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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-2753-LM  
LITIGATION \* February 24, 2017  
\* 10:05 a.m.  
\*  
\*

\* \* \* \* \*

TRANSCRIPT OF SPECIAL HEARING  
BEFORE THE HONORABLE LANDYA B. MCCAFFERTY

APPEARANCES:

For the Plaintiffs:

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Bonsignore Trial Lawyers, LLC

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Benjamin P. Lajoie, Esq.  
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PLAINTIFF APPEARANCES CONTINUED:

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For the Defendant:

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

2 THE CLERK: The Court has before it for  
3 consideration today a case management conference in MDL  
4 docket number 16-MD-2753-LM, In Re: Atrium Medical Corp.  
5 C-Qur Mesh Products Liability Litigation.

6 THE COURT: All right. Welcome everyone. Let me  
7 just get my paperwork together before we begin introductions.

8 Okay. Let's do this. Let me first have defense  
9 counsel introduce themselves. Defense counsel on this side,  
10 is that right? Introduce yourselves and just state your name  
11 and spell your last name for our stenographer.

12 MR. TURNER: Turner, T-U-R-N-E-R. First name is  
13 Hugh Turner.

14 THE COURT: Excellent.

15 MR. TURNER: I represent all the defendants in the  
16 case, your Honor. If I could, I would like to --

17 THE COURT: Are you from Florida?

18 MR. TURNER: I am.

19 THE COURT: Excellent. All right.

20 It's helpful if you can tell me where you're from,  
21 as well. Go ahead.

22 MR. TURNER: Okay. Your Honor, with me is my  
23 partner, Enjolique Aytch. She is going to carry the labor  
24 more with I think much of what we discuss today.

25 THE COURT: All right.

1           And I had met at least Attorney Aytch on the  
2 telephone recently which resulted in case management order  
3 No. 2.

4           So nice to meet you in person.

5           MS. AYTCH: It's nice to meet you, as well, your  
6 Honor.

7           For the record, the spelling of my last name, I  
8 know it's going to be difficult, A-Y-T-C-H.

9           THE COURT: All right. But it's pronounced as  
10 Aytch?

11           MS. AYTCH: Correct. Aytch.

12           THE COURT: Aytch. All right.

13           MR. TURNER: And next to Enjolique is Pierre Chabot  
14 from the Wadleigh Starr firm in New Hampshire.

15           THE COURT: Excellent. Somebody from New  
16 Hampshire. Nice to see you.

17           MR. CHABOT: For the record, that's C-H-A-B-O-T.

18           THE COURT: All right.

19           MR. TURNER: And on second table Jack Friberg also  
20 of the same firm.

21           THE COURT: Hello, sir. How are you?

22           MR. FRIBERG: Fine. Thank you, your Honor.

23           MR. TURNER: And last, but not least, Elan Hersh of  
24 my firm, your Honor.

25           THE COURT: Excellent. All right.

1 MR. HERSH: Good morning. Elan Hersh, H-E-R-S-H.  
2 Good morning, your Honor.

3 THE COURT: All right. Nice to meet all of you.  
4 And now for the plaintiffs. Let me just do this.  
5 I know that there are those of you who are sitting in the  
6 well, and I understand there are others also representing  
7 plaintiffs but not necessarily part of this proposed lead  
8 counsel structure, but I want you to feel free to be heard.  
9 And where you're sitting now I can read your name tags, and  
10 so if you do need to be heard I can see you and I can  
11 properly identify you.

12 My understanding, and I just want to confirm, there  
13 are 28 cases now -- plaintiff cases?

14 MR. BONSIGNORE: Yes, your Honor.

15 THE COURT: And 23 of the 28 are represented by  
16 counsel sitting in the courtroom today?

17 MR. BONSIGNORE: That's precisely correct.

18 THE COURT: All right. So five of the cases have  
19 authorized attorneys who are here today to represent them?

20 MR. BONSIGNORE: That's precisely correct.

21 THE COURT: Okay. So I would like then to have  
22 each plaintiff counsel just identify themselves.

23 If you are here as an authorized representative for  
24 another case -- I think even safer you could just mention the  
25 attorney responsible for giving you the authorization, but I

1 would like just for the record to have you identify  
2 yourselves, just tell me where you're from. I know some of  
3 you represent a numerous set of cases so I won't require you  
4 to rattle those off.

5 MR. BONSIGNORE: Thank you.

6 THE COURT: Go ahead. Attorney Bonsignore.

7 MR. BONSIGNORE: Thank you, your Honor.

8 Robert Bonsignore. I have a house in Las Vegas,  
9 but I also slept last night in my house in Belmont, New  
10 Hampshire, about twenty minutes from here. I'm a retired  
11 past president of the Belknap County Bar Association and very  
12 proud of it.

13 THE COURT: Excellent. Nice to meet you.

14 And thank you, sir, for acting as interim counsel  
15 for me. I had to appoint somebody, and I looked at the  
16 pleadings and I looked at the cases and it looked as though  
17 you had a critical mass of cases and some experience so I  
18 asked you to serve as interim lead counsel.

19 I appreciate that and appreciate the work you've  
20 done to coordinate things thus far. So you have the Court's  
21 thanks for that.

22 MR. BONSIGNORE: Thank you.

23 I would like to thank the plaintiffs' counsel for  
24 coming together and working cooperatively and limiting the  
25 issues in front of the Court.

1           We've already been hard at work, and it is a good  
2 group I'm proud to work with.

3           THE COURT: All right. I will be asking you some  
4 questions about your proposed leadership organization, but  
5 we'll get to that in a moment.

6           Attorney Orent.

7           MR. ORENT: Good morning, your Honor. Jonathan  
8 Orent. I'm an attorney with Motley Rice out of the Rhode  
9 Island office.

10          THE COURT: A little close to home. All right.

11          MR. MATTHEWS: Good morning, your Honor.

12          Todd Matthews from the Gori Julian firm in the St,  
13 Louis area.

14          THE COURT: Okay.

15          MR. SELBY: Good morning, your Honor.

16          David Selby with Bailey & Glasser from the  
17 Birmingham, Alabama, office.

18          THE COURT: Alabama.

19          MR. EVANS: Good morning, your Honor.

20          Adam Evans from the Hollis Law Firm in Prairie  
21 Village, Kansas, which is right outside of Kansas City.

22          THE COURT: Excellent.

23          And Mr. Tate from Georgia, I believe.

24          MR. TATE: Good morning.

25          Yes, Judge. I'm Mark Tate. Savannah, Georgia.

1 THE COURT: Excellent.

2 All right. I would like to have you identify  
3 yourselves as well in the back.

4 MR. MUGGEO: Good morning, your Honor. Lou Muggeo.  
5 Salem, Massachusetts.

6 THE COURT: Excellent.

7 MS. SCHIAVONE: Good morning, your Honor.  
8 Anne Schiavone. Kansas City, Missouri.

9 THE COURT: Excellent. Thank you.

10 MR. PRICE: Good morning, your Honor.

11 My name is Robert Price with the Levin Papantonio  
12 firm in Pensacola, Florida.

13 THE COURT: Okay. Thank you.

14 MR. DALIMONTE: Good morning, your Honor.

15 John Dalimonte from the Dalimonte Rueb Law Firm in  
16 Boston, Massachusetts.

17 THE COURT: Excellent.

18 Now, of the plaintiffs' counsel who is here  
19 authorized to represent other parties?

20 I know that my case manager has dutifully found  
21 this information out. I just want to put it on the public  
22 record.

23 MR. ORENT: My understanding, your Honor, is that  
24 we have collectively been empowered by Mr. Josh Wages of the  
25 Blasingame firm in Georgia, as well as Mr. Kreis from



1 Aylstock, Witkin, Kreis & Overholtz in Pensacola, Florida.

2 THE COURT: Your understanding is that. You seem a  
3 little hesitant on that.

4 MR. ORENT: No. The only reason is this morning  
5 one of my colleagues said, hey, Jon, I spoke to Josh and Doug  
6 this morning and they would like you to represent them this  
7 morning. I didn't actually physically have that phone call  
8 myself.

9 THE COURT: I understand. I appreciate the  
10 hesitation then.

11 So does that cover all 28 plaintiffs' cases in  
12 terms of representation?

13 I'm sorry. Go ahead, Attorney Evans.

14 MR. EVANS: Your Honor, the Bartosiewicz case,  
15 which currently the counsel of record is Dion Rassias, I'm  
16 authorized to represent that individual here today as well as  
17 the Jere Russell case. And counsel of record in that case is  
18 Brandon Bass from Tennessee.

19 THE COURT: Excellent. Thank you.

20 Anyone else?

21 THE CLERK: The Guzman case.

22 MR. BONSIGNORE: Yes, I'm authorized to represent  
23 the plaintiff in that case.

24 THE COURT: Excellent. Thank you.

25 I have an excellent case manager, as you will soon

1 discover.

2 All right. Now, Attorney Selby, I was looking for  
3 your appearance, and I think as of at least yesterday when I  
4 left you did not have an appearance. Is that in any -- you  
5 didn't have one in any original transfer, or court, or in  
6 this case. Am I right about that?

7 MR. SELBY: Well, your Honor, I don't know what the  
8 situation was. We're in the Perrine case. That was a  
9 tagalong order that came in.

10 THE COURT: So you did appear in that court?

11 MR. SELBY: Yes.

12 THE COURT: Okay.

13 MR. SELBY: But we -- the appearance was not as --  
14 before we could file a pro hac motion, it was transferred.  
15 So I filed an appearance in this court yesterday.

16 THE COURT: Okay. All right.

17 So the pro hac wasn't actually officially approved  
18 so that's why your name didn't appear on our docket?

19 MR. SELBY: That's correct.

20 THE COURT: All right. Okay.

21 MR. SELBY: And I didn't realize it until it was  
22 brought to our attention so we appreciate that. We did not  
23 realize that.

24 THE COURT: I was only looking because you're part  
25 of this lead counsel team. I just wanted to make sure lead

1 counsel obviously had appearances either in the transfer, or  
2 jurisdictions, or here. Thank you.

3 MR. SELBY: Thank you.

4 THE COURT: Okay. All right. So I think I've  
5 taken care of that.

6 Now, I spoke with Judge Temple yesterday, and this  
7 was just a very introductory conversation. I wanted to learn  
8 from him, A, is he open to coordination, and he is in terms  
9 of discovery. We spoke -- we did not speak in terms of  
10 specifics. That is something that we will do as a group.  
11 But he is open to that.

12 I also wanted to know how far along his cases were.  
13 You had described that I thought quite well for me in the  
14 background information, but I just wanted to have a sense  
15 from him as to where that litigation was.

16 Now, in your joint brief -- and I'm going to focus  
17 I think mostly on the joint brief. I read all of it. But  
18 ultimately matters on which you don't disagree -- matters on  
19 which you agree, I'm not going to spend a lot of time on here  
20 today.

21 What I want to do is sort of map out areas --  
22 understand the areas of disagreement and then ultimately have  
23 enough information so that I can issue a ruling on a fairly  
24 expedited basis after today.

25 I envision issuing a case management order No. 3,

1 and along with that a set of other individual orders that  
2 will be pretrial order 3(a), pretrial order 3(b), pretrial  
3 order 3(c), so that when ultimately somebody new to the case  
4 goes to our website -- and I've already set up a website for  
5 this case so that everybody can have quick access to every  
6 order I've issued. Not everybody is as handy with PACER, and  
7 so I want the website to make these orders very clear for  
8 people. New lawyers in a case, a direct file from wherever,  
9 Montana, coming into the case in a month, I want that lawyer  
10 to be able to go to the website and quickly look and see on a  
11 chart what the orders deal with. It doesn't help a lawyer to  
12 see case management order No. 3 with no parenthetical  
13 explaining what that order is about.

14 So ultimately I hope to have a website that very  
15 clearly lays out every single order in the case and a website  
16 that has a frequently asked questions chart so that  
17 lawyers -- and there have got to be many lawyers who aren't  
18 that familiar with MDLs. I'm certainly familiar with them in  
19 terms of the concept of them, but this is my first MDL.

20 But a lawyer, for instance, from Montana who is  
21 filing into this case who doesn't really know about MDL  
22 procedures, I want to have a frequently asked questions page  
23 that gives them answers, simple answers to questions like  
24 what is a master complaint, what is the short form complaint,  
25 where can I find the names of the key lawyers in the case

1 that I need to deal with. That kind of basic information.

2 So the website has been set up, and that will be  
3 one of my orders laying out for you that website link so that  
4 you can access that website. And ultimately I would like,  
5 obviously, your help and suggestions in terms of what will  
6 make that website even better.

7 So that discussion was prompted by my mention that  
8 I had spoken to Judge Temple. There has been ongoing state  
9 litigation, and I presume that I am looking at the same  
10 lawyers Judge Temple has been dealing with on behalf of  
11 Atrium.

12 There is a mystery lawyer that's referenced in the  
13 joint brief described as the lawyer who has negotiated in the  
14 state court the ESI protocols and such. Why that lawyer does  
15 not have a name in the briefing -- I don't know if you're  
16 protecting their identity, but who is that lawyer and --

17 MR. BONSIGNORE: The lawyer's name who -- I just  
18 prefer not to be pejorative to even get close to it. So  
19 maybe there's a little bit of protection.

20 The lawyer who originally was working with the ESI  
21 that no one agrees with, his name was John Kreis. Subsequent  
22 to that, many other lawyers came in and have proposed  
23 suggestions to improve that ESI protocol.

