

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 * April 13, 2017
* 2:00 p.m.
* * * * *

TRANSCRIPT OF TELEPHONE CONFERENCE
BEFORE THE HONORABLE LANDYA B. McCAFFERTY

Appearances:

For the Plaintiffs: Jonathan D. Orent, Esq.
Motley Rice, LLC

Russell F. Hilliard, Esq.
Susan A. Lowry, Esq.
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D. Todd Mathews, Esq.
Gori Julian & Associates, PC

James B. Matthews, III, Esq.
Josh B. Wages, Esq. (Via tele)
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Via telephone: Adam M. Evans, Esq.
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Anne W. Schiavone, Esq.
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David Selby, II, Esq.
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For the Defendants: Enjolique D. Aytch, Esq.
Hugh J. Turner Jr., Esq. (Via tele)
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John E. Friberg, Esq.
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1 P R O C E E D I N G S

2 THE COURT: Okay, we will go on the record.
3 Let me identify the case name for the record. Is
4 everybody in? All right. Okay, the case name is In Re:
5 Atrium Medical Corp. C-Qur Mesh Products Liability
6 Litigation, MDL No. 2753, MDL Docket Number for all
7 cases, 16-md-02753-LM.

8 Now, let me just set a ground rule to start.
9 I suspect there are a number of individuals, counsel on
10 the phone listening and joining this conference. The
11 ground rule is this with regard to the phone. Any
12 lawyer who is not serving in a leadership capacity
13 should mute his or her phone throughout the entirety of
14 this conference. You will listen in to the conference,
15 but I'm asking you to mute your phones for the purposes
16 of the conference. So that is our ground rule.

17 Let me -- there's one other ground rule that's
18 important, and that is that those lawyers who do speak,
19 members of the executive committee who do speak, just
20 need to identify themselves by name for our court
21 reporter, otherwise she will have no way of knowing who
22 is speaking. It also helps, I think, everybody else in
23 the room.

24 So what I'd like to do for now is to begin by
25 having lawyers who are present in this conference room

1 now go ahead and identify themselves and spell their
2 last names for our court reporter.

3 MR. ORENT: Good afternoon. Jonathan Orent,
4 O-R-E-N-T, for the plaintiffs.

5 MR. HILLIARD: Russ Hilliard, H-i-l-l-i-a-r-d.

6 MS. LOWRY: Susan Lowry, L-O-W-R-Y.

7 MR. MATTHEWS: Jim Matthews, M A T T H E W S .

8 MR. MATHEWS: And Todd Mathews, M-A-T-H-E-W-S.

9 MR. FRIBERG: Jack Friberg, F-R-I-B-E-R-G.

10 MR. CHABOT: Pierre Chabot, C-H-A-B-O-T, for
11 the defendants.

12 MS. AYTCH: Enjolique Aytch, A-Y-T-C-H, for
13 the defendants.

14 THE COURT: Excellent. Now, could members of
15 the executive committee who are listening in on the
16 phone whose phones are not muted, would you also please
17 identify yourselves for the record and spell your last
18 name as well.

19 MR. EVANS: Adams Evans, E-V-A-N-S, for the
20 plaintiffs.

21 MR. SELBY: David Selby, S-E-L-B-Y, for the
22 plaintiffs.

23 MS. SCHIAVONE: And Anne Schiavone,
24 S-C-H-I-A-V-O-N-E, for the plaintiffs.

25 THE COURT: Excellent. All right. And I

1 think I have seen most of you, which is very helpful,
2 from the previous conference. So, even those of you on
3 the phone, I remember you being here at the last
4 hearing.

5 Okay. I am looking at an agenda and happily
6 looking at what looks to be no disputes yet. So what
7 I'd like to do is just go through the agenda an item at
8 a time and begin with number one on the agenda which is
9 status of discussions related to defendants' production
10 of documents produced in the related state court
11 litigation.

12 MR. ORENT: Your Honor, for the record,
13 Jonathan Orent for the plaintiffs again.

14 The plaintiffs initially requested access on
15 March 24th to defendants to the materials that were
16 produced in the state court litigation. Subsequent to
17 that, again on 3/31, we followed up with some contacts
18 with defendants as well as on 4/7 and 4/11.

19 We understand at this point in time the
20 defendants have concerns relative to the lack of entry
21 of a protective order. We have, initially we offered an
22 eyes only offer to the defendants and subsequently have
23 offered as part of our proposal for a protective order
24 to just enter into the standard New Hampshire state
25 protective order. We have not yet resolved that issue.

1 Subsequent to that we requested access to the
2 non-confidential documents, so things that would not be
3 covered by protective order anyway, and are awaiting for
4 a response which we hope we will get some time soon.

5 THE COURT: All right. So, that looks like
6 that's something that is in the process that you're
7 working through, and ultimately when the protective
8 order is filed and approved, it looks like that major
9 barrier will be removed.

10 MS. AYTCH: Correct, your Honor, that is the
11 status of where we are discussing this. The concern
12 wasn't just for the protective order but for the
13 protective and the coordination order that we described
14 at the prior hearing. And Mr. Orent is right, that I do
15 owe him a response and the latest gesture, which I
16 believe was earlier this week or maybe late last week.

17 THE COURT: Okay. All right.

18 MR. MATHEWS: Your Honor, if I may.

19 THE COURT: Yes.

20 MR. MATHEWS: Todd Mathews for the plaintiffs.
21 There are some significant differences in our proposed
22 protective order as opposed to the defendants' proposed
23 protective order. If we can't work that issue out, is
24 that something you'd prefer for us to take up at the
25 next status conference or something you would prefer for

1 us to make motion of prior to that? I want the Court's
2 direction in case we run into an impasse.

3 THE COURT: I think that is probably a good
4 thing to put on for the next status conference. If
5 there's some time concern, time is of the essence
6 concern of any sort, then I think you could perhaps
7 brief it ahead of time. But before the next status
8 conference is only one month, so that isn't a lot of
9 time I guess if you would want to bring that to my
10 attention in the form of some sort of a formal briefing
11 or informal process.

12 MR. MATHEWS: The only reason I mention it is
13 we're now a month since we were appointed as a
14 committee. We just kind of want to get going, so, I
15 assume the Court would like for us to be as efficient as
16 possible, so I just wanted direction from the Court. We
17 can certainly bring it up at the next status conference,
18 if even an issue.

19 THE COURT: All right. And I am all for
20 efficiency, so if you can come up with a process that
21 you both agree on, I'm fairly confident I will support
22 you in that, so.

23 MS. AYTCH: Your Honor, just a little more
24 clarification on that. Should we, if we are unable to
25 resolve or reach an impasse on any of these items, brief

1 it in accordance to the case management order three that
2 has the one page-letter that sets forth our parties'
3 positions?

4 THE COURT: That is what I would expect. That
5 is certainly what I laid out in the case management
6 order, but if for some reason you feel as though it
7 requires greater briefing, more serious litigation, then
8 you can certainly bring that to my attention as well.
9 Hopefully that will not be necessary, but I can
10 understand if this is an important issue, if you reach
11 some sort of impasse, that you may want to litigate.

12 MR. ORENT: Well, I know that vis-a-vis the
13 plaintiffs, and this is certainly an issue that Mr.
14 Matthews is much more up on than I am, but we believe
15 that the standard New Hampshire protective order, the
16 one prescribed in the local rules, is more than
17 sufficient to fit the definitions of confidential, are
18 precisely in line with our thinking, and so that is what
19 we propose to the defendants and would be advocating
20 going forward.

