and my reading of this document means that it is part and parcel of the same thing. It is part of the deal. So, when defendants discussed disclosed information and specifically mentioned the data room by a specific date and time, that is as of 5:00 p.m. on October, 16th, 2018, that's the data room. That's the definition of the data room under this agreement, in the agreement, Page 5 of the agreement. There are other pages within the agreement that make reference to this.

And, again, your Honor, this is -- there are -- Section 4.4 of the Agreement leads to information that could only be gained from the reading room, the valuation of the company, its sales, how those are calculated. Those sort of things that were part and fall within those four categories of information we were requesting, whether or not by the letter, it was certainly the spirit of the agreement, and for the defendants to now say on a deal that they've been working on for months and didn't publicly disclose maybe even because of -- I don't know why -- but it puts a severe prejudice on the plaintiffs.

And so, what I would ask this Court is that if for some reason the Court doesn't find it persuasive that the asset agreement and those four categories of documents require the production of these documents, that the Court give us leave to file a request for production, a formal request for production for that specific information.

My concern, though, your Honor, is that we end up in the exact same place except 30 or 40 days have now passed because that is the amount of time required for the defendant to answer and file an objection without providing any substantive responses.

So, I think that that argument is all form over substance and doesn't place enough context into how flat-footed plaintiffs were caught on that day of October 22nd, your Honor.

THE COURT: And that was October 22nd in 2018?

MR. ORENT: Correct, your Honor. And we had a hearing on that same date.

THE COURT: Okay. All right. And I'm just trying to understand. We're now in February 2019. You've been asking for this in writing? Is that what's been going on?

MR. ORENT: We have, your Honor. That's correct. This issue was originally teed up for the January hearing, your Honor, but we had continued to meet and confer. We wanted to do that. So, when the hearing was cancelled in January it was then brought into the February hearing. But the correspondence, I believe, is all included here, your Honor. But we've been trying to learn as much as we could based on the documents that were produced, and, as your Honor knows, that does take some time, but we acted as promptly as we could on this.

THE COURT: Now, I reviewed some of the letters that were sent back and forth and are attached, I believe, at Exhibit A, and I can see here that Attorney Ocariz did respond with respect to access to virtual data room.

Okay. Let me go off the record for a moment. I'll be back in about five minutes.

(Off the record)

THE COURT: Okay. We're back on the record. I've given this some thought. Obviously, this is on an informal basis just on the basis of your letter briefs and on the basis of what you have argued, but the way, on balance, I decide this informally is as follows:

First and foremost, if there are documents in that data room that are responsive to any of the plaintiffs' discovery requests that have not yet been produced, they must be produced expeditiously. That's first.

With respect to this access to the virtual data room, let me say this: It seems to me that there is likely information in the data room that is relevant on the question of the purchase of Atrium's assets. I also think, and, again, I have not seen the document, but based on Attorney Orent's description of the -- rather, incorporated by reference, the references in the Purchase and Sale to this virtual data room almost sound as though it is part and parcel with that Purchase and Sale Agreement, and, additionally, I consider the fact that this is something that came up and was, frankly, a surprise to plaintiffs and was disclosed to plaintiffs really after the fact.

So, weighing all of that, my informal resolution of this would be that I would likely find that there is relevant information, and that to the extent there is a common-interest privilege it's not something I am familiar enough with to give you a sense of how I would rule on that; I would need briefing on that question. But it seems to me that the defendants can produce a privilege log, make the argument, you can meet and confer about these issues and develop a production protocol with respect to this virtual data room. And if, in fact, that meet and confer process falls apart and does not yield anything satisfactory, then I would say that plaintiffs should file a Motion to Compel within 14 days of this date, and I will give defendants seven days to object.

I will issue a ruling as expeditiously as I can, taking into consideration the time frame for the jurisdictional issue to be resolved.

So, my inclination is that this virtual data room does contain relevant info. I don't know enough about the common-interest privilege, but it seems to me if you're opening up this material and you're giving complete access to all of it to potential purchasers, I think certainly Mr. Orent has an argument that any privilege would be waived. Again, I don't know enough about the common-interest privilege to be able to give you any sort of ruling on that, but it seems to me that there is at least a good-faith waiver of privilege argument there.

But that's what I would do at this point informally with that question, and to the extent you want to formally litigate, then I need a Motion to Compel within 14 days, and I'll give you seven days to respond, and then I'll try to rule as expeditiously as I can; and, of course, at that point I would have some case law and you would be able to brief these issues for me so that I can give you a formal response. So, that's my ruling with respect to this last issue.

I want to also make sure that counsel have continued to meet and confer on the request for the production of tax returns. The indication in the agenda is that you are continuing to talk about that. Is that the case?

MS. ARMSTRONG: Yes, your Honor. This is Katherine Armstrong.

THE COURT: Okay. All right.

MR. ORENT: Yes, your Honor.

THE COURT: And then one final issue that I just need to -- a loose end I need to tie up. There is a pending Motion to Compel. It was Plaintiffs' Motion to Compel Getinge's responses to Plaintiffs' Amended First Set of Requests for the Production Numbers 24, 27, 36. The document is actually Document 545. It was filed back in March of 2018. It's still pending. We discussed it at a monthly status conference in April, and it sounded like the parties had worked it out or were going to work it out, so I held a ruling on the motion in abeyance, and I never heard back from counsel on it. And what I'm just asking you to do is to confer briefly about that pending motion and let my Case Manager know as soon as possible if, in fact, that motion is moot. Then I will close it out as moot. All right?

MR. CHEFFO: Thank you, your Honor.

THE COURT: Anything further?

MR. ORENT: Not for the plaintiffs, your Honor.

THE COURT: Anything further for the defendants?

MR. CHEFFO: No, your Honor, thank you.

THE COURT: All right. Thanks to all. Court's adjourned.

(WHEREUPON, the proceedings adjourned at 3:53 p.m.)

C E R T I F I C A T E

I, Brenda K. Hancock, RMR, CRR and Official Court Reporter of the United States District Court, do hereby certify that the foregoing transcript constitutes, to the best of my skill and ability, a true and accurate transcription. Of my stenotype notes taken in the matter of In Re: Atrium Medical Corp. C-Qur Mesh Products Liability Litigation, No. 16-md-02753-LM.

Date: 2/26/19

BRENDA K. HANCOCK, CRR, RMR
OFFICIAL COURT REPORTER