24 In the state court right now there's a man -- a  
25 lawyer named -- Josh Wages I think is the workhorse involved

1 in that dialogue.

2 THE COURT: I'm guessing perhaps defense counsel  
3 can probably tell me who the active sort of lawyers are in  
4 the New Hampshire state litigation.

5 I'm sure you may be aware of them, but my guess is  
6 you've been dealing with them directly for a year and a half?

7 MS. AYTCH: A little more than that, your Honor.

8 THE COURT: Yeah. So John Kreis was the  
9 individual?

10 MS. AYTCH: Douglas Kreis.

11 THE COURT: Douglas Kreis. Okay.

12 MS. AYTCH: I believe he was mentioned earlier  
13 because he has a matter in this MDL, as well.

14 THE COURT: In this MDL?

15 MS. AYTCH: Correct, but he has authorized counsel  
16 to represent his claims. His name is Douglas Kreis.

17 THE COURT: Okay. So did Attorney Kreis negotiate  
18 the state court ESI protocol with defense counsel?

19 MS. AYTCH: Yes. He was a participant as counsel  
20 of record in those negotiations.

21 THE COURT: Okay. Because one of my big questions  
22 for this side of the room is, why isn't the ESI state  
23 protocol which they've been working on for a year and a half  
24 something that we can use?

25 Again, I know that there are some issues and you're

1 going to tell me about them, but that is a big question for  
2 me.

3 Obviously people have been working on this for a  
4 year and a half. There's been thousands of documents that  
5 have been produced. So one of my upfront questions is going  
6 to be, why is that not sufficient.

7 I didn't hear defense counsel arguing strenuously  
8 against the development of the new ESI protocol. Are you  
9 willing -- are you going to concede at the outset that that's  
10 a document you're willing to sort of put to the side and  
11 start fresh in this federal MDL, or what's your position on  
12 that?

13 MS. AYTCH: No, your Honor, that concession is not  
14 going to be made. We can -- I'm going to defer to my  
15 co-counsel, Elan Hersh, to speak more about details of the  
16 ESI protocol if you have additional questions.

17 THE COURT: Absolutely. It makes sense that there  
18 would be separate responsibilities with respect to these  
19 issues.

20 Mr. Hersh, did you negotiate that?

21 MR. HERSH: I did on behalf of the defendants in  
22 the state court cases, your Honor.

23 I worked with Mr. Kreis and the local counsel that  
24 Mr. Kreis uses, the Sugarman, Rogers firm out of Boston.

25 Nolan King was the attorney I dealt mostly with on

1 that, and her co-counsel, Michael Appel out of Sugarman,  
2 Rogers as well. And so it was a multi-year process.

3 Judge Temple knows this very well. He may have  
4 mentioned it to you on the phone. But we spent many years  
5 hashing this out, and a lot of work went into reviewing a  
6 massive amount of information over the course of many, many  
7 months.

8 So, you know, it's our position that this ESI  
9 protocol is something that was worked on extensively and we  
10 want to give due consideration to that ESI protocol before  
11 setting it aside, but we're open to hearing from plaintiffs'  
12 counsel of course about --

13 THE COURT: Additions, subtractions, tweaks?

14 MR. HERSH: Yes. Exactly.

15 THE COURT: And are you willing to concede, and I'm  
16 asking plaintiffs, generally that the state ESI protocol is a  
17 document from which you will work to develop the protocol for  
18 this, or are you starting from scratch?

19 MR. BONSIGNORE: No. We began these negotiations  
20 in Young with the Magistrate Judge and we worked forward. Of  
21 course we will begin with what's --

22 THE COURT: Tell me that again. You began that  
23 with the Magistrate Judge where?

24 MR. BONSIGNORE: In this court.

25 THE COURT: Okay. In one of my cases?



1 MR. BONSIGNORE: Yes.

2 THE COURT: Okay.

3 MR. BONSIGNORE: We started to move forward and  
4 then the MDL stayed that --

5 THE COURT: And which case was that?

6 MR. BONSIGNORE: Young.

7 THE COURT: Young.

8 MR. BONSIGNORE: We had exchanged drafts and we had  
9 limited -- we had tried to reduce the number of disputes.

10 Since that time we've consulted with experts and  
11 we're prepared today, or very soon, to have the two ESI  
12 designated lawyers sit and try to negotiate. That's what we  
13 proposed in the joint brief was, first off, let's get  
14 together and see exactly what we are disputing.

15 THE COURT: Okay.

16 MR. BONSIGNORE: Then let's find out more  
17 information.

18 Part of the problem is just agreeing with  
19 something. We need to understand the architecture of the  
20 data. So it's hard to negotiate if we don't know exactly how  
21 they keep their data, and that would reduce the number of  
22 issues in dispute. So that's why we asked for the expedited  
23 discovery, and that was at the request of the experts that  
24 we're consulting with.

25 So our goal is to be lean and mean. Our goal is

1 not to turn this into a big overblown process. We understand  
2 that we need to be lean and mean. We're driving toward that.

3 We just feel firmly that the ESI protocol drives  
4 all discovery.

5 THE COURT: I'm sorry. It what?

6 MR. BONSIGNORE: The ESI protocol drives all the  
7 discovery.

8 THE COURT: Right.

9 MR. BONSIGNORE: There's been a number of disputes  
10 in the state court litigation. It's one discovery dispute  
11 after another, after another. And whether items have not  
12 been produced that are highly relevant to our theories, or  
13 whether they're in there and they haven't been able to be  
14 found because of the way that they've been produced, we don't  
15 know yet, but some of the items that we're targeting are  
16 missing from the state court discovery.

17 THE COURT: For example -- and you've discussed  
18 that with Attorney Hersh already, these items that are  
19 missing?

20 MR. BONSIGNORE: They're listed in our brief twice.

21 THE COURT: The items that are missing?

22 MR. BONSIGNORE: That we haven't been able to find.

23 THE COURT: Okay. What are they? I don't remember  
24 that from reading the brief, but there was a lot of  
25 information in there.

1           And I see that Attorney Dalimonte -- am I saying  
2 that right?

3           MR. DALIMONTE: Yes. That's correct, your Honor.

4           THE COURT: And I see that you're attempting to  
5 rise as well. I am not going to forget you. Are you  
6 involved also in some of the ESI discussions?

7           MR. DALIMONTE: Well, I have experience in ESI in  
8 other MDLs. But I have spoken to Mike Appel from Sugarman,  
9 Rogers about ESI that they had set up in the state court.

10          Should I go up to the mic or can you hear me okay?

11          THE COURT: I can hear you fine.

12          MR. DALIMONTE: Okay.

13          THE COURT: Again, I'm going to go back a step and  
14 talk to you generally about your national organization, but  
15 who in your lead counsel team is your ESI lawyer, your  
16 equivalent of Attorney Hersh?

17          MR. DALIMONTE: Your Honor, it's not me. I'm new  
18 to this. All I just wanted to address with the Court is the  
19 distinction of my conversation with Mike Appel and my  
20 understanding of the ESI that they have set up.

21          What they have is a proprietary internal database,  
22 and it doesn't have a lot of the means that they're going to  
23 address in the mass litigation that we have here that we're  
24 anticipating. This was much smaller litigation at the time  
25 in the state court.

1           The ESI -- Mr. Bonsignore is absolutely correct --  
2 that drives a lot of the discovery going forward. It just  
3 needs to be looked at and evaluated to make sure a lot of the  
4 data can transfer over to a different type of a data system  
5 so that we can access those items, because there are certain  
6 search terms, there are certain software applications and so  
7 forth that we're able to utilize, but we've got to work with  
8 that with our experts to make sure that that -- we can set  
9 the protocol up right from the get-go.

10           That's all I wanted to address with the Court.

11           THE COURT: All right. Thank you.

12           MR. DALIMONTE: In a macro sense, not very specific  
13 to this because --

14           THE COURT: All right. Thank you, sir.

15           Who on your lead counsel team is the ESI?

16           MR. BONSIGNORE: Two of us have been working  
17 closely with the expert. That's myself and Adam Evans.

18           The items specifically in response to your question  
19 that we are unable to find in the state court case yet are  
20 the design history file, the 510(K) file, the device master  
21 record, the DFUs or the IFUs, which are directions for use or  
22 instructions for use.

23           THE COURT: Okay. Slow down. No wonder I don't  
24 remember that. Acronyms don't necessarily always make it  
25 into the memory bank.

1           Where are you reading from and where would we see  
2 these? Is this in your written --

3           MR. BONSIGNORE: Yes, this is in the plaintiffs'  
4 introductory brief.

5           THE COURT: Okay. What page?

6           MR. BONSIGNORE: Page 8. On the docket, it's page  
7 11.

8           THE COURT: Okay. Hold on one second.

9           MR. CHABOT: Your Honor, you could also look at  
10 page 15 of the joint brief.

11           THE COURT: Okay. So are you talking then about  
12 items No. 3 and 4? Is that what you're talking about?

13           I'm looking at the joint brief, page 15. You were  
14 talking about items that you expected to see but you haven't  
15 seen. Are you talking about items 3 and 4? It would be  
16 materials purchased through Chinese sources. That's one.

17           MR. BONSIGNORE: No. This is the plaintiffs' brief  
18 that we're looking at. It's not in the joint brief.

19           THE COURT: Okay. What about paragraph 4, design  
20 history file, 510(K) file, device master record, directions  
21 for use?

22           MR. BONSIGNORE: That's it. Yes.

23           THE COURT: Okay. It was not clear to me that  
24 those were the shortcomings of the ESI protocol. That's not  
25 been made clear to me.

1 MR. BONSIGNORE: That's not exactly the whole  
2 answer. Those are part of the shortcomings.

3 The shortcomings of the ESI protocol involve highly  
4 technical matters that the folks that specialize in this get  
5 together -- we would like to have it for them.

6 THE COURT: Well, you just told me you were one of  
7 the ESI specialists in your group so --

8 MR. BONSIGNORE: Yes, with an expert who we will  
9 have come in and actually argue it.

10 THE COURT: Okay. All right.

11 MR. BONSIGNORE: We didn't realize we would get  
12 into this today. We thought it would be a briefing following  
13 trying to work through it.

14 THE COURT: Well, you're essentially asking for  
15 expedited procedures in putting together a protocol, an ESI  
16 protocol. There's already a protocol. That's fairly  
17 expedited. It's already in existence. It's been negotiated  
18 over a year and a half. Judge Temple has approved it, as I  
19 understand it. Attorney Hersh was part of those  
20 negotiations.

21 The only person I've heard from in this courtroom  
22 who has any idea from the plaintiffs' side, unless they're  
23 not speaking, is Attorney Dalimonte who has spoken to one of  
24 the lawyers in Boston who helped Attorney Hersh negotiate  
25 this.

1 My question to --

2 MR. BONSIGNORE: We've done a lot more than that.

3 THE COURT: Don't interrupt me, please.

4 MR. BONSIGNORE: I'm sorry.

5 THE COURT: That's one of the only rules that I  
6 will enforce in this courtroom. You do not interrupt me.

7 Now, you had asked as part of your joint brief that  
8 I expedite an ESI protocol. And so an obvious question for  
9 me is, why wouldn't the state protocol that is in effect in  
10 that set of 25 cases, same defendants, why wouldn't that  
11 suffice?

12 So my question -- and again, it's really one of the  
13 overarching questions in terms of the disputes that you  
14 have -- is what is wrong with using the state protocol that's  
15 been negotiated by these lawyers?

16 And so my guess is that you have arguments on that  
17 score because you've asked in a brief that you filed before  
18 me, Judge, we want a new protocol, basically, and you want to  
19 have defendants produce all the discovery they've produced  
20 pursuant to this new protocol. That's my understanding of  
21 what you're asking for.

22 So my question is -- and perhaps, Attorney Orent,  
23 you could help here. What is the problem with the protocol  
24 that has been negotiated in the state court? Just in a  
25 simple way can you describe to me what are the problems?

1 MR. ORENT: So we think of an ESI protocol as the  
2 bones to have documents produced. It includes things like  
3 the metadata and --

4 THE COURT: I understand generally what they are.  
5 Tell me what's wrong with the one that's been negotiated and  
6 approved.

7 MR. ORENT: There are three particular reasons why  
8 I think that we would like to create a new ESI protocol.

9 Now, that doesn't necessarily mean creating it from  
10 scratch, but it means adopting something with alterations  
11 such that we increase and improve the functionality of the  
12 product that was already in place.

13 THE COURT: Okay.

14 MR. ORENT: And the basic -- the first reason is  
15 when the original ESI protocol was negotiated they were using  
16 a very different piece of software to review -- a very simple  
17 piece of software to actually conduct a document review.

18 So when we talk about metadata and things of that  
19 nature, the ability for us to conduct discovery and  
20 understand the universe of documents is in part driven by the  
21 metadata.

22 So we, as an MDL, anticipate using more  
23 sophisticated software on the review end which will allow our  
24 jobs to be easier, and so that's one reason that implicates  
25 how documents are actually produced to us.



1           The second answer is that this has been the subject  
2 of a number of discovery disputes and it has caused the folks  
3 at the state court level to actually have to go back and  
4 attempt to renegotiate what has already been done.

5           Where here we have a clean slate and I think that  
6 it makes sense -- rather than to create and have to fight  
7 discovery disputes immediately -- to see if we can work  
8 together to come up with a cohesive plan that will  
9 essentially avoid discovery disputes later on.