21 THE COURT: And how does it differ from the
22 protective order that you must have in place in the
23 state?

24 MS. AYTCH: Some of the terms are pretty much
25 the same. Other things are a lot broader. In our

1 agreements, both orally and in writing, the defendants
2 were going to take the first of a couple of orders and
3 then the plaintiffs were going to take the first, we
4 were supposed to take the first of the protective order.
5 It combines the language from the protective order
6 entered in the Ferguson matter, that's one of the
7 individual cases that are now in this MDL, with any
8 provision from the state court and also provision from
9 the District of New Hampshire civil form number three
10 just to make it all encompassing. What we received back
11 wasn't a red line of that, so I have not yet compared
12 the two. So I need to go back and look like at the two
13 side-by-side. I thought we'd get a red line or
14 something like that, so.

15 THE COURT: Okay. All right. Where is the
16 state -- can somebody just update me on the status of
17 the state MDL?

18 MR. MATTHEWS: I believe that would be my job,
19 your Honor. I'm the state court liaison. I'm not a
20 member of the executive committee, but I'm the state
21 court liaison.

22 THE COURT: Matthews with two T's.

23 MR. MATTHEWS: Correct. With the accent that
24 I was reminded of earlier.

25 There is a motion to compel set for discovery.

1 There's going to be more of those. To be frank,
2 discovery is a significant issue in those cases. And
3 there is also a motion before the Court for the, to
4 establish the bellwether process. That's already been
5 argued and we're just waiting for Judge Temple to decide
6 which way he wants to go on the bellwether process. But
7 I don't think the bellwether process is going to be too
8 much of an issue, but the discovery issues are
9 significant. And one of the reasons that Mr. Orent
10 listed this first I think on the agenda for getting the
11 plaintiffs' executive committee the discovery that has
12 been produced in the state court is that even though we
13 think we've only gotten the tip of the iceberg, we have
14 gotten a lot of good documents we believe, and we're set
15 to try the first case in August of 2018. And in order
16 to coordinate discovery between federal court and the
17 state court, federal court needs to catch up with us a
18 little bit so that we don't take a corporate deposition
19 and then the federal court people want to take the same
20 person five months later and you run into, well, you've
21 already taken him, you don't need to do it again, and
22 they also need to be up to speed on the documents when
23 we do take that first deposition because we're ready to
24 start taking depositions. We're frankly just waiting so
25 that they can kind of catch up before we get going,

1 although we're not going to be able to wait long since
2 we've got to take corporate depositions, do experts, do
3 expert discovery, and we've only got a year to do that.

4 THE COURT: Okay. All right. And it looks
5 like the protective order is really the hurdle that is
6 in the way at this point. Once you get access to
7 discovery you can share information, get prepared for
8 something a little more coordinated.

9 MR. MATTHEWS: Right.

10 THE COURT: Okay. Go ahead.

11 MS. AYTCH: Well, that as well as the fact
12 that we don't have a Master Pleading yet in this case
13 that would even define the scope of that. So that would
14 also be something that the defendants would like to have
15 on file.

16 In addition on the state court litigation, I
17 believe there's also motions to amend in some of the
18 state court litigation. It's an issue I know we haven't
19 spoken with your office yet about our agenda for that
20 status conference, but I believe that that's going to be
21 heard before Judge Temple at our next hearing as well,
22 and then other than that I believe these two items.

23 MR. MATTHEWS: That's correct. The motions to
24 amend are simply to add the defendants that merged
25 Atrium into them. Getinge -- tell me how to pronounce

1 that.

2 MS. AYTCH: You have that correct.

3 MR. MATTHEWS: Getinge and Maquet.

4 MS. AYTCH: Maquet.

5 MR. MATTHEWS: Maquet were not named has
6 defendants in some of the state court actions, and so we
7 filed motions to amend to add them and they're going to
8 oppose that. I think they are defendants in the federal
9 court action, so that will have to be hashed out also.

10 THE COURT: Okay.

11 MR. MATTHEWS: But I don't see that as a
12 stumbling block to getting started with discovery in the
13 federal court cases.

14 THE COURT: And as I recall, that was going to
15 be one of your early issues, perhaps, an early motion
16 maybe.

17 MS. AYTCH: I'm sorry --

18 MR. MATTHEWS: There's already a motion to
19 amend --

20 THE COURT: To remove certain defendants from
21 this case.

22 MS. AYTCH: Okay.

23 MR. ORENT: And your Honor, we anticipate
24 filing the Master Complaint tomorrow. We are on the
25 final draft form, so absent some sort of a delay that is

1 unforeseen, there's a final draft circulating among
2 plaintiffs' leadership at this point in time. We
3 committed with the defendants to file it by the 14th
4 such that there would be plenty of time by the June 12th
5 date for them to answer and for us to coordinate this,
6 so we are in schedule for that or on schedule for that.

7 The only issue I would just raise is with
8 regard to the protective order which is sort of the
9 elephant in the room. We have great concerns about the
10 protective order that was entered into in terms of what
11 was done at the state court level. Though I've not seen
12 the documents, I have seen statistics, a breakdown of
13 the production in terms of what was marked as
14 confidential. And my understanding is a hundred percent
15 of the documents were marked as confidential, including
16 documents that were publically available or IFUs,
17 instructions that go in the boxes and things of that
18 nature.

19 And so we don't want to hamstring the
20 plaintiffs' counsel as we're going into depositions by
21 entering into the same agreement and, you know, I don't
22 know if there was an expedited process for production
23 that the parties agree to that would allow for that, but
24 I suspect plaintiffs are going to be filing motions to
25 de-designate documents as confidential and that is sort

1 of underlying our concern and that is one of the reasons
2 that we decided we would go with the standardized form
3 as opposed to just rubber stamping one of the documents
4 that had previously been agreed to by plaintiffs because
5 we want to prevent that from happening here and we want
6 to prevent that avenue of motion practice, quite
7 frankly, and so that is underlying our thinking in this
8 whole process. And like I said, Mr. Matthews and his
9 colleague, Mr. Wages, produced printouts for us in terms
10 of statistics of breakdown of documents and things of
11 that matter which is the reason for this.

12 So, we're hopeful that we can reach agreement,
13 but if not, we will certainly let your Honor know.

14 THE COURT: Okay. All right. And I'll be
15 ready to assist and try to get you some sort of
16 expedited hearing if necessary and an expedited result
17 if I can as well, so.

18 Anybody else want to comment further on that?

19 MR. MATHEWS: Your Honor, I may just suggest
20 these are documents, this initial documents have already
21 been turned over to the state court litigation. We've
22 offered to enter into a very simple one-page only the
23 PDC members can review these documents and nobody get
24 entirely confidential while we work out the protective
25 order, and that would at least allow the PDC to get

1 going on reviewing documents and see where we're at, if
2 that would be some sort of interim solution to the
3 protective order as a whole.

4 THE COURT: And have you proposed that to
5 defense counsel?

6 MS. AYTCH: That is the response that I owe.

7 MR. ORENT: We did --

8 MS. AYTCH: That was most -- I'm sorry, go
9 ahead.

10 MR. ORENT: Well, on 3/24 we met actually with
11 Mr. Matthews and his firm to get apprised of the full
12 ongoings of the state court litigation over that
13 process. We went through a number of the pleadings that
14 had been filed, a number of motions, discovery answers,
15 things that were not marked as confidential. During the
16 course of the meeting as we were about to turn to the
17 documents themselves, we actually uncovered the fact
18 that actually we couldn't look at the documents because
19 of the confidentiality agreement. We also had had a
20 scheduled call with the defendants at that time, and at
21 that point we entered, or we offered to enter into what
22 I called an absolute confidentiality agreement as in we
23 would just look at them on the screens, take notes but
24 not take the documents and not leave with the room with
25 them. Defendants declined that offer of ours, and so we

1 followed it up with some subsequent requests for access
2 to documents, and that's sort of where we are in terms
3 of process.

4 THE COURT: All right. And how do you feel
5 about his proposal, a kind of temporary but rather broad
6 confidentiality proposal pending the detailed
7 confidentiality order?

8 MS. AYTCH: We would like the framework of not
9 only the confidentiality order but the coordination
10 order to be in place. When this was raised prior, that
11 was our position. We haven't been given at this point a
12 demonstration for why it needs to be on an expedited
13 basis. At that point I understand we're going to have
14 it tomorrow, but we still didn't have a Master
15 Complaint. It was kind of a hurry-up-let-us-see all
16 this stuff, but with no otherwise structure or
17 protections in place, and still without that kind of
18 demonstration for good cause for why everything needs to
19 be done now, has been our position that we can get these
20 things in order first.

21 MR. ORENT: Just so your Honor is aware, we
22 did present the defendants with a coordination order as
23 part of our packet of materials sent over to them and
24 have yet to receive comment on that coordination order.

25 MS. AYTCH: If I may also speak to that

1 cooperation order.

2 THE COURT: You may.

3 MS. AYTCH: Again, one of the things that we
4 agreed in writing that the defendants would take the
5 first shot at is the coordination order. We sent over
6 our proposed coordination order days before we received
7 back their coordination order, which again, apparently
8 was not looked at. The coordination order that we
9 received back is a one-paragraph essentially order that
10 says we'll try to cooperate and coordinate. The
11 coordination order that was proposed was a multi-page
12 document.

13 So, that was -- I still owe a response. That
14 was just sent. So I have not been able to figure out
15 like of the other provisions in our coordination order
16 that kind of sets forth how coordination will happen, if
17 those are objectionable and had that real meet and
18 confer yet.

19 MR. ORENT: And this is sort of one of the
20 things that I had suggested to defense counsel, your
21 Honor, was that we schedule a prearranged weekly call,
22 because I think there's a lot on all of our collective
23 plates. So far defendants have declined to accept me on
24 that offer. But we have been trying to get prior to
25 this hearing a meet and confer to discuss the meat of

1 some of these issues, to underline some of our thinking
2 including the coordination order, which again raises
3 concerns of what they sent, so we did a thorough
4 analysis of the draft that they sent to us, but what we
5 did was ultimately we decided that a simpler more
6 straightforward language-wise approach was better, that
7 it did not present some of the dangers of prejudice that
8 the draft that we saw felt like, and so we believe that
9 really having that opportunity to dig down and sit with
10 the defendants we'd be able to work out an issue like
11 that.

12 And again, we have been proponents of a
13 prearranged weekly call or something like that or even
14 in-person meetings once a week or every other week until
15 we get all of this done. I mean, I think that's --
16 there's a lot on our plates. I'm very aware of the
17 Court's June 12th deadline and, you know, I think we
18 should all be rowing in the same direction, and so I
19 would just renew my request for that and hopefully
20 you'll consider that and take it back to your folks.

21 THE COURT: And I'm going to guess you're in
22 favor of something like that.

23 MS. AYTCH: I'm in favor of the meet and
24 confers. We've given several different times that we
25 can meet and confer, but a standard weekly call is just

1 not doable on our end, even on my end. So, I do agree
2 with Mr. Orent that we need to meet and confer. I don't
3 think that these issues are ripe to bring to the Court
4 yet because we haven't had a thorough discussion about
5 how we've arrived at each of these documents, but I do
6 believe that we can do so and then if there is still
7 disagreement, we can bring it to the Court properly
8 under the arrangement set forth in case management order
9 number three.

10 THE COURT: Okay. And so there's no
11 possibility of even an early morning sort of time that
12 you reserve once a week or every other week so that you
13 can guarantee you will be able to actually, especially
14 during the first six months --

15 MS. AYTCH: Exactly, no, we definitely have
16 proposed times, like let's get together in days ahead,
17 we have invited them to propose times to us. We have
18 proposed times to them to get together. And then we can
19 make that call as we have for numerous times in order to
20 get the agenda together and to have other discussions.

21 THE COURT: It will be easier for a group, an
22 executive committee, to have a date and know that I have
23 a time. It's a little I think probably easier for your
24 side with smaller numbers to put together ad hoc
25 conversations and meet and confers. So, I'm certainly

1 sympathetic to the weekly, at least for the first six
2 months as you try to get through some of the trickier
3 issues up front. I think what he's proposing makes
4 sense, particularly when you've got a group of lawyers
5 who are trying to plan their schedules. And as you say,
6 it's very hard on your end to plan for one time the same
7 time every week, but it's got to be impossible I think
8 for them to be able to match your schedule. So it makes
9 a lot of common sense to me.

10 Can those on the phone hear us?

11 MR. TURNER: Yes. Yes, your Honor.

12 THE COURT: Good.

13 MS. SCHIAVONE: Yes, your Honor.

14 MR. SELBY: Yes, your Honor.

15 MR. EVANS: Yes, your Honor.

16 THE COURT: One reason we do it in this room
17 is to make sure you can hear and participate in that
18 way. In the courtroom it's a little harder sometimes to
19 hear via conference call.

20 But I am -- that to me sounds like a good
21 idea. So I would certainly support that and I think it
22 would help get things moving if you had a time you knew
23 you were going to be able to speak with Attorney Aytch.

24 MS. AYTCH: We will meet with our team and get
25 back with you with a proposed time.

1 MR. ORENT: Thank you very much, I appreciate
2 that.

3 THE COURT: And the last time we were here,
4 I'm still talking about the state MDL, the state MDL,
5 the impression that I got was that there hadn't been
6 much that had been happening. That you had done an ESI
7 Protocol but there hadn't been much in the way of
8 discovery. That's the impression I got, and my memory
9 could be wrong, but --

10 MR. MATTHEWS: I think you got the right
11 impression.

12 THE COURT: Okay.

13 MR. MATTHEWS: I have to preface my remarks by
14 saying that my firm has only been involved in the state
15 court litigation for a short period of time, and some of
16 the cases were filed three years ago.

17 I think there was a bog down at some point
18 because there were some settlement discussions that went
19 nowhere but lasted a long, long, long time, and as a
20 result of that our co-counsel acquiesced on some things
21 that maybe you wouldn't normally acquiesce to, frankly,
22 but what's done was done. So, we're set for that and
23 we're living with it.

24 But now that we've gotten, I think we've
25 gotten about 50,000 documents, give or take, you know, I

1 know that sounds like a lot if you're doing a car wreck
2 case, but if you're doing an MDL it's not. And, for
3 example, in the Transvaginal Mesh MDL which is what I'm
4 still in, we had 14 million documents in just one
5 manufacture, all ESI. We're fighting over that and we
6 don't want to start taking depositions and have to go
7 back and redo them when we get additional documents.
8 Just this week we've gotten additional documents that
9 were requested over a year and a half ago.

10 So, it's been a struggle, but we're catching
11 up. But to tell you the truth, based on what we've got
12 we could start taking some corporate depositions which
13 is one of the reasons I wanted to share documents as
14 soon as we could so that everybody in this room could
15 start participating in depositions, but I realize we're
16 going to have to wait a while to do that. It may be,
17 though, that in state court we can't wait on a few of
18 those, we're just going to have to get going.

19 So, there's an ESI Protocol in state court.
20 It's not the one that we would hope to get in federal
21 court, and, but it is what it is in state court, so
22 we're dealing with it. But we do want to get going I
23 guess. We actually were told that Judge Temple, that we
24 could start taking corporate depositions March 15th, and
25 so, you know, our first reaction was let's go, but that

1 didn't make any sense if we're going to coordinate, so
2 we're holding off.

3 But no, as far as depositions go, there have
4 been no depositions. It's just been document production
5 and letters and objections and motions and things like
6 that.