10           And the third thing is that we have a very  
11 different view as to how to conduct discovery in the way we  
12 intend on pursuing it. I don't mean to suggest that there's  
13 going to be duplication, but I think our visions are  
14 different. And so where there may be a custodian first  
15 approach with folks at the state court level, we as a driving  
16 principal in this MDL are keenly aware of the number of  
17 cases. We have our own expectations as to what the size and  
18 scope of this MDL will ultimately be based upon our own  
19 collective inventories.

20           THE COURT: What is that, just generally?

21           MR. ORENT: Ballpark?

22           THE COURT: Ballpark. We do a lot of ballparking  
23 in MDLs. I'm comfortable with an estimate.

24           MR. ORENT: I'm going to preface this with your  
25 Honor just by saying that I was at the first of the vaginal

1 mesh MDL hearings about eight years ago, and my colleague  
2 Fred Thompson famously got up before Judge Goodwin and said,  
3 Judge, I anticipate that we may have as many as five or six  
4 hundred cases in this, and he was off by about 99,000 to 400  
5 cases.

6           So that being said, I think that we believe  
7 ultimately that this MDL will likely be in the 500 to a  
8 thousand case range, which is not an overly huge MDL.

9           What we want to do as a driving principal as part  
10 of our organizational structure is we believe in  
11 maintaining -- we don't want to necessarily do the let's get  
12 everything document dump and go through it. We want to be  
13 very strategic as to the documents we seek. All of the  
14 discovery that we intend to conduct is going to be very  
15 narrowly tailored and proportional to our end, which is to  
16 ultimately get quicker trials and resolution of these cases.

17           And so we have these three overarching goals, and  
18 having a more efficient ESI protocol on the front end is  
19 going to really assist all of us in doing our job.

20           THE COURT: This is great. This is just what I  
21 needed, a summary of what are the problems. So I think I  
22 have a sense of that.

23           Can you just describe -- give me another sort of  
24 sense of how are the visions different. You suggested state  
25 court, very custodian, first focused. How is your vision

1 different from that?

2 MR. ORENT: Well, your Honor --

3 THE COURT: Again, I know we're going to get into  
4 specifics at some point on ESI if in fact you're going to  
5 negotiate a new protocol, but give me just a general sense.

6 MR. ORENT: So having done medical device  
7 litigation in a number of large scale cases previously, we  
8 know that there are certain document types, certain folders,  
9 certain corporate structural items that we're going to want  
10 that we need. And so by selecting these as opposed to  
11 going -- excuse me. By selecting these first, seeking things  
12 like the design history file, the what are called FMEAs, or  
13 failure mode effect analysis -- there's going to be a lot of  
14 acronyms. They have documents which are risk assessment  
15 essentially documents within their corporate files,  
16 regulatory decision-making files. These are the kind of  
17 things that -- if we get them before doing a mass let's get  
18 documents from everybody in the company, what we can do is we  
19 can start giving those to our experts. We can start honing  
20 the issues narrowly at the outset so that we can cut down  
21 perhaps on the number of folks that we're going to actually  
22 have to ultimately depose, which ultimately makes it less  
23 expensive for the defendants, less expensive for our clients,  
24 and will ease the burden on the Court with discovery  
25 disputes.

1           So this is all within our overriding architecture  
2 design of what we envision this MDL to be from the  
3 plaintiffs' side.

4           THE COURT: Okay. That's helpful. Thank you.

5           Have you spoken with Attorney Hersh about these  
6 different visions or different approaches, or is that  
7 something you were hoping that I would order via this  
8 expedited ESI protocol discovery?

9           MR. ORENT: To be honest, your Honor, I didn't want  
10 to be presumptuous that you would approve our slate as  
11 proposed and so --

12           THE COURT: Well, you've been working with Attorney  
13 Bonsignore as a team, I understand.

14           MR. ORENT: Correct.

15           THE COURT: And the defendants are on the other  
16 side obviously, and you had to put together this joint brief.

17           MR. ORENT: Correct.

18           THE COURT: So I'm just curious why there wouldn't  
19 be discussions around that ahead of time before this hearing.

20           MR. ORENT: Well, my understanding was that there  
21 were discussions about a lot of these matters.

22           THE COURT: Okay.

23           MR. ORENT: In fact, the two 30(b)(6)s that are  
24 mentioned in our brief.

25           I just wanted to indicate that I personally wasn't

1 involved. So we've had numerous calls and worked in a  
2 closely related fashion.

3 THE COURT: Okay.

4 MR. ORENT: But I haven't rolled up my sleeves and  
5 gotten into a room with defendants, which I would like to do,  
6 and see if he can iron out a number of these issues.

7 We've made progress. We've actually narrowed the  
8 issues I think quite significantly through efforts on both  
9 sides, and I think that, you know, we can continue to.

10 But the reason we wanted expedited is because  
11 oftentimes -- the word expedited honestly is a loaded term,  
12 and I think we're all aware of that, but what we didn't want  
13 is a situation where six months from now we're still working  
14 on it. So I think in our minds expedited might not be  
15 necessarily, you know, tomorrow or next week but --

16 THE COURT: What does it mean?

17 MR. ORENT: I think within a two to three month  
18 range for some of these items.

19 THE COURT: If you said within 90 days, you might  
20 have gotten agreement from the defense counsel, but the word  
21 expedited -- I didn't do a search, but I know you used the  
22 word expedited at least in your section of these briefs  
23 innumerable --

24 MR. ORENT: We did.

25 THE COURT: -- occasions.

1 MR. ORENT: I apologize. I didn't meant to cut you  
2 off, your Honor.

3 Again, you know, I think that sometimes when you're  
4 doing large scale discovery weeks and months can feel like  
5 days. And so when we talk about expedited, we use that to  
6 place a sense of urgency on the need to get this material as  
7 a priority.

8 THE COURT: I prefer specifics. So a word like  
9 expedited is not helpful. I think if you had placed a time  
10 frame in there, for instance within 90 days, that might have  
11 obviated their disagreement and dispute because I think --  
12 and Attorney Hersh is standing up. I would like to give him  
13 an opportunity to speak. I think this might be news to you,  
14 Attorney Hersh, on some level, but go ahead.

15 MR. HERSH: The time frame is news. I also didn't  
16 know what expedited was.

17 But before we even go there I would like to correct  
18 some of the statements that I've heard from plaintiffs'  
19 counsel, none of whom to my knowledge have actually seen any  
20 of the documents that we've produced in the state court  
21 cases.

22 Number one. We produced all the documents that  
23 Attorney Bonsignore claimed haven't been produced yet.  
24 Although I don't know how he could determine whether or not  
25 they've been produced since he hasn't actually seen those

1 documents.

2 THE COURT: Okay. So let me just so we're clear --  
3 and I'm looking specifically at page 15 -- you're talking  
4 about you have in the state court proceedings -- you've  
5 produced documents that are in paragraph 4, 1 through 4,  
6 design history file, 510(K) file, device master record, and  
7 directions for use?

8 MR. HERSH: That's correct, your Honor.

9 THE COURT: You've produced all of those?

10 MR. HERSH: We've produced all of those.

11 THE COURT: Okay. All right.

12 MR. HERSH: Secondly, we produced metadata for our  
13 documents and spent months negotiating the list of metadata  
14 fields that plaintiffs requested in the state court actions,  
15 and that's something that we're willing to expand if  
16 plaintiffs give us a good reason why additional fields need  
17 to be produced. That's something we can do relatively easily  
18 for the documents that we've already produced.

19 Number three. We've produced noncustodial files.  
20 So Attorney -- is it Orent?

21 MR. ORENT: It is Orent, yes.

22 MR. HERSH: Suggested it was only a custodian-based  
23 production. That's not the case. We've -- prior to  
24 producing custodial files we produced thousands of  
25 noncustodial files, including the documents that are

1 referenced in that paragraph No. 4.

2 So we have produced a very large, broad, thorough  
3 set of discovery that's taken years to kind of arrive at.

4 Before the plaintiffs rush to judgment on the  
5 deficiencies of the production, which they haven't actually  
6 seen, we don't feel that it's appropriate to be -- or we  
7 would be hesitant to make changes to that ESI protocol until  
8 they can come out and specifically show us why it's  
9 deficient.

10 The arguments that I've heard so far seem somewhat  
11 hollow because we've produced the metadata, we've produced  
12 the noncustodial files, you know, we've produced the  
13 documents that they have asked for here.

14 So I'm more than happy to sit down and talk with  
15 the opposing counsel about changes that we could make that  
16 are valid, but we don't want to have to reinvent the wheel  
17 after we've spent a lot of time -- you know, there must have  
18 been twenty attorneys working on these documents over the  
19 course of seven or eight months. Judge Temple knows this  
20 very well.

21 And so if there are additional documents or  
22 additional search terms or additional custodians that they  
23 believe for a specific reason need to be included because  
24 they would have captured documents that did not get captured  
25 in the state court case, we're more than willing to get



1 together and to talk about it and maybe even come to  
2 agreement on that, but we just don't want all the work that  
3 we've done to have to get reduplicated.

4 THE COURT: Let me ask you a follow up.

5 MR. HERSH: Sure.

6 THE COURT: One of the arguments that Attorney  
7 Orent made was that many disputes, discovery disputes, have  
8 gone on in the state litigation, and of course I'm not aware  
9 of any of that, and that a better ESI protocol would obviate  
10 those disputes.

11 It's obviously to your interest that there be less  
12 discovery disputes, it's in all of our interests, and so that  
13 sounds good to me. I want to reduce the number of discovery  
14 disputes. If an ESI protocol can be tweaked and made better  
15 to reduce the number of discovery disputes, I will be in  
16 favor of it in a general sense.

17 So can you comment on that portion of his  
18 three-part argument?

19 MR. HERSH: Absolutely. What I would say is that  
20 our most recent ESI protocol that was negotiated was towards  
21 the end of last year in November.

22 The ESI protocols that we've negotiated are the  
23 outcomes of those discovery disputes. For example, with  
24 search terms, with custodians, we did. We disputed and we  
25 litigated those issues for a long time, and we finally came

1 to agreement and memorialized our agreement in those ESI  
2 discovery -- ESI protocols. Those are the documents which  
3 are the outcome of the disputes that we had in the state  
4 court.

5 THE COURT: Okay.

6 Mr. Orent, can you explain that to me? Because  
7 that sounded very attractive to me. I want to do whatever I  
8 can to prevent disputes from occurring. But if in fact all  
9 of the disputes were about developing the ESI protocol they  
10 developed in November of last year, tell me what you were  
11 talking about.

12 MR. ORENT: Your Honor, just to sort of back up a  
13 moment. One of the issues, I think, is part of this ESI  
14 protocol, and we may have a terminology debate here as to  
15 whether ESI protocol includes the production protocol or just  
16 the format in which the documents themselves are actually  
17 produced, and so I wanted to just sort of clarify that at the  
18 outset.

19 My understanding, though, is that folks in the  
20 state court -- and of course this is -- defendants are  
21 absolutely right. When we talk about the documents being  
22 produced in the state court, it's based on conversations with  
23 individuals within the state court litigation.

24 We're certainly not going to argue -- if they're  
25 going to say here that they produced something and it was our

1 understanding that they didn't, we're not in that position.

2 But what I might posit is if the state court folks  
3 can't readily find it because of a metadata issue, that is  
4 one very logical reason why the defendants can say that  
5 they're producing something and we're hearing back from the  
6 state court that they haven't seen it.

7 THE COURT: Why wouldn't you pick up the phone and  
8 call Attorney Hersh and say have you produced this document?

9 MR. ORENT: Well, again, our initial sort of  
10 request was for the production of this handful of documents  
11 that made sense at the front end.

12 So really what we're talking about, though, is not  
13 a missing document or documents but it's a making sure that  
14 the flow of information between the two sides is as best as  
15 it can be.

16 Again, to be clear, we're not seeking to reinvent  
17 the wheel completely, but what we are seeking to do is to  
18 make tweaks that are specific to the scenario that is here,  
19 and that we are different counsel, we represent different  
20 people, but we also recognize that the defendants are  
21 spending money to produce these things and also that costs  
22 time to do things.

23 So what we're looking to do is to really work with  
24 the defendants to tweak what has already been done in an  
25 efficient manner, and that is through, you know, we call it a

1 new ESI protocol, but you could call it what they've worked  
2 on in negotiating with certain things, parameters that make  
3 it agreeable to us.

4 THE COURT: Okay. I've heard enough about this ESI  
5 protocol issue.

6 I'm a little concerned, to be honest, about the  
7 meet and confer process, the conversations that have occurred  
8 between plaintiffs' side of the case and the defense side.  
9 It sounds as though this could -- this whole I think almost  
10 one hour of debate could have possibly been avoided by more  
11 aggressive meet and confer, more aggressive cooperation.  
12 Instead of calling antidotal state court litigators in their  
13 cases, calling the defense counsel and saying have you  
14 produced to the other side, and let's talk about the ESI  
15 protocol, let's see if we can't tweak that.

16 You're concerned about expedited. That could have  
17 possibly been tweaked before you got here today. And so the  
18 notion that you want an expedited brand-new protocol from the  
19 get-go, it is concerning to me in light of the fact that you  
20 seem to know very little about what defense counsel has  
21 already produced and why.

22 I'm being transparent and I will be throughout this  
23 entire case. That concerns me in terms of the leadership  
24 process.

25 So let's go to the leadership process. I don't

1 want to hear anymore about the ESI protocol right now. I'll  
2 ask you further questions about that if I have them. I am  
3 not going to spend anymore time on it right now, okay? So  
4 please sit down.

5 MR. BONSIGNORE: Can I just correct --

6 THE COURT: Please sit down.

7 MR. BONSIGNORE: Okay.

8 THE COURT: I am going to ask you some questions  
9 now about the leadership proposal, and I have some concerns  
10 about that in light of the lengthy discussions we just had.

11 So the proposal, as I understand it, is that Mr.  
12 Bonsignore and Mr. Orent would be co-liaison counsel, and you  
13 would have an executive committee I think of three lawyers,  
14 maybe there are four: Mr. Evans, Mr. Matthews, Mr. Selby.

15 Is Mr. Tate also included in that? No. Okay. So  
16 those three. So essentially five what you might call  
17 executive committee lawyers.

18 And then Mr. Bonsignore -- co-liaison counsel, Mr.  
19 Bonsignore and Orent, would then appoint on an as-needed  
20 basis members of a steering committee to essentially help you  
21 manage the litigation, file necessary briefs, conduct the  
22 litigation, share expenses, et cetera.

23 Tell me -- explain to me why that structure --

24 And again, I apologize to defense counsel because I  
25 know you don't take a position on this and so frankly you're

1 not really part of this discussion, but unfortunately this is  
2 really the only time I have to figure this out.

3 So explain to me why that structure will work best,  
4 and tell me why there wouldn't be -- at least right now it's  
5 28 cases. Now, you anticipate 500 to a thousand. That could  
6 call for really a different kind of structure.

7 I'm looking at 28 cases. I'm thinking give me one  
8 lead counsel and give me one liaison counsel, and then we'll  
9 put together what you need by way of, you know, a steering  
10 committee.

11 But what I don't want to have happen is have  
12 duplicative billing and an accumulation of bills that could  
13 be streamlined. I'm sure that you share that concern  
14 yourselves, but why not just -- and from the perspective of  
15 just the Court, my case manager needs a person. Now, she can  
16 obviously e-mail both and hope that one of you responds  
17 immediately back to her even if it's just I can't respond  
18 right now, I'm in trial, I'll get back to you, so she knows  
19 that you have a heartbeat, you're here.

20 And there were some problems in terms of  
21 communication. I don't want any problems with my case  
22 manager. I don't want her coming to me and saying I'm not  
23 hearing back. I want counsel to be responsive, and how would  
24 I hold sort of co-counsel accountable when we're not hearing  
25 back or how -- if I want to set up a conference fairly

1 quickly, it's a little easier if it's one person. Now,  
2 again, it's 28 cases right now. If it's really going to be a  
3 thousand cases then perhaps some sort of co-structure makes a  
4 lot of sense. But why this particular structure? Go ahead.

5 MR. ORENT: Your Honor, at the front end I am  
6 extremely, extremely sensitive to what you're talking about  
7 in terms of billing and duplication of work and excess work.

8 In fact, one of the things that we are going to do  
9 or was going to ask your Honor about was getting an  
10 appointment of an accountant, someone local here that perhaps  
11 the Court is familiar with, to oversee the hours and make  
12 sure that things are in order, you know, that plaintiffs'  
13 counsel would submit monthly time and whatnot.

14 THE COURT: I like the sound of that, and that was  
15 going to be one of my questions. Is the plaintiffs' side in  
16 general -- do you look favorably on the sort of common  
17 benefit fund approach to these cases? That would --  
18 obviously, I would like to see every plaintiffs' counsel  
19 either shaking their head, or here's the problem I have with  
20 that, before we go into something like that.

21 But that is certainly, frankly, a best practices  
22 recommendation of MDL judges, that this is an issue that we  
23 solve up front.

24 So it sounds like you've had discussions along  
25 these lines, and clearly you've got to decide who is going to

1 bear the cost of expenses. I am happy to look into -- and  
2 hear from you, frankly -- how you would handle that.

3 Those would all be -- ultimately, you know, what  
4 you're doing by way of work and your billable hours, the  
5 expenses, all of that would be submitted I would presume  
6 under seal.

7 I can envision perhaps asking my Magistrate Judge  
8 to help me with that and on a monthly basis just review the  
9 submissions and make sure that they're detailed enough and  
10 they're warranted and they're not duplicative and that the  
11 expenses are obviously appropriated. That kind of thing I'm  
12 certainly open to.

13 Attorney Matthews.

14 MR. MATTHEWS: Your Honor, if I may speak to this?

15 THE COURT: You certainly may.

16 MR. MATTHEWS: This is an issue I'm highly  
17 sensitive to having been on the short side of this process  
18 too many times.

19 I have started a draft common benefit order --

20 THE COURT: Terrific.

21 MR. MATTHEWS: -- that I would like to submit to  
22 the Court in the next 30 days.

23 THE COURT: And that's something all the plaintiffs  
24 know about? Okay. Terrific.

25 MR. MATTHEWS: It is highly detailed in expense



1 allowance and all of that.

2 THE COURT: I'm not going to spend anymore time on  
3 it then. That's all I needed to hear.

4 MR. MATTHEWS: Okay. Thank you.

5 THE COURT: I will accept that, and I'll hope that  
6 you submit that on an -- it sounds like that expedited basis,  
7 within 30 days, would fall within your definition.

8 MR. MATTHEWS: Thank you, your Honor.

9 THE COURT: Okay. So the common benefit fund  
10 proposed order will be something that plaintiffs' counsel --  
11 and it sounds like Mr. Matthews has some experience drafting  
12 those.

13 MR. MATTHEWS: Absolutely. Thank you, your Honor.

14 THE COURT: Excellent.

15 All right. I'm very open to that. I'm very open  
16 to appointing a local, you know, CPA to help me with that and  
17 to help with tax issues and everything else to keep track of  
18 those numbers.

19 I wasn't clear, frankly, on whether we would need  
20 it in terms of the scope of this MDL because at this point  
21 it's only 28 cases. The MDL in state court -- obviously,  
22 those are New Hampshire plaintiffs so it would necessarily be  
23 smaller.

24 But do you agree, Attorney Aytch, that it's looking  
25 like it might be as many as 500 to a thousand? Obviously I'm

1 not going to hold Mr. Orent to that, but do you have a sense  
2 of that if you were to ballpark it?

3 MS. AYTCH: If I were to ballpark it based on the  
4 internal information that we have, maybe if they all filed  
5 complaints, but I would just be speculating.

6 I just wanted to raise an issue for the Court, and  
7 it may actually be my error, and I apologize both to the  
8 Court and to the case manager.

9 I have a list of 29. As I've been over here trying  
10 to figure out where that missing case is --

11 THE COURT: Which one?

12 MS. AYTCH: I believe it's McLain, and that  
13 conditional transfer order was just lifted.

14 THE COURT: Is that correct?

15 THE CLERK: That is correct.

16 THE COURT: I would defer to her. I'm sure she's  
17 on top of that, but I appreciate -- so there really are 29.  
18 I should be saying 29 cases.

19 THE CLERK: It hasn't been transferred here yet,  
20 McLain.

21 MS. AYTCH: Oh, okay. My apologies.

22 THE CLERK: No, that's okay. It's on its way.

23 THE COURT: Excellent. Okay. So really we'll have  
24 29 in no time, and this will grow. And it sounds like maybe  
25 the 500 to a thousand is not off the mark, but you wouldn't

1 be able to speculate any more than that at this point?

2 MS. AYTCH: Exactly, your Honor.

3 THE COURT: Okay. So low end 500, you think?

4 MS. AYTCH: By our speculative estimates, we have  
5 it at the high end of 500 but --

6 THE COURT: Okay. All right.

7 MS. AYTCH: But again, I probably would not --

8 THE COURT: I'm not going to hold anybody to any of  
9 this. I just wanted to have a sense.

10 It sounds like then a common benefit fund and a  
11 setup makes a lot of sense, and I'm glad that you've already  
12 talked about that and plan on submitting that to me. So  
13 that's excellent.

14 How does the committee plan to include all  
15 plaintiffs, and how do you deal with objections from  
16 plaintiffs? Maybe it would be great if I could hear from  
17 other lead counsel as well just to essentially hear from you  
18 as ultimately I have to decide who is going to run this for  
19 plaintiffs' team nationally for me in this case.

20 So I want you to go ahead because obviously the two  
21 of you have primary responsibility here. But to the extent  
22 anyone else would like to speak, I would welcome hearing from  
23 you.

24 How do you deal with plaintiff lawyers who call you  
25 up and say, I don't agree with that at all, I don't agree

1 with this common benefit fund? How are you proposing to  
2 handle that?

3 MR. ORENT: Well, I think at the front end the  
4 structure of having a five member executive committee that  
5 oversees a larger plaintiffs' steering committee takes into  
6 account variables from things like firm size, geography, and  
7 we hope to have some additional diversity within the larger  
8 plaintiffs' steering committee so we can get in a variety of  
9 perspectives.

10 I think one of the things that is also beneficial  
11 of having a group lead as opposed to an individual who calls  
12 the shots by themselves is that it gives the opportunity for  
13 folks to really present their opinions, have matters of  
14 litigation strategy and things like that be fully vetted and  
15 discussed, and have people internally, of course, be able to  
16 present any differences of opinion to that group.

17 And then ultimately, I do think it is our  
18 responsibility, to the extent that there are any objections  
19 that we as a leadership group have from members within the  
20 plaintiffs' bar, we need to let the Court know, of course,  
21 that this issue is outstanding. The plaintiffs' executive  
22 committee supports it. However, there are individuals within  
23 the plaintiffs' bar that perhaps don't.

24 I mean, one of the things that I think about when I  
25 think about a responsibility like liaison counsel is that

1 that job is a communication job but not necessarily a  
2 decision-making job.

3 THE COURT: Yes.

4 MR. ORENT: And the reason that we have this  
5 separate structure is for that very reason because I don't  
6 think that -- in a litigation that maybe is going to have 500  
7 cases, but maybe not, we have to be very cognizant of costs  
8 and doing things that are going to prolong the litigation  
9 unnecessarily and work against our clients.

10 And so having the broader base opinion, but also it  
11 allows people to work commensurate with their individual  
12 caseloads so that one person is not bearing the  
13 disproportionate brunt of the work, it's being shared, but  
14 also --

15 THE COURT: Okay. Let me ask you. At least at the  
16 start wouldn't it make sense to divide up the administrative  
17 and the substantive legal matters into two people?

18 I'm all for some sort of executive committee or  
19 steering committee, and then subcommittees, I'm all for that,  
20 but just in terms of -- for instance, just a plaintiff lawyer  
21 who is not part of the leadership group wanting to get  
22 something to the committee, having one person to be able to  
23 communicate that issue with. If it's a substantive legal  
24 issue, that's the opinion I would call. If it's an  
25 administrative issue, I want to get access to the depository

1 of discovery. How do I do that? I want this document. Tell  
2 me how I -- the liaison counsel would handle those matters.

3 Just in terms of the court, my case manager  
4 scheduling a conference, that would be a liaison counsel.  
5 The liaison counsel would then call lead counsel and say,  
6 listen, here are the legal issues I need your help on, do we  
7 need our executive committee, that sort of thing, just in  
8 terms of the defense counsel knowing who to call.

9 I think when you defuse it and divide it, it makes  
10 it a little bit harder for those on the other side figuring  
11 out, okay, how do I get into that leadership.

12 MR. ORENT: Well, I think the answer is that that's  
13 why Mr. Bonsignore and I are co-liaison, to fulfill those  
14 roles you're talking about.

15 What we envision the executive committee driving  
16 are when there are decisions about cost that need to be made,  
17 when there are decisions of do we include this in the brief  
18 or that, and there's legal debate over a particular substance  
19 and a decision needs to be made that affects everybody, how  
20 do you make those calls. And having a broader base of  
21 individuals who are committed to be engaged in strategic  
22 litigation decision-making I think is a valuable thing, and I  
23 think having five individuals makes sense in that standpoint,  
24 particularly again from different firm type backgrounds,  
25 different litigation backgrounds, so --

1 THE COURT: Let me just ask. Is there anybody on  
2 this side of the room, including in the back, anybody who  
3 thinks that having a lead counsel and a liaison counsel as  
4 opposed to a co-liaison counsel structure makes better sense?

5 (No response)

6 No? Don't care really?

7 MR. TATE: Obviously these guys have worked on a  
8 lot of MDLs. I've just never seen a co-liaison. I've seen  
9 co-lead. But my past experience I think, maybe everybody's  
10 past experience, there has been a liaison counsel who is  
11 separate from lead counsel. I think this works just fine.

12 There was an early bit of maneuvering that we  
13 undertook, and I was able to speak with Mr. Bonsignore and  
14 Mr. Orent and we worked out what my concerns were very  
15 easily. So at least in the very brief period of time like  
16 this it's worked great.

17 THE COURT: Well, and part of -- I mean when a  
18 large number of people are in agreement on something, I  
19 certainly want to approve it but -- and there's the but -- I  
20 think ultimately that -- and I think this ESI issue is a  
21 symptom of it because I've got Mr. Orent and Mr. Bonsignore  
22 both, and I don't really -- and a brief that talks about  
23 items that you haven't received and that you don't think will  
24 be received pursuant to this state ESI protocol. Even if the  
25 brief doesn't say that, that's what Mr. Bonsignore

1 represented the brief said.

2 I want to be able to look at Mr. Bonsignore and  
3 specifically say you put that in the brief -- if he's lead  
4 counsel, I want to be able to hold lead counsel, who would  
5 work with the group, accountable for whatever is filed. I  
6 don't really want to have two people and not really know,  
7 well, who wrote the brief, who did the brief, who didn't call  
8 Mr. Hersh, which one of you didn't call Mr. Hersh ahead of  
9 time, at least call Ms. Aytch and find out who's your ESI  
10 person, who negotiated the state ESI protocol because I need  
11 to speak to them. I'm filing a motion, a brief, in court,  
12 and I need to make sure it's accurate so I need to talk to  
13 your person. Which one of you was responsible for that;  
14 didn't do it? That's what I don't want to get into in the  
15 future.