7 THE COURT: Okay.

8 MR. CHABOT: Your Honor, this is Pierre Chabot
9 just for the record. You know, I don't agree with, or
10 disagree with, any of the numbers that were just
11 recounted, you know, I would just point out that frankly
12 Atrium is a different company than the companies that
13 were involved in the Transvaginal Mesh Litigation, and
14 the expectation of having millions of documents, you
15 know, we came to a pretty specific agreement with the
16 plaintiffs' team in the state court litigation that
17 netted the collection of, you know, depending on how you
18 count duplicates, maybe 225,000, maybe 250,000
19 documents, which I think were reduced down when we
20 de-duplicated them and, you know, at this point if
21 50,000 documents is correct, you know, we've produced
22 something close to 20 percent of the documents we've
23 collected which we did as a result of a responsiveness
24 review, which again, you know, I know plaintiffs have
25 taken a different position in the state court

1 litigation, but our position is that responsiveness
2 review was done, you know, by agreement, and frankly it
3 was, I think you're going to be hearing these things
4 again in this litigation because we think that's sort of
5 the appropriate way to go at it. I know we're not going
6 to agree about that. That's an issue I think you'll be
7 hearing about in a few minutes. But from our
8 perspective we spent six months responding to what were
9 then three pending document requests, you know, we
10 devoted a lot of time, a lot of energy and a lot of
11 resources to conducting discovery in the manner that was
12 called for by all the agreements that existed in that
13 case. And that's one of the reasons that I think we
14 would like to have a coordination agreement in place
15 prior to turning all of this stuff over in this
16 litigation because we would like to be spared the effort
17 and expense of doing that again, you know, here in this
18 Court. That's one of our sort of primary concerns I
19 think with all of this.

20 MR. ORENT: And your Honor, this sort of
21 dovetails into the ESI issue. I know your Honor is
22 familiar last time that I was before you, that we were
23 all before you, and there's really two issues with ESI
24 and I want to again separate them.

25 There's ESI production format which is the

1 metadata fields to go with documents; so name of sender,
2 date sent, recipients, that sort of thing. Then there
3 is the separate side of things which is the production
4 -- for the production protocol or the ESI request for
5 production if you will.

6 In the state court the initial agreement
7 through after a series of negotiations and motion
8 practice resulted in eleven key words being used to
9 search the email and custodial files of about 20
10 witnesses. That produced about 200,000 hits or so,
11 250,000 hits when de-duped came out to about 172,000
12 documents. At that point the defendants then engaged in
13 a responsiveness review as opposed to just giving up all
14 172,000 documents that produced ESI hits. That produced
15 a universe of about 50,000 documents, the 50,000
16 documents that Mr. Matthews and his firm has.

17 What my proposal to the defendants was, and as
18 I mentioned last time in court, we didn't want to do a
19 custodian by custodian approach, which means look at
20 Jonathan Orent's email and computer, then Russ
21 Hilliards', then Jim Matthews', and so on so forth.
22 What we wanted to use is technology-assisted review or
23 TAR as it's been referred to. And technology-assisted
24 review uses the idea of a seed set if you will. That
25 is, you have individuals code a statistically

1 significant set of documents and teach the computer to
2 then go out and search for responsive documents. And so
3 what we suggest is is to not use key words any longer.
4 We've agreed to bypass that so to build on top of the
5 work that has already been done, but we want to go and
6 do a computer- assisted, technology-assisted review of
7 not just a handful of custodians but all of the relevant
8 systems and search across the network.

9 Now, so far we really haven't gotten anywhere.
10 The defendants' original position was that we should be
11 limited in the coordination agreement to the eleven key
12 words and 20 custodians, and they had agreed I think to
13 expand it to 27 custodians. None of those custodians
14 were from Maquet.

15 THE COURT: Maquet.

16 MR. ORENT: Maquet, sorry. I'm not going to
17 try the other one because I'm going to get it wrong.

18 MR. MATTHEWS: Getinge.

19 MR. ORENT: Getinge, thank you. I'm going to
20 practice those for next time. But none of those
21 documents came from those two defendants. So what we
22 said --

23 THE COURT: Say that again, none of those --

24 MR. ORENT: None of the documents that have
25 been produced have been from those two defendants.

1 They've been from the entity that, the division that is
2 Atrium. And so what we suggested is we're going to have
3 to do separate -- we're going to have to start from
4 scratch for those other two entities, but as far as
5 Atrium is concerned we're suggesting rather than going
6 back and using the original 85 key words that were
7 suggested to defendants as the initial list from which
8 the eleven were culled by agreement as a starting point,
9 rather than going back and selecting additional key
10 words and engaging in this process where you're sort of
11 chipping away at it, that we would use a technology-
12 assisted review as a seed set, have the computer system
13 that the defendants are utilizing produce all of the
14 relevant documents from across their system, not do a
15 separate relevancy review because that would be
16 encompassed by the technology-assisted review, and then
17 we would get the real documents, the real meat of the
18 documents, and on a 172,000 document seed set we ran the
19 numbers and it's not an overly large number that would
20 actually need to be manually coded by defendants'
21 lawyers. So that's what our approach to the ESI
22 Protocol would be.

23 Now, we, back in March, on March 24th,
24 initially as required by the Court's order, paragraph
25 7.2, reached out because we wanted to understand is that

1 doable. We wanted to understand what their system
2 architecture is like, what their operating systems are,
3 how do they interface with mobile devices. One of the
4 things that was out of the ESI Protocol that the state
5 court entered into, if you recall I mentioned we needed
6 tweaks to the actual production format agreement. A
7 couple other things that were excluded from that were
8 things like instant messaging programs, cell phones to
9 the extent that data from cell phones was recorded in
10 corporate bodies, to the extent that laptops were
11 disposed of and didn't make it on to the network drives,
12 those might have been left out, FTP sites, backup and
13 data archives. So there's this universe of documents
14 that fell outside of even any of the search criterion
15 that we were interested as tweaks to the approach.

16 So, on March 24th during our call we said that
17 we needed a whole host of items, including the
18 organizational charts, the system architecture,
19 essentially the system maps if you will, and also their
20 data retention policies for various mediums. One of the
21 things that we're keenly aware of is the proportionality
22 argument that defendants, or proportionality concerns
23 that defendants will have. And so the only way to know
24 where those concerns lie is to get the policies that are
25 their standard operating procedures on those items.

1 We still have not received a response as to
2 whether or not defendants will produce any of that
3 material or under what circumstances it will produce it.
4 We renewed that request on 3/31 and again on 4/7, and
5 still have not received any response. My understanding
6 is defendants, defense counsel has gone to their client
7 and have not received a response.

8 But, you know, those are the types of concerns
9 that when we talk about discovery and ESI and not
10 wanting to necessarily just take what was done in the
11 state court, those are the things that are going on in
12 our minds that we want to prevent from being problems
13 that our colleagues on the state court side are
14 constantly fighting about. I mean, there's a series of
15 letters that went back and forth between defense counsel
16 and Mr. Wages, Mr. Matthews' partner, over the last
17 couple days over whether the design history file, one of
18 the documents that we discussed last time, whether that
19 was even produced. The state court still can't locate
20 it in the production set. And I believe Ms. Aytch has
21 agreed to produce the Bates numbers.

22 And so, we don't think that with a -- if we do
23 thinking on the front end, that we're going to have
24 those kind of problems, or we hope not to, so we'll be
25 able to identify where the documents are within the

1 production set, know that we've got the relevant
2 documents, we're utilizing technology to make the burden
3 easier on individuals. That's really what we're looking
4 to do.

5 THE COURT: Okay. All right. It's a much
6 more comprehensive answer than February 24th in terms of
7 what you're looking for that would be different than
8 what they've done in state court.