16 I will be obviously wanting to understand who is  
17 lead counsel in this case, who is consulting with the  
18 executive committee making the decision substantively on  
19 what's necessary, for instance, in terms of discovery.

20 And then with liaison counsel that person has to be  
21 somebody I know is going to e-mail my case manager when we  
22 e-mail and somebody I know is going to be responsive to Ms.  
23 Aytch when she needs to get in touch with you.

24 My instinct now -- and again I'm being transparent.  
25 I would like to start with a lead counsel, a liaison counsel,



1 and then give you your executive committee to answer all of  
2 the issues that you I think were most concerned with. So  
3 that's my leaning.

4 Mr. Dalimonte.

5 MR. DALIMONTE: Your Honor, if I may share just  
6 some of my experiences.

7 THE COURT: Do you disagree with anything or do you  
8 have anything to add?

9 MR. DALIMONTE: I don't disagree, but this is a  
10 first hearing and putting together this organizational  
11 structure. I know, for instance -- and your Honor is  
12 absolutely correct about who is responsible or going to be  
13 assigned or appointed to, for instance, deal with ESI or  
14 perhaps some other topic.

15 In the past what we've done -- in other MDLs we've  
16 set up committees and subcommittees, and it's the chair of  
17 that subcommittee. So there may be a committee assigned  
18 specifically to ESI, to just use that as an example. The  
19 chair of that committee would deal with Attorney Hersh, and  
20 that's where --

21 THE COURT: Right. I totally understand that, and  
22 I agree with that. I'm looking right now at just this idea  
23 of co-liaison counsel. And I think what I'm going to do is  
24 go with my instinct on that right now, and it's based on  
25 frankly the briefing that I've read. It's based on the

1 arguments I've heard. It's based on my own intuition of what  
2 is going to work best for my case manager, for defense  
3 counsel in terms of cooperation and communication. I think  
4 there needs to be a lead counsel who's responsive and a  
5 liaison counsel who is the organizer, who's the  
6 administrator, who's somebody who we can all rely on to make  
7 sure everybody knows what's going on in the case.

8 I would love to have somebody from New Hampshire,  
9 frankly, who could be my liaison counsel but -- it appears  
10 as though there is New Hampshire counsel, Shaheen & Gordon,  
11 that is common to both, but they are not here today. Am I  
12 correct?

13 MR. DALIMONTE: Correct, your Honor.

14 Your Honor, if I may add, I know we haven't filed  
15 any cases yet, but Attorney Paul Maggiotto is a personal  
16 friend of mine. His office is directly across the street  
17 from this courthouse. I've spoken to him about his  
18 involvement in this.

19 THE COURT: Yeah, but --

20 MR. DALIMONTE: I understand we don't have --

21 THE COURT: I would like -- I mean obviously this  
22 is a cohesive group.

23 MR. DALIMONTE: It is.

24 THE COURT: And so I want the recommendations to  
25 come from this universe of people. Obviously you're included

1 in this group, but just a name being thrown out I'm not  
2 sure -- I think that would be better suited for the committee  
3 and your group to decide.

4 I would have chosen -- I think I would have had a  
5 leaning, talk me out of it, to have a New Hampshire based  
6 liaison counsel, somebody I can get to, somebody who if I  
7 need to can get to court, but that's not possible because I  
8 don't have that person here.

9 I thought there might be. I thought Shaheen &  
10 Gordon, for instance, might be present today, but I am not  
11 going to pick a liaison counsel or lead counsel from anybody  
12 who's not here. I can tell you that right now.

13 So those are my thoughts with respect to the  
14 structure. I don't want you to be surprised. I will adopt  
15 your committee approach, your subcommittee approach with  
16 regard to ESI or whatever other subcommittees you design from  
17 your steering committee, any executive committee structure,  
18 but I think I would like to have a lead counsel and a liaison  
19 counsel as opposed to having two people who are responsible  
20 for the same thing.

21 Ultimately if it gets unwieldly because the numbers  
22 are just too great, I can revisit that, but that is where I  
23 think I'm headed.

24 MR. ORENT: Your Honor, just one suggestion might  
25 be that if we, as a group, following this hearing could

1 submit something where perhaps we break down exactly what the  
2 responsibility between the two goals might be, the way we  
3 would particularly envision it, and then perhaps put forward  
4 a name or names for those. Unless your Honor is inclined to  
5 do so now.

6 THE COURT: Let me think about that.

7 MR. ORENT: Okay.

8 THE COURT: All right. Thank you.

9 MR. ORENT: Thank you, your Honor.

10 THE COURT: And a state court liaison. Do you  
11 envision ultimately that that makes sense, appointing  
12 somebody to sort of keep us all on the same page, make us  
13 aware of what's happening, and if -- I mean I can envision  
14 that there would be perhaps a science issue or a science day  
15 where I would need to hear from experts. I would invite  
16 Judge Temple to be present for that so that you don't have to  
17 have a hearing in state court and a hearing here as well. We  
18 could do things in one place and consolidate issues that can  
19 be easily consolidated and shared.

20 I just want you to know I'm open to that kind of  
21 creative thinking. So it would be helpful for us to know,  
22 you know, what's going on in the state case and have a person  
23 who is a state court liaison.

24 Do you agree with that approach?

25 MR. BONSIGNORE: Your Honor, we've reached out to

1 the state court counsel, and we're attempting to get an  
2 answer back as to whether they will agree to that. We've  
3 thought of this.

4 THE COURT: When you say state court counsel, do  
5 you mean Noonan and Christine Craig from Shaheen?

6 MR. BONSIGNORE: Christine Craig was to be here  
7 this morning, she had an emergency, and Mike Noonan couldn't  
8 cover for --

9 THE COURT: Okay. Attorney Aytch.

10 MR. BONSIGNORE: The state court counsel that I've  
11 talked to is Jim Matthews.

12 THE COURT: Okay. Attorney Aytch.

13 MS. AYTCH: Just for a point of clarification for  
14 the Court, Shaheen & Gordon is not counsel of record in the  
15 state court matters before Judge Temple for the C-Qur mesh.

16 THE COURT: Okay. Then I'm confused about that.  
17 Noonan and Craig, are they from Shaheen & Gordon?

18 MR. BONSIGNORE: Yes.

19 THE COURT: They're not involved in any of the  
20 state court --

21 MR. CHABOT: Your Honor, they are involved in a  
22 separate group of pelvic mesh cases, but they are not  
23 involved in --

24 THE COURT: Okay. All right.

25 MS. AYTCH: And not the C-Qur product. So not the

1 C-Qur mesh.

2 THE COURT: Okay. Well, perhaps on this issue with  
3 respect to a state liaison you could help with that by -- is  
4 there somebody that you could suggest?

5 MS. AYTCH: I will defer to plaintiffs' side, but  
6 counsel in both the state court and federal court cases  
7 currently, I hear others may be coming in, but currently are  
8 Douglas Kreis.

9 THE COURT: Kreis? And that's K-R-E --

10 MS. AYTCH: K-R-E-I-S, but he's not in New  
11 Hampshire, and Josh Wages --

12 THE COURT: Spell his last name.

13 MS. AYTCH: Oh. Wages, W-A-G-E-S.

14 THE COURT: Okay.

15 MS. AYTCH: Who's in Athens, Georgia, and his firm,  
16 which also has Patrick Garrard and Jim Matthews. Those are  
17 the two that are involved in both the federal and the state  
18 court litigations.

19 THE COURT: Okay. Well, that would be something to  
20 perhaps include in whatever you might propose to me after  
21 this hearing because I would be open to that. I think it  
22 could help matters.

23 Document depository. Have you talked about that,  
24 thought about that specifically?

25 MR. BONSIGNORE: Your Honor, if I could direct your

1 attention to document No. 20, page 9.

2 THE COURT: I know that it's mentioned, but you  
3 didn't give me much by way of detail.

4 MR. BONSIGNORE: What had happened was this. That  
5 we did in fact reach out to defense counsel on a repeated  
6 basis to try to get these issues resolved. So we did make  
7 every attempt to meet and to confer to the point where I was  
8 probably a pain in the neck.

9 The reason that it didn't move forward was because  
10 there was no structure in place, and I respect defense  
11 counsel's position not to engage in ESI protocol discussions,  
12 not to engage in anything binding until it was certain what  
13 would happen.

14 So with regard to the document depository, we  
15 believe at the plaintiffs' end that flows from the ESI  
16 protocol, and we did put forward a schedule on page --  
17 document 20, on page 9, that sets forth timelines and  
18 specific numbers of days from which the parties will move  
19 forward, and it is faster than 30 days because -- the first  
20 thing is -- as you say, the first thing is really simple.  
21 Get the two ESI experts to talk on the phone, and the next  
22 thing would be -- maybe the state court ESI protocol is  
23 perfect, but then maybe it's not, but we have specific dates  
24 in there, and the document depository flows from this ESI  
25 protocol.

1 THE COURT: I'm asking right now about the  
2 mechanics of the document depository.

3 MR. BONSIGNORE: If they produce it, we have --

4 THE COURT: You have a way of setting up a document  
5 depository?

6 MR. BONSIGNORE: We have it set up. It's  
7 Relativity. We're ready to roll.

8 THE COURT: Okay. That's all I needed to know.

9 MR. BONSIGNORE: If it's populated, it might be  
10 populated in a way that we can't read it. So that's why we  
11 want the protocols, the metadata. It goes beyond the  
12 metadata. It goes into the formatting, what search terms.

13 THE COURT: Okay. I asked about document  
14 depositories. I'm never going to get through this hearing if  
15 you don't answer the question that I'm asking. I just want  
16 to make sure that's something you're prepared to provide.

17 Bellwether selection cases, it looks as though you  
18 both agree generally on that concept. I had nine cases  
19 myself in this court. Certainly, to avoid lexicon issues,  
20 it's very easy if we can choose a Bellwether case or two from  
21 my group of nine, that would make me happy. That's a ways  
22 off in the future, but it's just something I throw out and  
23 something that I didn't see in your briefing.

24 Okay. Everybody is in agreement, though, generally  
25 with the concept of state coordination?



1           Okay. Everybody is shaking their head yes. Nobody  
2 is disagreeing with that. All right. Good.

3           Cases -- plaintiffs' cases. Are there -- and again  
4 you would be educating me about these cases because I know  
5 very little other than what I've read in your briefs and what  
6 I've seen, you know, from the transfer court by way of  
7 summaries.

8           Can you pick -- and you didn't discuss this in the  
9 briefs and so perhaps there isn't a way to divide up your  
10 cases. Are there groups of plaintiffs that can be divided by  
11 say product or certain liability issues that would be common  
12 that could create different tracks? And again, I don't need  
13 a direct answer to this, a detailed answer, but is it  
14 something that is -- that can be done in at least the 28  
15 cases that we have? I know in state court they had tracks  
16 based on the hernia mesh products and I believe the vaginal  
17 mesh. No?

18           MR. CHABOT: Those were two separate groups of  
19 consolidated cases, your Honor.

20           THE COURT: Okay. All right.

21           Are there easy boxes you can put plaintiffs' cases  
22 into?

23           MR. EVANS: I don't know if I would use the word  
24 easy, but I think that they can be divided essentially by  
25 injury because the expert testimony needed to prove up each

1 of the different buckets of injuries would be one into  
2 itself. So someone with a, you know, profound infection  
3 case, that would have a different constellation of experts  
4 for it versus a profound adhesion case. And so that may be  
5 one of the things that you may want to consider as developing  
6 tracks is the injury that the plaintiff suffered.

7 THE COURT: Okay. And that's something obviously  
8 in the future that you could propose to me after a meet and  
9 confer, but that's something that would make sense to me, if  
10 there's a way to divide plaintiffs into tracks.

11 Overall in a large sense, I know what you've  
12 proposed is a general discovery track and a specific case  
13 discovery track, and you seem to be in agreement on that.  
14 I'm not sure we need to go into much by way of debate about  
15 it unless somebody wants to bring anything to my attention.

16 I know you also are in support of a master  
17 complaint and a short form complaint. And ultimately now  
18 discovery is stayed, and I would lift that once I decide on  
19 the organizational structure and once I issue a discovery  
20 order, which I would hope to do, you know, on an expedited  
21 basis.

22 So the stay will stay in effect until such time as  
23 the leadership counsel is in place so that defense counsel  
24 know exactly who they're talking to and negotiating with and  
25 the Court does, as well.

1 My guess is that there will be more frequent issues  
2 that need to be brought to my attention early on. My  
3 intention now is to have a monthly status conference. I  
4 don't see any reason why it can't be telephonic unless  
5 there's some reason that I see to have it in person. I would  
6 obviously notify you well in advance, but I envision having a  
7 status conference monthly at which you will give me agenda --  
8 jointly prepared agendas. I will detail this in whatever  
9 order I issue after this, but just to give you a sense.

10 I want to know ahead of time and I want parties to  
11 know ahead of time what's on the agenda, what's going to be  
12 discussed, and ultimately -- I intend to schedule those the  
13 second Thursday of every month, okay, and obviously I'll put  
14 more details in my order so you know precisely when you  
15 should file such agendas and what you need to bring to my  
16 attention.

17 We are at 11:30, and I want to give our  
18 stenographer a break if she needs it.

19 We'll all take a break. So we'll be back here at  
20 20 minutes of. So ten minutes. All right. Court is in  
21 recess for the moment.

22 (RECESS)

23 THE COURT: It was a little longer break than I  
24 anticipated.

25 All right. Before I forget, plaintiffs' team is

1 going to file a motion proposing a structure that involves  
2 lead liaison counsel and then whatever executive committee  
3 structure you propose.

4 Can you do that within ten days of today's date?  
5 Is that something you could present to me, confer with  
6 everybody present today?

7 MR. ORENT: We can, your Honor.

8 THE COURT: All right. Okay. I just want to make  
9 sure that's clear in case I forget to mention that before we  
10 begin.

11 Okay. All right. Discovery disputes. You  
12 mentioned discovery mediation with the Magistrate Judge. At  
13 this point, especially early on in the case, I think I'm  
14 going to maintain control over the entirety of the case, and  
15 then what I'll do is perhaps refer specific issues that I  
16 need assistance on to the Magistrate Judge.

17 Discovery disputes. In this case I want to resolve  
18 them quickly, expeditiously, and my hope is to resolve those  
19 informally to the extent they can be resolved in that manner.

20 If litigation is necessary with respect to  
21 obviously a discovery dispute, then I'll order briefing on it  
22 and we obviously will confer about it and we'll all be on the  
23 same page that perhaps formal litigation is necessary, but I  
24 want to avoid that as much as possible and have discovery  
25 disputes resolved informally, and I will lay out that process

1 in an order to assist you in getting it to me in an  
2 expeditious manner, making me aware of what the dispute is  
3 and making the other side aware of what you're planning on  
4 bringing to me. I'll lay that process out, but I want to try  
5 to resolve those for you as quickly as I possibly can to keep  
6 the case moving.

7           Okay. I am also going to obviously include  
8 something about a master complaint, short form complaint, and  
9 these are something that the parties are going to meet and  
10 confer about and propose more specifically.

11           Now, in terms of -- this is more of a nuts and  
12 boltsy type question, but in terms of short form complaints,  
13 let's say a direct filer files a case -- I'll use Montana  
14 again -- files a case here directly in New Hampshire and  
15 they're going to file the short form complaint. The case is  
16 ongoing. We've got short form complaints. The master  
17 complaint has been filed. We're moving along. Somebody  
18 files directly in here.

19           The way you proposed having the defense counsel  
20 acknowledge receipt of that was a notice of appearance. Is  
21 that a term of art? You don't mean an appearance. How would  
22 the Court know that defense counsel has received that short  
23 form complaint? It's more nuts and boltsy.

24           I know that for service it's a waiver and as soon  
25 as that's filed we know you've received the complaint and you

1 have waived service, formal service, and then all the  
2 deadlines and clocks starts ticking as of that.

3 What happens with the short form complaint? The  
4 way it's presented in the briefing it sounded like you both  
5 agreed on a notice of appearance, and I wasn't clear on  
6 exactly what that meant.

7 MS. AYTCH: Your Honor, in that situation if they  
8 were to then do the waiver, and we would be filing the waiver  
9 on the record, then my understanding is that therefore I  
10 would then be appearing or this team would be appearing when  
11 we filed that waiver and then at that point we would have  
12 acknowledged receipt of it, but it would be related to your  
13 case management order No. 2.

14 THE COURT: Okay. What about though -- let me just  
15 point you to the joint brief, page 20.

16 MS. AYTCH: Okay.

17 THE COURT: So you wouldn't have to answer -- I'm  
18 in the weeds here on this short form complaint process.

19 "Defendant's obligation to answer or otherwise  
20 respond to short form complaint should be stayed."

21 Do you see that at the top of page 20?

22 MS. AYTCH: Yes.

23 THE COURT: "And defendants acknowledge receipt by  
24 filing an entry of appearance within 30 days of receiving the  
25 short form complaint."

1           What is an entry of appearance?

2           MS. AYTCH: That's still what I was -- just to  
3 appear in the case. And so by filing a waiver of service you  
4 would then have us appear in the case and that would be  
5 acknowledgment, but defendants can file an actual document  
6 called a notice of appearance for the short form complaint if  
7 that would keep the record cleaner for the Court.

8           THE COURT: I think where you're already here, and  
9 with a lot of these plaintiffs' cases you would have already  
10 filed either a waiver or an answer, it seems to me these  
11 short form complaints are intended to really expedite things  
12 and make things easier for everybody.

13           Having to file something in response to each one of  
14 those -- I just would want it to be in some way consistent,  
15 make sense, and I just wasn't clear on why you would be  
16 acknowledging receipt by filing an entry of appearance within  
17 30 days of receiving the short form complaint for instance in  
18 a case where you've already answered.

19           MS. AYTCH: Oh. Well, my understanding is that  
20 this provision is for future cases, and this is already  
21 ongoing.

22           THE COURT: Okay. All right. So this would be --  
23 say the Montana coming in, it's just direct filers?

24           MS. AYTCH: Exactly.

25           (Attorney Noonan enters the courtroom)

1 THE COURT: Okay. All right.

2 Okay. I guess Mr. Noonan has appeared. I  
3 appreciate that. I was just hoping there would be somebody  
4 from New Hampshire here but --

5 MR. NOONAN: I apologize, your Honor, for having  
6 screwed up my schedule and showing up dressed like I am.

7 THE COURT: Don't worry.

8 MR. NOONAN: But I'm here.

9 THE COURT: Well, that's important. Thank you.

10 I was misinformed, too. I thought that Shaheen &  
11 Gordon was more involved than you are.

12 I understand you've got cases in this MDL, and so I  
13 was just curious as to whether or not someone from your firm  
14 would make a good state court liaison counsel, and your  
15 involvement in state court litigation was on a smaller number  
16 of cases than I had thought.

17 MS. AYTCH: Right. And it's completely separate  
18 litigation because it's a different product that's involved.  
19 It's not the C-Qur mesh.

20 THE COURT: Okay. But I appreciate you coming.

21 MR. NOONAN: When summoned by a federal judge, I  
22 always show up promptly.

23 THE COURT: Well, I didn't mean to summon you at  
24 all.

25 Okay. All right. So I was just a little unclear



1 exactly on how the short form complaint process will work.  
2 I'm not going to worry about that right now. I'll just  
3 indicate in my order that the parties have agreed on a master  
4 complaint and a short form complaint process.

5 Okay. In terms of general and specific tracks and  
6 a master complaint and then individual short form complaints,  
7 do you envision staying the individual cases by way of  
8 discovery and allowing general discovery to go forth first?  
9 Now, I know you both agree on plaintiffs' fact sheets in the  
10 individual cases and you agree on the plaintiff profile forms  
11 and authorizations in the individual cases once you negotiate  
12 the form. So those are obviously discovery in individualized  
13 cases.

14 But other than those two matters, fact sheets and  
15 the initial disclosures, do you want the discovery in  
16 individual cases essentially to be stayed? Is that  
17 necessary?

18 MR. BONSIGNORE: It is the position of the  
19 plaintiff that it should be stayed and that when we get to  
20 the Bellwether trial that the defendants should be able to  
21 have at it.

22 However, it would seem inefficient to have so many  
23 people be subject to a discovery process, discovery disputes,  
24 where we haven't decided liability yet. So it's an energy  
25 and cost savings effort.

1 THE COURT: I agree with that.

2 Do you agree with that, defense counsel?

3 Attorney Aytch.

4 MS. AYTCH: Yes, your Honor. I was trying to go to  
5 the particular page about initial disclosures, which I  
6 believe is page 5 of the joint brief.

7 Yes. The case-specific discovery we agreed to be  
8 stayed with regard to individual cases.

9 THE COURT: All right. Good. I just wanted to  
10 clarify that my reading of your brief was consistent with  
11 that understanding.

12 With the exception of the initial disclosures via  
13 the profile form and the fact sheets, are those the two  
14 exceptions?

15 MS. AYTCH: Right. That's correct. Just that  
16 other statement that we had with regard to initial  
17 disclosures on the plaintiffs' side beyond just the fact  
18 sheet and the form, the profile form. If they have any other  
19 discovery that would constitute initial disclosures beyond  
20 that, that should still be turned over. We don't want to  
21 limit that portion. But other than that, your Honor is  
22 correct.

23 THE COURT: Right. And I am going to get to that  
24 issue because I know there's a little bit of a dispute there.

25 Have you seen the model order in the light reading

1 that I assigned you, the manual, the sample order on  
2 deposition guidelines? It's pretty standard, plain vanilla  
3 deposition guidelines. Any objection to me just issuing that  
4 to help you to have an order to go to to decide basic  
5 deposition guidelines? Would you like some time to look at  
6 that?

7 MS. AYTCH: With the Court's indulgence.

8 THE COURT: All right. No problem. It is -- the  
9 sample orders, if you go to the end, I think you're looking  
10 at section 40.3. It's much easier to negotiate if you have  
11 it as a PDF searchable on your computer with bookmarks. At  
12 least for me.

13 MS. AYTCH: I'll pull that up right now.

14 MR. CHABOT: That's an order creating a website.

15 THE COURT: Okay. I apologize. I'm giving you the  
16 wrong cite, but it's in that sample -- you'll see it.  
17 Deposition guidelines. It's the longest -- it's really one  
18 of the longer sample orders and it just lays out deadlines.  
19 And I would be happy to let you look at that and let me know,  
20 you know, if that's something you both agree with or if  
21 there's part of it you want me to tweak.

22 Okay. 30(b)(6) depositions. That dispute --  
23 before we get to that, let me just ask -- Attorney Bonsignore  
24 mentioned that he could not even reach defense counsel and  
25 get back answers to his questions. No?

1 MR. BONSIGNORE: Let me clarify that. We have had  
2 excellent communication. We've worked through all of that.

3 The roadblock that I was talking about was I was  
4 pushing to get the ESI protocol moved forward. I was all  
5 over it, and I wanted to have Mr. Hersh and a designee who  
6 talks tech talk, not lawyer talk, tech talk, get together,  
7 work through everything and narrow the issues.

8 And their position I couldn't argue as being  
9 unreasonable. I just disagreed with it. I wanted to push  
10 forward. Let's do it now. Their position was you're just a  
11 temporary lead. People are not yet appointed. There's no  
12 leadership. If we deal with you right now, there could be a  
13 new person very soon and we'll have to go through this again.

14 So I still disagree, but they could have been  
15 right. I see their point.

16 THE COURT: Okay. Thank you for clarifying that  
17 for me.

18 Do you want to respond to that at all?

19 MS. AYTCH: That's pretty accurate.

20 As Mr. Bonsignore indicated, the ESI protocol issue  
21 has been ongoing since the first case filed in this Court  
22 before your Honor, which was Young. We started along those  
23 lines. The parties submitted different briefs.

24 From that point I had also heard from other  
25 plaintiffs' counsel in the room prior to and then right after

1 the designation of temporary lead counsel where their voices  
2 wanted to be heard.

3 So rather than hash it out several times,  
4 especially with regard to the nitty-gritty, especially  
5 considering the joint brief, we contemplated a series of  
6 orders that we wanted to propose to you. I wanted to delay  
7 the discussion of the details until that time that I  
8 understand that all would be heard and had their input  
9 acknowledged so Mr. Hersh wouldn't be burdened with that  
10 conversation on numerous occasions.

11 THE COURT: Okay. That makes sense.

12 Okay. 30(b)(6) depositions. Essentially  
13 plaintiffs want to depose an organizational person and an IT  
14 person. You're envisioning one of each?

15 MR. BONSIGNORE: We envision ideally one of each  
16 because we want to keep things straightforward and limited  
17 and lean.

18 THE COURT: All right.

19 MR. BONSIGNORE: I don't want to be limited to one  
20 of each without the ability to come back and ask because as  
21 it usually turns out you would have to do maybe two -- either  
22 of the organizational or two of the minimum of the ESI  
23 architecture.

24 The reason that we want this is to make the  
25 discovery in the future more streamline.

1 THE COURT: Okay. All right. More streamline.

2 But why do you need in person depositions? Why not  
3 just receive the typical standard document production charts,  
4 you know, whatever you ask for by way of organizational  
5 structure and your IT structure, and then from those perhaps  
6 you could say, listen, can we depose this individual within  
7 this chart, what do you think of that, and you might get  
8 their agreement at that point.

9 But why start off with a deposition of somebody?  
10 It seems to me before I would do that I would want to really  
11 get the document production.

12 MR. BONSIGNORE: Again, on page 20 -- I mean on  
13 document 20, I think it was page 19 that I referred to  
14 earlier, the first step is to get them together. We might be  
15 able to work this out. The 30(b)(6) depositions would follow  
16 written discovery because of course we would want to have it.  
17 We would just like to move it --

18 THE COURT: I thought your request was for 30(b)(6)  
19 depositions and there was a dispute over that. So now you  
20 have solved that dispute for me. You're going to go forth  
21 with documents.

22 I'm going to essentially use the approach suggested  
23 by defense counsel in terms of providing normal document  
24 answers, document production, with respect to organization  
25 and IT. And then if you need a 30(b)(6) deposition, perhaps

1 you can justify that, and Attorney Aytch or Attorney Hersh,  
2 whoever is handling that, can agree to that without Court  
3 intervention.

4 MR. BONSIGNORE: Wait. Your Honor, there is  
5 disagreement.

6 MR. ORENT: I think when we wrote this document we  
7 actually had it precisely as -- we wanted the depositions  
8 first.