9 MR. MATTHEWS: Can I say one more thing, not
10 to make it too comprehensive, but --

11 THE COURT: Sure.

12 MR. MATTHEWS: -- what Mr. Orent is proposing,
13 and I am not the IT person, but it's my understanding
14 from what he's proposing is that what has happened in a
15 number of cases in state court litigation would not
16 occur if what he proposes is put in place, and that is,
17 for example, we have emails that are produced that say
18 see attachment, and there is no attachment. And we
19 can't -- it's not produced. And there have been letters
20 about this and the response has been, well, it doesn't
21 exist anymore, or something to that effect, and that's
22 happened three or four times. So, there's got to be an
23 attachment. Of course the attachment is what we're
24 interested in, not the email that says see attachment.
25 And if it was coordinated as Jon proposes, I don't think

1 those issues will be there because those would all be
2 produced in the ESI.

3 MR. CHABOT: Your Honor, can I just quickly
4 address that, because I actually have a deepened
5 understanding of this discreet issue. It relates to
6 email threading. It has happened twice as far as I'm
7 aware of. And there have been threads of emails, eight
8 emails, ten emails long, and one email in the thread.
9 So they take the entire thread, they produce the whole
10 thread at once, and the way the program is set up it
11 also produces any unique version of the email such as
12 one without an attachment or with an attachment that
13 would otherwise be excluded in the thread. And there
14 are emails -- the one I'm aware of was from 2005, you
15 know, eight years before the litigation began, that that
16 email with that attachment wasn't separately retained in
17 that custodian's custodial file. And I just want to
18 sort of make clear what that issue has been because I
19 don't want to leave the implication that there's been
20 any identified actual problem with the collection
21 efforts in the state court. I'm afraid that implication
22 is left, and I don't agree with that. What has happened
23 has been a pretty, I think, understandable, you know,
24 lack of a document from many, many years before the
25 litigation began.

1 THE COURT: Is it something that you provide
2 fairly quickly in response to --

3 MR. CHABOT: I'm not sure that we have those
4 emails anymore. You know, when they identify one of
5 those, they say this particular component of a thread
6 does not appear to have been produced. We go back to
7 our vendor. I'm sure if we have it, we give it to them.
8 But I think in most cases if it wasn't produced
9 initially, the technology is very good, that usually
10 means that email isn't there anymore and it's usually
11 because it antedates the litigation hold.

12 MS. AYTCH: Your Honor, if I may speak on this
13 for a moment. Going with what Jim said, I'm also not
14 the ESI guru either.

15 THE COURT: That's Mr. Hersh if I recall.

16 MS. AYTCH: That is Mr. Hersh. And in
17 anticipation of this we have exchanged our ESI Protocol.
18 I got your response. They want some tweaks to it. And
19 again, we need to have that meet and confer process.
20 Mr. Hersh would be much better to articulate the
21 objections on this and where he stands with the
22 collections effort. In our first meeting telephonically
23 we got a long list orally of things. We said will you
24 please reduce it to writing so that we can go to our
25 client. We got that produced in writing on the 31st.

1 Mr. Hersh is handling that.

2 In preparation for today, to know whether or
3 not we were going to discuss the substance or the
4 status, I asked about that to know whether or not he
5 needed to be here. So, without me being able to
6 articulate properly our stance and then objections on
7 the technicalities of the ESI, and that being Mr. Hersh,
8 again, I ask if we can resort back to our process of
9 case management order number three. If we cannot come
10 to an agreement, put all that in writing so we can
11 intelligently present the defenses' side to plaintiffs'
12 proposal.

13 THE COURT: Okay. Is there any sense of TAR
14 and what the general reaction to that has been, I mean,
15 I don't want to lock you in to that, but do you have a
16 general sense?

17 MS. AYTCH: I have a general sense that we're
18 objecting to TAR on the full universe of all of our
19 databases. It started to be a little bit Greek to me,
20 so I'm not exactly sure if it was burdensome or how they
21 interacted or what that is. I know Elan is still
22 gathering all that information and then being able to
23 present it to me so that I can either present it to the
24 Court or he can present it to the Court, where those
25 issues are with TAR in that sense.

1 In other senses we've used TAR before. So
2 just as a process I don't think that there is anything
3 objectionable to that. But in the way that it's being
4 proposed, I believe there is. But unfortunately, I do
5 apologize that I'm not able to articulate that and that
6 I don't have Mr. Hersh physically available to do that
7 as well.

8 THE COURT: No, I appreciate this level of
9 detail works for this particular status conference, so,
10 and it's a lot more detailed and I have a better
11 understanding of what the issues are than I had at the
12 last hearing, so I appreciate that. And so I know
13 essentially what to expect, I think, if in fact you need
14 to have some disputes resolved, some help finalizing a
15 protocol. But again, TAR is something you're going to
16 have to educate me on if there are disputes.

17 I suspect you have an expert, both sides have
18 experts who are fluent with this software and this --

19 MR. ORENT: We have individuals who are, yes,
20 very well versed in it. I would just sort of add to
21 that. One of the sort of issues before we get into the
22 technicalities of it is, and this is why, you know, I'm
23 focused actually on the documents that we had asked for
24 in that March 31st letter, which will allow us to
25 actually have the discussion on what extent of TAR is

1 even possible, because if we don't know what networks
2 they are using, what their systems are set up, do they
3 plug their laptops in and it's attached to the network
4 or not, do they have, you know, citrus space system
5 where everybody in order to log in and save their file
6 to have to use the system.

7 THE COURT: And are you turning over that
8 infrastructure, IT infrastructure information yet, or
9 are you still waiting for a protective order to turn
10 that information over?

11 MS. AYTCH: No, my understanding is that we're
12 in the process of figuring out and gathering that. It
13 was a laundry list. There may be some things that we do
14 need to come for a protective order for or some things
15 that we feel are just overly burdensome or overly broad
16 for even what they're trying to ascertain. So, as soon
17 as I'm informed about it I will make sure that the Court
18 is informed about that as well.

19 THE COURT: All right. Tell me about the
20 state court litigation. It's a different product
21 altogether?

22 MS. AYTCH: No.

23 MR. MATTHEWS: Same.

24 THE COURT: Everything is the same?

25 MS. AYTCH: The state court litigation --

1 THE COURT: Somebody in the last hearing said
2 that it was a different product. Somebody said that.

3 MS. AYTCH: Your Honor, I was mentioning that
4 the different product was in regard to when we were
5 talking about in terms of liaison counsel and which
6 counsel would be present because you had mentioned --

7 THE COURT: I had a misapprehension or a
8 misunderstanding as to who was involved and who wasn't.

9 MS. AYTCH: Yeah, counsel in another
10 litigation that we had in New Hampshire state court,
11 also before Judge Temple, but that did involve a
12 different product. But in the state court litigation in
13 which Mr. Matthews and Mr. Wages' firm is involved is
14 the same product product. And in one kind of set of
15 those cases it's Atrium Medical Corporation only as the
16 defendant and another set of that litigation there are
17 the additional defendants. But it's the same product or
18 the same family of products rather.

19 MR. MATTHEWS: Same family of products.
20 There's more than one product, but they're very, very
21 similar, and we just all call them C-Qur.

22 THE COURT: Okay.

23 MS. AYTCH: But it's the same.

24 THE COURT: All right.

25 MR. ORENT: And just by way of background,

1 your Honor, one of the things that your Honor will see
2 and defendants will see in our Master Complaint is the
3 reason that for certain products, and I guess in state
4 court depending, you know, in state court they filed
5 complaints for individual cases and so they were
6 tailored, so, Atrium for pre -- is it 2011, 2015?

7 MS. AYTCH: October 2011.

8 MR. ORENT: Thank you.

9 MS. AYTCH: You're welcome.

10 MR. ORENT: Pre-October 2011, Atrium was a
11 separate entity. It was then later merged with the
12 other two defendants. We allege that it is and has
13 successor liability for several different reasons under
14 several different theories as well as a piercing the
15 corporate veil-type allegation against the other two
16 defendants. That will be spelled out. But there was
17 prior to 2011 no relationship that we know of between
18 the two entities.