9 Here's the concern. The concern is that when you  
10 do a request for production series of interrogatories first,  
11 your Honor, what happens is that you get pages of objections,  
12 you get thousands upon thousands of documents, and you don't  
13 get the right hand served quickly.

14 THE COURT: Well, you haven't dealt with this  
15 defense counsel yet. So you don't have a history of telling  
16 me, Judge, I have asked for this and look what I got in  
17 response. I got the manual on complex litigation when I  
18 asked a simple question about how MDLs work.

19 So my -- I'm not going to be that sympathetic until  
20 you have some sort of history with these people that would  
21 suggest they are not reasonable and they are going to bury  
22 you in documents.

23 It seems to me that you could figure out the IT  
24 infrastructure by asking specific narrow interrogatories.  
25 And if you get back what you're describing I would be

1 sympathetic to saying, you know what, let's cut through this,  
2 let's have a person and you ask the person the questions.

3 But at this point I'm inclined to allow the narrow  
4 focused document discovery that defense counsel has agreed  
5 to. And obviously you're interested in doing that on an  
6 expedited basis so clearly you can produce those requests in  
7 short order to defense counsel and get that going.

8 And to the extent you have problems, I would like  
9 to hear about them. Hopefully you'll be able to resolve  
10 them. I only want to hear about them if you really can't  
11 resolve them.

12 MR. ORENT: Of course. Thank you, your Honor.

13 THE COURT: Okay. So that issue is taken care of.

14 Initial disclosures. There was some disagreement.  
15 I tried to figure out precisely where the disagreement was.  
16 I think -- is it around -- first of all, what plaintiffs  
17 would produce by way of initial disclosures, I think defense  
18 counsel says we don't want to get the individual plaintiff  
19 profile forms. We would like to have a general liability  
20 causation disclosure, to the extent you can provide that  
21 first and right away, and then we'll start, you know,  
22 accepting the plaintiff profile forms and authorizations that  
23 you both hopefully will be able to negotiate and submit to me  
24 for approval. Believe me, if both sides are in agreement on  
25 something, I'm very likely to just approve that for you, and



1 I'll try to get that to you very quickly to the extent you  
2 present something.

3 So what is wrong with providing general initial  
4 disclosures from plaintiffs? And am I articulating that  
5 accurately?

6 MR. CHABOT: That was precisely what we want, your  
7 Honor.

8 THE COURT: Okay. Any problem with just agreeing  
9 to do that to the extent you can?

10 MR. ORENT: No, just so long as, you know, it's  
11 understood that this is a -- we are in the process of  
12 organizing as a steering committee and, you know, it will be  
13 a response on behalf of all plaintiffs. As we go forward,  
14 there will be necessarily required supplementation as we go.  
15 I just want to be clear about that at the outset that the  
16 initial disclosures are not going to be nearly as thorough as  
17 they might be once we're fully up and running.

18 THE COURT: I think that's fair. All right. Okay.

19 And then the profile forms and authorizations, you  
20 negotiate those and then start obviously having individual  
21 plaintiffs present their really short form initial  
22 disclosures to defense counsel. You guys are both in  
23 agreement on that it seems. Okay.

24 I'm sorry. Go ahead.

25 MS. AYTCH: Are you going to get the defendant's

1 positions on defendant's initial disclosure?

2 THE COURT: I was because I see a disagreement  
3 about the quantity of production, and I thought the  
4 disagreement was plaintiffs want all prior in any case  
5 disclosure, production, and you're saying we'll do any case  
6 in this MDL. Is that correct?

7 MS. AYTCH: I think that may be a separate issue,  
8 your Honor.

9 THE COURT: Okay.

10 MS. AYTCH: What I was speaking to specifically --  
11 our original position was that the initial disclosures that  
12 we filed in prior cases, which I believe were only three,  
13 would stand.

14 THE COURT: I don't think they disagreed with that,  
15 that you -- initial disclosures that have been served are  
16 considered served?

17 MS. AYTCH: Correct.

18 THE COURT: I didn't see a disagreement on that.

19 MR. BONSIGNORE: We did disagree with that, your  
20 Honor.

21 THE COURT: You did. Okay.

22 MR. BONSIGNORE: We would like to start fresh. We  
23 would like to have them produced. They did identify which  
24 initial disclosures they were. We would like to have them  
25 just served fresh so as to start fresh. So this way if we do

1 have problems with them it's a clean docket and we can move  
2 forward.

3 MS. AYTCH: And I understood your Honor to say that  
4 we're willing to do the initial disclosure process in this  
5 MDL. We are now in agreement on that position.

6 MR. BONSIGNORE: We're now in agreement.

7 THE COURT: Okay. All right. Good.

8 MS. AYTCH: On that.

9 THE COURT: Okay. Good. Thank you.

10 All right. And what about the issue of any prior  
11 cases and disclosing those?

12 MS. AYTCH: So that issue is a little bit more  
13 complex.

14 THE COURT: Okay.

15 MS. AYTCH: We don't have -- we're not objecting to  
16 never disclosing productions in prior cases. What we're  
17 saying is that before we make those disclosures we would like  
18 to have the coordinated discovery case management order, if  
19 that's going to be there, a confidentiality stipulation, all  
20 of those targeted protections to also be entered in this  
21 case.

22 Additionally -- and I do believe I saw in the  
23 plaintiffs' position that they said that we could stay it,  
24 but we also have an issue with producing a prior production  
25 in some current new form that we didn't produce before.

1 Especially if that has a cost associated with it. We don't  
2 believe that we should have to bear the cost of changing a  
3 prior production that was perfectly compliant in another  
4 court for this court if that's the way the plaintiffs want it  
5 hearing earlier they have a repository of Relativity, which  
6 we also use.

7 So I would think that that wouldn't be required,  
8 but I wanted to highlight their position that they wanted all  
9 of our prior productions to now conform to some future set of  
10 requirements and object to that.

11 THE COURT: Okay. And the company you're both  
12 using for depository is what?

13 MR. BONSIGNORE: It's the platform of Relativity.  
14 It's the best of all.

15 THE COURT: Okay. Excellent. All right.

16 Okay. So you've heard essentially defense argument  
17 that we're fine to provide disclosures in other cases, but we  
18 want to do that under the protection of confidentiality  
19 orders in this court and an order with respect to  
20 coordinating other proceedings. That makes sense to me.

21 Is there any problem with that?

22 MR. ORENT: Your Honor, it depends on how we define  
23 coordination. There's a legitimate concern, and I think your  
24 Honor referenced it, with regard to the deposition protocol.

25 We're at the outset of document discovery here and

1 we're starting new, and the state court litigation has been  
2 going on for 18 months. So to the extent that there's going  
3 to be certain discovery that's already done -- for example in  
4 the deposition setting -- we're not necessarily going to be  
5 ready to take that deposition.

6 And likewise in terms of the document production  
7 set issue. Essentially one of the issues that we've spent a  
8 lot of time this morning talking about is ESI and things like  
9 that.

10 We're certainly willing to engage in a discussion  
11 and have engaged in discussion related to confidentiality.  
12 We're always sensitive to that with companies, but it need  
13 not necessarily be the same.

14 I think when we talk about coordination we just  
15 have to be careful as to how we define it. We want to  
16 coordinate as best we can, but we're not procedurally in the  
17 same step. We're not all up to speed. And we are going to  
18 have separate experts and so --

19 THE COURT: I heard defense counsel saying, though,  
20 they're willing to do this but after they negotiate with you  
21 a proposed order on state coordination and a protective  
22 order, and you would have an opportunity to negotiate that.

23 I didn't hear them saying that they weren't going  
24 to negotiate that with you.

25 MR. ORENT: You're right. No, I just wanted to be

1 sort of clear at the outset as to what our concerns were.  
2 We're always willing to work with the other side, and I have  
3 no doubt that we will come close to agreement if not fully  
4 agree, but I did just want to let the Court know what our  
5 concerns were that are out there.

6 And one of the things that we have to protect our  
7 clients on in particular is, as I am aware, depositions are  
8 soon to begin in the state court setting. So we are eager to  
9 work with the defendants, but we don't want to prejudice  
10 ourselves.

11 THE COURT: Okay. All right.

12 Is that fact deposition witnesses or expert  
13 witnesses in the state?

14 MS. AYTCH: No depositions have been taken yet in  
15 the state court. So it will begin with fact witness  
16 depositions.

17 THE COURT: Okay. All right.

18 MS. AYTCH: And nothing has been set, noticed, or  
19 anything.

20 THE COURT: Okay. All right.

21 And the issue of form of production there was some  
22 dispute. You wanted them to -- instead of just taking let's  
23 say the pile of disclosures they've already made in one case  
24 and just handing it over to you, you want them to hand it  
25 over to you in a particular format that may be different from

1 that which they've already expended resources on and  
2 produced?

3 MR. BONSIGNORE: There's two different issues in  
4 there. With regard to the initial disclosures we're  
5 agreeing, okay, let's make sense here, we'll take what you've  
6 already done. But this is not an individual case. This is  
7 an MDL. And so if it's insufficient in our minds, we want to  
8 have a fresh start.

9 With regard to the actual previous document  
10 production, we have not had a chance to let the techy lawyers  
11 sit together and make sure that these -- I just call them  
12 commas and periods, and things like this, line up so that  
13 when this Relativity comes over into our Relativity we can  
14 read it properly. We can research it properly.

15 It's just as likely that it might be fine as it  
16 isn't fine, but until we know how they're producing it we  
17 can't agree to accept it.

18 THE COURT: So essentially it's a dispute without a  
19 dispute.

20 MR. BONSIGNORE: Yes.

21 THE COURT: So I'm not going to deal with this at  
22 this point.

23 MR. BONSIGNORE: Yes. If we can meet and confer  
24 now that we have people in place, it might go away.

25 THE COURT: Okay. Good.

1           Okay. There was a dispute about privilege logs. I  
2 think I have the dispute based on what I've read on paper.

3           Anybody want to be heard specifically about that  
4 dispute?

5           MR. MATTHEWS: Your Honor, I think we laid it out  
6 fairly well in our papers.

7           If the Court has some specific questions or  
8 concerns, but I think it's laid out pretty well from the  
9 plaintiffs' side.

10          THE COURT: Okay.

11          Anything further you want to say on that?

12          Attorney Chabot, go ahead.

13          MR. CHABOT: Your Honor, I have some helpful  
14 authority if you would be interested in hearing about it.

15          THE COURT: Absolutely.

16          MR. CHABOT: I would first just point to Section  
17 11.43 of The Manual for Complex Litigation.

18          THE COURT: That little small paperback book?

19          MR. CHABOT: Just bear with me while I go back in  
20 here.

21          We just undertook to do a quick search in the  
22 District of New Hampshire and in the First Circuit, and  
23 although we couldn't find any cases really specifically  
24 litigating the sufficiency of the contents of a privilege  
25 log, you know, there's a number of cases out there that



1 discuss sort of what doesn't suffice, which is simply placing  
2 a label on it and calling something attorney-client  
3 privileged. And there I'm looking at Walker versus  
4 Administrative Office of the Courts. It was a decision of  
5 yours in case number 11-CV-421. I only have a Westlaw  
6 citation, 2013 Westlaw 672584.

7 I think the items we've agreed to are certainly  
8 well beyond the law that was found not to be sufficient in  
9 that case, your Honor.

10 And again, you know, this is all in dicta, but if  
11 you look at United States Ex Rel. Hamrick versus  
12 Glaxosmithkline, 814 F.3d, 10, at page 16, the First Circuit  
13 was describing a privilege log containing entries such as --  
14 and I'm going to give an example. This was the entire  
15 description of a document. It said, "Confidential in-house  
16 counsel to outside counsel communication providing  
17 information relevant to rendering legal advice regarding  
18 Hamrick employment issues." That privilege log was described  
19 as quite detailed by the First Circuit Court of Appeals.

20 I don't need to bore you with all the cases we've  
21 pulled up, but we couldn't find anything certainly supporting  
22 the additional elements that the plaintiffs were looking for  
23 in this case.

24 I think that the committee notes of the 1993  
25 amendment to Rule 26(b), which is the provision that adds the

1 requirement of creating a privilege log, are fairly clear  
2 that -- it's not even in every case that you have to detail  
3 every document and the burden of doing this is something that  
4 should be considered in deciding how the privilege log should  
5 look.

6 I think what the plaintiffs' group has described  
7 would be the type of thing that could be mandated with a  
8 court order if there turned out to be an insufficiency with a  
9 privilege log, but I think that the items that we've agreed  
10 to provide are more than adequate, your Honor.

11 THE COURT: All right.

12 Anybody else want to be heard on that?

13 MR. MATTHEWS: Your Honor, I would just add very  
14 quickly. The reason that we seek the detail that we seek in  
15 this issue is obvious. We don't want to have to come bother  
16 the Court on these issues.

17 THE COURT: Thank you. Go ahead.

18 MR. MATTHEWS: The better information we can have  
19 to determine if there are issues or aren't is all we're  
20 after. We don't want to burden the Court.

21 THE COURT: And I assume this will be one of those  
22 issues that perhaps would be assigned to somebody to handle  
23 for the committee, and that person would be on the phone  
24 hopefully with defense counsel and meeting and conferring and  
25 trying to figure out areas of privilege where you do want to

1 bring it to my attention because they're just not willing to  
2 give you any information.

3 I can hear those discrete privilege disputes, and I  
4 can hear them for you -- I don't want to do that unless you  
5 really have a point where you just can't agree to disclose  
6 something or to provide further information, but I would like  
7 to deal with those in more bite-sized pieces, if I could, as  
8 opposed to getting a massive privilege log that I have to go  
9 through and engage in litigation around. That's something  
10 that I could see referring to the Magistrate Judge to help me  
11 with if you go that route. But I am willing to help you with  
12 these where you truly do meet at loggerheads and you need  
13 some assistance. I am happy to try to help you work through  
14 those to try to keep privilege issues and disputes to a  
15 manageable scope.

16 MR. MATTHEWS: Certainly.

17 Your Honor, I've handled privilege issues in the  
18 Actos litigation and the Granuflo litigation, and I'm very  
19 mindful of not unloading a truckload of documents on a judge  
20 or a magistrate or a special master because I think that does  
21 more harm than good. So I'll be coordinating that effort on  
22 our side.

23 THE COURT: Okay. Excellent.

24 MR. MATTHEWS: And I don't think we'll burden the  
25 Court too much.

1 THE COURT: All right. Excellent. Okay. Thank  
2 you.

3 So those are the privilege logs. Let me see. I  
4 want to make sure I covered the four items you guys were in  
5 dispute about. I want to make sure we've gone over those.  
6 Those were the items listed at page 15, and you outline the  
7 defendant's disagreements with them starting on page 17 of  
8 the joint brief.

9 We've done the 30(b)(6). We're going to do that  
10 via documents. So that's resolved, number one.

11 Number two, you guys are going to meet and confer  
12 with respect to that, as well.

13 And then the specific items -- I don't think we've  
14 talked about documents that relate to materials if purchased  
15 that originated or were sold through Chinese sources.

16 Do you want to address that?

17 MR. BONSIGNORE: We removed that from the expedited  
18 list in compromise. We're trying to limit what we need to  
19 do. So that is no longer in dispute. We ask for it on an  
20 expedited basis no longer.

21 THE COURT: And how about the other four items?  
22 Did you remove those as well from your expedited?

23 MR. BONSIGNORE: Well, the thing is that obviously  
24 we're going to go directly to the documents that are  
25 produced, obviously go directly to the state court documents,

1 and we're going to look for those. We just heard for the  
2 first time that they're produced. So that's what we need  
3 right away.

4 We're trying to move the litigation, as Attorney  
5 Orent said, forward fast, and that's where we really need to  
6 get going. So I would like to not bother you. But if we  
7 can't find them, we will be right back looking for those.

8 THE COURT: Okay. Let me just ask defense counsel.  
9 This is a joint brief. Obviously you were aware that they  
10 were disputing these materials and those could be -- he's  
11 already produced them apparently and could be produced.

12 Is it the same issue? You wanted to make sure you  
13 had lead counsel as opposed to interim lead counsel?

14 MS. AYTCH: Your Honor, I never realized that there  
15 was an issue that there was a position that we had not  
16 produced these things.

17 We had produced them in state court, and I would  
18 have been willing to say that.

19 The way I read this particular section was this was  
20 yet another thing that plaintiffs' counsel seemed to want at  
21 the end of today.

22 Our position is that we want the other orders that  
23 were stated in section -- on page 4 of the joint brief and 5,  
24 so the confidentiality agreement, all of that to be in place  
25 and then we'll produce these.

1           Moreover, these are the type of things that would  
2 be in initial disclosures. Succinctly, our position -- our  
3 side just didn't see such the hurry in moving everything to  
4 get done as of today, and it may be a misunderstanding in the  
5 plaintiffs' use of the word expedited, but we were just  
6 trying to put forth that all of this would come. We just  
7 didn't understand why it needed to be so rushed.

8           MR. BONSIGNORE: Just two points, your Honor. I  
9 don't think expedited will be used in a brief again for a  
10 little while unless it's absolutely necessary.

11           THE COURT: Well, if we use it we mean 90 days. Go  
12 ahead.

13           MR. BONSIGNORE: Yeah. The other thing is if they  
14 can provide the Bates numbers for those items that we've  
15 listed, it would just save so much trouble. Obviously we're  
16 going to go back again and try to find them, but we've asked  
17 several times if we can get the Bates numbers from the  
18 defendants. It will just eliminate that issue.

19           THE COURT: Okay. So you already have piles of  
20 discovery you've gotten?

21           MR. BONSIGNORE: No, we don't. We will get that.  
22 I think after today we'll get it.

23           So basically there's some documents that they're  
24 going to produce that as I understand it are in one case. We  
25 don't have access to those yet. Once the order is issued, we

1 will get access to them. And if we have the Bates numbers,  
2 then we can instantly go and pull out exactly what we want to  
3 look at first.

4 THE COURT: Yeah, I can't imagine defense counsel  
5 is going to have a problem once the stay is lifted and once  
6 certain orders are issued.

7 What order specifically -- I want to make sure --  
8 when I lift the stay, I envision having in place counsel  
9 structure and a discovery order that deals with some of these  
10 initial disclosure issues, that kind of thing.

11 You want me to have a protective order, as well?

12 MS. AYTCH: I would turn the Court's attention to  
13 document 19, which is the joint brief. It begins on page 4.

14 THE COURT: Page 19?

15 MS. AYTCH: Document 19, which is the joint brief.

16 THE COURT: Oh. Okay.

17 MS. AYTCH: Page 8 of the PDF, but page 4 of the  
18 brief.

19 THE COURT: Got it.

20 MS. AYTCH: In those particular case management  
21 orders that the parties submit that we should get to the  
22 Court, which are the executive committee, as you noted, the  
23 confidentiality stipulation and protective order, the ESI  
24 protocol, and then some proposal for coordination of  
25 discovery.

1           Essentially what we're looking for once we make the  
2 same production is that we're not going to be asked in this  
3 litigation for the exact same things a second time.

4           THE COURT: I understand that.

5           MS. AYTCH: That's kind of where we're getting. We  
6 have no problem making this production. We would like this  
7 framework to be established.

8           THE COURT: Okay. But ultimately you need the  
9 order on the leadership before you do the ESI protocol.

10          As I understand it from Mr. Bonsignore, he  
11 describes having difficulty communicating with you about ESI  
12 protocol because you didn't know who the formal lead counsel  
13 was going to be.

14          So are you envisioning that to be the first order  
15 that I would issue, setting up a leadership structure?

16          MS. AYTCH: That would be ideal, but we are not in  
17 a position to tell the Court the order.

18          THE COURT: I know. I'm open though to your  
19 suggestions.

20          Do you both agree that's the first order of  
21 business, to make sure that the first pretrial order would  
22 deal with the plaintiffs' structure?

23          MR. BONSIGNORE: Yes, your Honor.

24          THE COURT: Okay. And you can get me what you need  
25 to get me within ten days?



1 MR. BONSIGNORE: Yes, your Honor.

2 THE COURT: Okay. All right.

3 And then confidentiality stipulation. Now, you  
4 don't mention Rule 502. I assume you're going to give me a  
5 502 order? Is that something you've done in the state  
6 system?

7 MS. AYTCH: Yes. But it's also something that  
8 we've done in individual cases that are now centralized in  
9 this MDL. So we have a draft that we can flow in again  
10 working from that if that's the Court's wish. That order was  
11 entered definitely in the Fergersen matter, I believe, maybe  
12 as well as one other matter, but I definitely know we got  
13 there in the Fergersen matter.

14 THE COURT: Okay. All right.

15 So you're going to meet and confer and propose a  
16 protective order and a Rule 502 order which would protect  
17 everybody in this case and make for much, much smoother, I  
18 would suggest, ESI production.

19 MR. BONSIGNORE: Yes, your Honor. It's anticipated  
20 we will meet and confer.

21 THE COURT: All right. So that's number two, and  
22 the third is the ESI protocol, okay, and then -- it's the  
23 leadership structure.

24 Okay. So really number four in that list and  
25 number one are somewhat related. And then the discovery

1 order talking about coordinating discovery and coordinating  
2 with state court litigation. Those are the five orders that  
3 would make you feel comfortable in terms of starting the flow  
4 of information?

5 MS. AYTCH: Right. In terms of doing productions  
6 of cases that are not centralized in this MDL, yes, those are  
7 the protections that we would want established.

8 THE COURT: Okay. All right. I think I have the  
9 position with respect to that, and I've gone over the four  
10 items of dispute. I think there's less dispute as I sit  
11 here.

12 I'm going to adopt your pathology preservation  
13 order as you submitted it.

14 I'm going to adopt your proposal regarding fact  
15 sheets, that you didn't have any disagreements on those.

16 And I know you're working on document depositories  
17 so that is not an issue.

18 Anything else? I think I have gone through my list  
19 of what I thought were the disputes and areas of question for  
20 me.

21 Anything else? It's 12:30.

22 MR. BONSIGNORE: No, your Honor. We're good.  
23 Thank you.

24 THE COURT: Excellent. All right.

25 Attorney Aytch.

1 MS. AYTCH: Your Honor, we just kind of wanted to  
2 speak more to the pleadings stage and the pleadings form.

3 The way we understand it, there will be a master  
4 long form complaint and we will get to respond to that.

5 Based upon some of the complaints that have come  
6 through there are causes of action asserted that we don't  
7 believe are viable and that we would like to challenge at  
8 that stage.

9 So as discovery progresses we think that discovery  
10 should of course be narrowed to the claims that remain within  
11 whatever the master long form complaint is.

12 THE COURT: I totally agree with that.

13 Is there any disagreement on this side?

14 MR. BONSIGNORE: No, your Honor. We were just  
15 discussing the timetable.

16 THE COURT: Okay. All right.

17 Well, I think the proposal generally meets with my  
18 approval, that you try to narrow the scope of everything so  
19 that you're not doing discovery on some claim that there's a  
20 big dispute about whether or not it even should be in the  
21 master complaint going forward.

22 And I know defense counsel brought up corporate  
23 entities that shouldn't be in the case from their  
24 perspective. There should be meet and confer about that.  
25 But then if you can't resolve it, obviously that would be an

1 issue that would matter to everybody in the case and I would  
2 like to decide those questions.

3           So in that instance I would be open to, you know,  
4 summary judgment motions that dispose of pieces of the case  
5 that will help all of us narrow the issues and focus the  
6 case.

7           And obviously I'm in favor of any discovery that is  
8 focused around certain tracks and issues so I appreciate  
9 that.

10           Anything else? Okay. So the next thing I'm going  
11 to get then is the proposal from counsel, and then I'll try  
12 to get an order out very quickly for you.

13           My order will summarize essentially what happened  
14 here, and then I will have separate orders that will flow  
15 from my case management order. There will be pretrial orders  
16 separately labeled. There will be a website up. In fact,  
17 you can even get the link from my case manager because it's  
18 already in existence. It's not looking like it's ultimately  
19 going to look, but right now it has really the basics, and  
20 we're ultimately going to keep all the orders there and other  
21 matters that you suggest to me to make this something that  
22 state court litigators can go to and find my orders, find  
23 calendars, find out when we're having hearings that they may  
24 want to attend.

25           I just want to make sure that it's available to

1 litigants, people who aren't part of the leadership team,  
2 plaintiffs themselves who are in other states who might be  
3 able to go to the website and find out basics about what to  
4 them might be a rather massive black hole in terms of  
5 information. So I want to make this something that's  
6 accessible to as many people as I can.

7 So anything further we need to accomplish? I  
8 appreciate everybody's attendance here today. I appreciate  
9 the efforts of co-counsel in putting together this joint  
10 brief and your joint submission. It's a lot harder to do  
11 that on this side of the table than it is for you, and I  
12 appreciate the work that went into that.

13 I look forward to being on the phone with you I  
14 guess as soon as sometime in March, the second week of March.  
15 It would be the second Thursday. We'll be on the phone.

16 I'll have an order out that just describes to you  
17 how to handle that in terms of getting the appropriate agenda  
18 so I can check in with you.

19 If there comes a point where we have a status  
20 conference scheduled and there's nothing really that needs to  
21 be discussed, you just communicate to my case manager and I'm  
22 amenable to obviously giving you a month off.

23 All right. Anything else anyone needs to tell me?  
24 Attorney Orent.

25 MR. ORENT: Just a quick question, your Honor.

1 THE COURT: Yes.

2 MR. ORENT: If I understand, the monthly calls are  
3 going to be by phone. I was just wondering -- for those of  
4 us who are within driving distance -- is the phone optional  
5 or is it everyone on the phone?

6 THE COURT: Well, what I would like to do is have  
7 everybody be able to call in and listen. I would probably  
8 have -- other than lead counsel, lead liaison, I will  
9 probably have everyone mute their phones for purposes of the  
10 call, but I want them to be able to listen and hear what's  
11 happening. I would like to do a transcript also and make  
12 that available to anybody who wasn't able to attend.

13 But with respect to in person versus on the  
14 phone -- if you want to be in person, obviously you have  
15 local counsel who could attend, and we have the capability of  
16 hooking people in by conference. So I could meet certainly  
17 with those who are able to be here in person. I'm not  
18 opposed to that. You just need to let my case manager know  
19 so she can set that all up.

20 MR. ORENT: Thank you, your Honor.

21 THE COURT: I'm also open to video conferencing.  
22 If you think it would be helpful or necessary, just speak to  
23 my case manager. As long as both sides are in agreement on  
24 something, we'll pretty much try to make that happen for you.

25 MR. ORENT: Thank you, your Honor.

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THE COURT: Thank you very much.  
MS. AYTCH: Thank you, your Honor.  
THE COURT: Court is in recess.  
(Conclusion of hearing at 12:40 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: 3-31-17

  
**SUSAN M. BATEMAN, LCR, RPR, CRR**  
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