19 So, for folks who were implanted pre-2011, it
20 was appropriate in state court for those folks to just
21 name the Atrium entity versus some of these folks who
22 are in federal court who have 2013 or '14 or '15
23 implants, and that's the basis of it.

24 It also guides the original I think agreement,
25 the last state court implant I believe was implanted

1 '13, so at least as of the date of their discovery
2 agreements, and so discovery did not postdate I believe
3 2013. And Jim will correct me if I'm wrong.

4 MR. MATTHEWS: That's true.

5 MR. ORENT: So, we also have plaintiffs who
6 are implanted later so we're going to need additional
7 discovery in those '13, '14 and '15 through to the
8 present day. So, that's just to let your Honor know why
9 there's different defendants in different litigations
10 and --

11 MS. AYTCH: I will defer to Josh Wages and his
12 team, but I don't know that he would say that, that
13 that's why there was that distinction because the
14 implant dates varied throughout one, even if the
15 defendants were named or were not named, that's kind of
16 the basis of the litigation going on, so I don't want to
17 state plaintiffs' position but given the way that things
18 were pled I'm not sure that that's completely accurate.
19 But, we recognize that this litigation not only
20 post-dates those implants and are continuing, but this
21 litigation originally named those defendants, so, it's
22 not the same issues.

23 THE COURT: Okay. All right. Fair to say
24 that we've gone through one, two and three? Anybody
25 else want to speak on one, two or three?

1 MR. TURNER: Judge, this is Hugh Turner.
2 Could I be heard? I'm on the telephone.

3 THE COURT: You certainly may --

4 MR. TURNER: I was there last -- excuse me,
5 your Honor?

6 THE COURT: You certainly may. Go ahead.

7 MR. TURNER: I appreciate that. And I just
8 wanted to apologize to the Court because frankly I was a
9 little surprised that we had an in-person conference
10 today given the Court's order that indicates to me that
11 unless the Court ordered otherwise, that the conferences
12 were by telephone. And looking at the agenda as well, I
13 have concluded, after consulting with Enjolique Aytch
14 and local counsel, that the matters to be brought on
15 today were for the most part just a status update, not
16 the in-depth discussion that's taking place today. What
17 I'm leading up to is that I may have chosen to have Mr.
18 Hersh there today if I realized that we were going to
19 have in-person conferences and that these issues would
20 come up.

21 So, I wanted you to know that that wasn't a
22 decision that we made without thinking about it, but it
23 was a decision to keep Mr. Hersh here because of the
24 fact that I didn't think that the issues would be
25 discussed in the depth that they appear to be at the

1 present time.

2 THE COURT: And I'm sure I'm asking questions
3 about it and asking for further information, and to the
4 extent, you know, you weren't prepared for that, I would
5 not worry about it. I would say this. That at the last
6 hearing I did not have much clarity from plaintiffs as
7 to what the problems were with the ESI state protocol.
8 At least now Attorney Orent has given me enough detail
9 so I at least know the universe of disputes that are out
10 there and that may come again. And I can remember Mr.
11 Hersh and I can remember very well his responses to each
12 critique on February 24th, and I am prepared to wait and
13 hear further from you on it. But I, frankly, appreciate
14 a little more detail this time around from plaintiffs'
15 perspective as to why that carefully and, I mean, it's
16 been a year and a half in negotiation process for any
17 ESI Protocol, so I was concerned as you will recall at
18 the outset with why wouldn't that be good enough for
19 plaintiffs. And so, frankly, it is. I think I do need
20 to hear probably more from plaintiffs on this at this
21 point, and Mr. Orent has definitely filled me in, and I
22 think Attorney Aytch probably knows more about this than
23 she's giving herself credit. And I, frankly, don't want
24 too much, I don't want to be in the weeds too much on it
25 because I don't have a big enough understanding of TAR

1 at this point. So, I don't think Mr. Hersh is necessary
2 and I think that was probably the right call on your
3 part.

4 So, I wouldn't worry about that. And we will
5 get to attendance at monthly status conferences. That's
6 the last thing on the agenda and we can talk about the
7 question you raised about in-person versus telephonic.
8 And I certainly in my order indicated that, you know, I
9 want to make sure people across the spectrum understand
10 that they can call in, they can participate in this
11 conference by listening, and that lawyers such as
12 yourself, who are active leadership counsel, can
13 participate via telephone, but as I recall at the
14 conference on the 24th, I did, I was very open to the
15 possibility if counsel wanted to, to appear on an
16 in-person basis, but I was really frankly leaving that
17 up to counsel to the extent they wanted to do that.

18 And, so, I don't think, and again, I'm kind of
19 jumping ahead on the agenda, I don't think in the future
20 there has to be in-person conferences, but I, you know,
21 I want to leave that up to individual counsel to decide
22 that. And that could be another thing I think that you
23 could meet and confer and talk about if -- but you're no
24 less persuasive on the telephone. I can hear you
25 perfectly, Mr. Turner, so, the fact that an attorney is

1 not present at the table does not make them any less
2 persuasive to me.

3 So, ultimately I want to leave that decision
4 in your hands. And to the extent at the beginning of
5 this, the first six months or so, we're going to have
6 some litigation on matters, and I hope not, it sounds
7 like we've got reasonable people across the table from
8 each other in terms of meet and confers and trying to
9 compromise where you can give up something on both
10 sides, plaintiffs and defendants, so that there's not
11 money expended litigating, formally litigating some of
12 these questions, but if it happens that we need formal
13 litigation, obviously, you'll let me know and you will
14 get the issue in front of me and I'll make a decision.
15 I'll try to do it as quickly as I can.

16 MR. TURNER: Okay, thank you, your Honor.

17 THE COURT: We've also done number four I
18 think.

19 MS. AYTCH: Yes, I would agree, your Honor.

20 MR. ORENT: I agree, your Honor.

21 THE COURT: Okay. Let's move on, then, to the
22 coordination order. You've also told me about that and
23 you're working to meet and confer on that, and I think
24 that's all I need to know at this point until I have
25 something in front of me that is more detailed with

1 respect to that. I know you're in the process of
2 getting back to each other on joint proposals.

3 MR. ORENT: Absolutely.

4 MS. AYTCH: Yes.

5 THE COURT: So we can move on five, then.

6 Anybody else want to say anything about the coordination
7 order agreement? Okay.

8 All right, and then discovery in general is
9 number six. Parties agreement on the general method of
10 compliance with Rule 26 disclosure requirements. The
11 proposed discovery order is due June 12th. It sounds
12 like you're on a fast track to get together a Master
13 Complaint, then there would be a Master Answer, and a
14 proposed discovery schedule. I'm guessing you're
15 probably not going to have much in the way of
16 disagreement on that, assuming you can get some of these
17 other big items --

18 MR. ORENT: I hope, you know, I've done other
19 mass torts before and not had issues, and knowing
20 defense counsel and having worked with them a few weeks
21 I would imagine that we will be able to come up with a
22 schedule.

23 THE COURT: I think so, too. Anything else
24 you will need to tell me about the issue of just general
25 discovery or --

1 MS. AYTCH: It --

2 MR. ORENT: This -- I'm sorry.

3 MS. AYTCH: It was the general method of
4 compliance with particularly Rule 26 disclosures. I
5 think we came to an agreement that we would, the
6 parties, well, what that would constitute and then that
7 would be done 14 days after the filing of the
8 defendants' Master Answer is my understanding of number
9 six, but I will defer to plaintiffs' counsel.

10 MR. CHABOT: 26(a)(1).

11 MS. AYTCH: (a)(1).

12 MR. ORENT: The initial disclosures.

13 MS. AYTCH: The initial disclosure.

14 MR. ORENT: So we are in agreement on that and
15 I think our letters back and forth reflect that.

16 THE COURT: Okay.

17 MR. ORENT: And utilizing some format of a
18 standardized form for the plaintiffs, which is obviously
19 a more complicated process for large numbers of people
20 to do those disclosures, and so I think it sort of
21 dovetails into number seven.

22 THE COURT: Yes, I was going to say, goes into
23 number seven as well.

24 MR. ORENT: And we've exchanged documents on
25 that and I would expect that we will reach agreement on

1 those items.

2 THE COURT: Okay.

3 MR. ORENT: Your Honor, number eight we
4 submitted today, a common benefit order.

5 THE COURT: I have not had a chance to study
6 it carefully, but I will review that. Anything you want
7 to say about that before --

8 MR. MATHEWS: Your Honor, one thing struck me.
9 I'm the one who prepared the common benefit order. As
10 technology progresses here, I think I need to add one
11 part in there about taxis and Ubers and parameters for
12 that because I could see that becoming a problem that
13 I'll have to deal with down the road where somebody
14 submits me a huge Uber bill and I've got to explain to
15 them why that's not okay, so if I could have the weekend
16 to add that language.

17 THE COURT: Absolutely.

18 MR. MATHEWS: And then give you a new updated
19 proposed --

20 THE COURT: And then we can do what's
21 necessary by way of ECF to supplant your second version.

22 MR. MATHEWS: Thank you.

23 THE COURT: I'm sure Russ can take care of
24 that for you.

25 Okay. Status of parties' discussions related

1 to pathology preservation issues.

2 MR. ORENT: Your Honor, this is plaintiffs'
3 issue and at this point I don't know whether ultimately
4 we're going to deal with it in another way other than
5 just alerting the Court to our concern, which is the
6 pathology preservation protocol that the Court entered
7 previously and that temporary lead counsel agreed to
8 with defense counsel. In theory it's fine. My concern
9 is is that the theory and the practice are going to be
10 two different things, and let me back up and explain why
11 I say that.

12 The preservation protocol that's drafted now
13 places the requirement upon a medical facility where a
14 plaintiff has had an explant procedure to preserve the
15 pathology and then divide it equally, maintain a chain
16 of custody for both sets and then send it to defense and
17 plaintiffs. My concern is is that a complicated set of
18 instructions like that are going to be disregarded by a
19 hospital pathologist and their departments and that
20 they're going to want to just either preserve it and
21 send it to one place or throw it out.

22 I've raised this as a concern because I
23 foresee this being a problem having dealt with cases
24 over the last decade where pathology preservation has
25 been an issue. I understand and I'm very well aware

1 that plaintiffs' temporary lead counsel previously
2 reached an agreement with defendants, and so I don't
3 necessarily know that -- and we have sent a proposed
4 change of that so that it would become plaintiffs' sole
5 responsibility to maintain the pathology, send it to a
6 private facility, at which point then it would be
7 divided by the parties and paid for by the parties as
8 opposed to the facility. I understand why defendants
9 may not want to engage in that sort of procedure. I am,
10 quite frankly, I know the Court has adopted the prior
11 proposal. I'm willing, if the Court desires to just go
12 along with what it has until there is an issue, but I
13 wanted to raise this as a concern on the front end of
14 something that we had, and if your Honor, and I know
15 defendants -- well, I'll let defendants speak for
16 themselves, but if your Honor's inclined to stay with
17 the process as is, I really just wanted to flag our
18 concern so that if we needed to raise it at a future
19 point in time, that your Honor would at least be aware
20 of where we're coming from.

21 THE COURT: So the only issue is just that the
22 hospital pathology department is required under the
23 protocol to save two separate --

24 MR. ORENT: To divide it in half. And my
25 concern is whether they're actually going to do it. If

1 the order is followed as is written, we have no problem
2 with it, and it's really a policing of it with the
3 hospitals that worries me.

4 THE COURT: And you've seen this issue crop up
5 where hospital pathology departments don't necessarily
6 take great care in following protocols?

7 MR. ORENT: Correct. That they would rather
8 follow their own hospital protocol or send it to one
9 place or they're not going to maintain the chain of
10 custody the way that we would like.

11 THE COURT: And how would one -- would they
12 maintain the protocol if it were just one as opposed to
13 two separate?

14 MR. ORENT: We found that with one following a
15 single protocol where they're not really required to do
16 anything, they just put it in a jar that is sent to them
17 by a facility, put one in it and then --

18 THE COURT: Send it to the --

19 MR. ORENT: Send it to a private entity, there
20 are several private entities out there, and then have a
21 neutral pathologist that's agreed to by the parties then
22 do the division and photography of that. We found that
23 to be, work better. But again, there's nothing in the
24 order as written that we have a problem with, and so I,
25 you know, is the hospital going to follow the procedure

1 as outlined, and that's my only area of concern. And
2 again, it's certainly not ripe for motion practice. I
3 don't know that we would raise it as a motion before
4 your Honor in that, you know, right now we have, you
5 know, no -- I guess I'm just struggling to find the
6 words, but essentially we would just want to flag it as
7 an issue that may come up. It's a concern of ours.

8 THE COURT: Have you raised that with Attorney
9 Aytch?

10 MR. ORENT: We have. And I understand based
11 on our prior conversation they wanted to live with what
12 was agreed to by the temporary lead counsel, and I
13 certainly respect that and I don't want to be someone
14 who goes back on prior agreements and, you know, we
15 certainly have concerns and that's why we're raising
16 them, but this is not necessarily the issue that we
17 would want to come to your Honor with motion practice
18 on. I mean, it is something that was agreed to.

19 THE COURT: All right. It is order, as I
20 recall, 3C.

21 MR. ORENT: 3C.

22 THE COURT: Okay. Go ahead.

23 MS. AYTCH: Not only agreed to but proposed
24 by, and we talked out the issues when we entered into
25 that order. I, again, I just got the language so I need

1 to review it, but without a demonstration that there has
2 been an issue when there's a court order in place, we,
3 one, think it may be premature, and as I understood it
4 initially there was a language, and I'm sorry, I have
5 not studied it in detail, that it would be plaintiffs'
6 responsibility to handle the preservation and the
7 evidence, and so just at first blush the concern where
8 an interested party is handling evidence rather than a
9 neutral, we want to hone in on that.

10 And so at this point, considering that we did
11 negotiate it with the plaintiffs' proposed order that we
12 made a couple of tweaks to, we do like to live with the
13 order that we negotiated and had entered by the Court.

14 THE COURT: Okay. But you're at least open to
15 studying language that he has proposed?

16 MS. AYTCH: Correct.

17 THE COURT: Okay. All right. Thank you. So
18 that's number nine.

19 Ten. I think I have a sense of where you're
20 at with your Master Complaint and then to follow the
21 answer. It looks as though that's almost complete and
22 ready to propose.

23 MR. ORENT: That's correct, your Honor. As I
24 said earlier, it is my full anticipation that that will
25 be filed tomorrow absent something that comes up in the

1 final review process this evening, I don't see why it
2 wouldn't.

3 THE COURT: All right. And then there's a
4 certain number of days, is it 45 days thereafter --

5 MS. AYTCH: 45 days.

6 THE COURT: -- you will file your answer.
7 Okay. All right.

8 So, really, the ESI proposal and
9 confidentiality protective order are the two major
10 things that we need to work through and you may need my
11 help along the way, and I'm prepared to assist in that.
12 And I think if you need some sort of -- certainly the
13 agenda and the monthly issues, obviously this is a good
14 way for me to check in with you, make sure you're
15 working the case, you clearly are, but if there's
16 something that you need litigated in a different way,
17 then I think counsel come to an agreement, and then I
18 think you can notify my case manager, get the issue to
19 me, and I'll let you know whether we can proceed along
20 those lines. But I'm perfectly willing, if need be, to
21 have, you know, a hearing outside of our scheduled
22 status conferences obviously.

23 MR. ORENT: Thank you, your Honor.

24 THE COURT: And attendance at monthly status
25 conferences. I'm not sure I want to provide much more

1 clarity than leaving it to you. I'm glad to see all of
2 you again. Very much nice to see each one of you. But
3 I think, you know, as these status conferences start
4 happening every month, I think you'll feel less of a
5 need to probably be here in person and feel more
6 comfortable being on the phone. But to the extent you
7 really want to be here in person for some reason, I
8 don't want to deny you that opportunity. Again, that
9 doesn't mean the other side feels they need to be here
10 in person, and I don't want to ratchet up fees that you
11 don't need to necessarily incur if you don't have to,
12 and I certainly encourage attorneys to participate by
13 telephone to the extent they can, and -- I very much
14 know the attorneys are listening carefully, the
15 executive committee and Mr. Turner.

16 Is there anybody else from the defense side on
17 the phone? There's Mr. Turner and I believe that's it.

18 MS. AYTCH: I believe that's it.

19 THE COURT: Okay. So, unless you want me to
20 say anything more about number eleven, it looks like
21 we've gone through our agenda.

22 Is there anything anybody on the executive
23 committee or Mr. Turner, anything you'd like to say
24 before we close the hearing? I will say that with
25 respect to the plaintiffs' work around your lead

1 counsel, your proposal, the Court is appreciative. I'll
2 just say two words, thank you. That was a lot of work
3 and you did a fine job on that.

4 So, anything else?

5 MR. ORENT: One last thing, your Honor, and it
6 occurred to me as we were discussing the different
7 products or that issue, is that I don't know how much
8 exposure to the actual science and the products that
9 your Honor has. What I have done in other MDLs that may
10 be beneficial to your Honor, and I apologize, I just
11 thought of this, is perhaps a science day might be in
12 order.

13 THE COURT: I mentioned a science day actually
14 at our February 24th hearing and I would like to share
15 that opportunity with Judge Temple and anybody on the
16 state side as well so we could coordinate that, if he's
17 open to that. I think he might be. And again, you may
18 end up on a different timeframe, but to the extent we
19 can coordinate these things, I think it would be
20 helpful. And I am very open to that at a time that you
21 think would be ideal for me to be educated about some of
22 the science. Yes, sir?

23 MR. MATTHEWS: I was going to say exactly what
24 John just said, and ask if we could invite Judge Temple
25 to coordinate it like that, and the reason I think it

1 would be good to have it early on in this MDL is because
2 I believe it would help you better understand the
3 discovery issues and why certain things are being asked
4 for or why certain things are being denied.

5 THE COURT: Do you agree with that, Attorney
6 Aytch?

7 MS. AYTCH: In terms of the efficacy of having
8 a science day?

9 THE COURT: Having it early, earlier rather
10 than later. Obviously having one doesn't preclude
11 having another later if it's necessary, but do you agree
12 with that?

13 MS. AYTCH: The efficacy of having a science
14 day, yes. The earlier, the more time, I guess, if I can
15 get kind of a structure because we are proceeding along
16 a trial schedule in the state court, so just being what
17 proposed timeframe you have when you say earlier?

18 MR. MATTHEWS: I can do it next week. I can
19 do it as soon as possible. I mean --

20 THE COURT: Well, that's what we I think
21 generally thought the word expedited meant last time.
22 But then it became 90 days. So, I am open to whatever
23 you as a group think makes sense and I will defer to you
24 and I'll certainly defer to your agreement as to a
25 timeframe. I will host it. We can use our, even our

1 ceremonial courtroom which is very large that would, you
2 know, house as many people as, you know, probably you
3 would need and, you know, do whatever is necessary by
4 way of hosting that. Judge Temple may want to host it.
5 I'm very open to sharing the responsibilities and doing
6 it all here. And I will just let you meet and confer
7 about that as well and you can bring that up with me
8 either at the next status conference more specifically
9 in terms of a timeframe and maybe we can put that on the
10 calendar.

11 MR. ORENT: I was actually, the first thought
12 that I had was perhaps at the next status conference
13 some of us will already be here, the Court will have
14 already devoted some time, that gives everybody about a
15 month to plan for it. We can sort of negotiate the
16 parameters to make sure that it is fitting everybody's
17 expectations, we all already have this date on our
18 calendars.

19 THE COURT: Okay. Speaking of calendars --

20 MR. TURNER: Judge.

21 THE COURT: Yes. Go ahead.

22 MR. TURNER: If I could speak. I hate to
23 douse anybody's enthusiasm, but the fact of the matter
24 is that a month or two months is not realistic from the
25 defense side, and I don't think it needs to be, a

1 science day is very good idea, but I think we're looking
2 further out than that. And I do appreciate that
3 plaintiffs' counsel has been involved in this pelvic
4 litigation for the last three years, so therefore they
5 could probably do it right away, and I'm sure they could
6 try the cases right away, but the defense is entitled to
7 have its time to defend and prepare its defense. So, I
8 think we're looking at something further down the line,
9 and I do encourage that we get together and confer and
10 meet on that and then come back with something jointly
11 acceptable.

12 THE COURT: I think Attorney Matthews was
13 almost tongue in cheek suggesting something that
14 quickly. He's just indicating he's ready to go. But I
15 think meet and confer, bring up by way of more details,
16 more specifics, perhaps even a timeframe at the next
17 status conference is what I think that we're all in
18 agreement on.

19 MR. MATHEWS: Two things real quick. On that
20 issue, I think the purpose of the science day would
21 simply be to relate the science of it, not the liability
22 angles and aspects of it, which I think to address that
23 issue we're not concerned right now about the defenses
24 of the case, it's just allowing the Court to understand
25 the science of this case better.

1 So, you know, I certainly think at the next
2 status conference we will be able to set up a science
3 day.

4 THE COURT: All right. Well, let me also
5 bring up a conflict. I am on a judicial committee, a
6 governing committee that requires me to be in
7 Washington, D.C. June 8th which is one of our written in
8 stone status conferences, so I need to see if I can
9 reschedule that with you now.

10 I have free afternoons, according to my case
11 manager, June 16th and June 22nd.

12 MR. HILLIARD: I will be calling in from
13 Tanzania, your Honor, so whenever they can --

14 THE COURT: The whole month of June?

15 MR. HILLIARD: And July.

16 MR. CHABOT: On the event we will be
17 discussing ESI, we may, I had to do it, we may have to
18 get back to you so we can get Mr. Hersh's schedule.

19 THE COURT: All right, why don't we do this
20 then. We will pick -- I just wanted to alert you that
21 June 8th I will be in DC and I won't be in Tanzania, I
22 won't be quite that far, but we will need to tweak the
23 June date, so I'll have you, if you would be so kind as
24 to contact --

25 MR. CHABOT: What were the two dates?

1 THE COURT: June 16th and the 22nd are free
2 afternoons according to my case manager.

3 MR. CHABOT: Hopefully we can get one of
4 those.

5 THE COURT: And she can get on the phone with
6 you and try to give us another date in June. Are you
7 gone the whole month?

8 MR. HILLIARD: I'm going the months of June
9 and July.

10 MS. LOWRY: He has not offered to take me, so
11 you --

12 THE COURT: We will be seeing you then, all
13 right. You can call in.

14 MR. HILLIARD: I can call in. You and I spoke
15 in 2009 the first time I was over there teaching.

16 THE COURT: Oh my gosh.

17 MR. HILLIARD: Do you remember?

18 THE COURT: That was a long time ago.

19 MR. HILLIARD: That was a long time ago. I've
20 been going back every year.

21 THE COURT: All right. I think we've covered
22 everything. Is there anyone who would like to say
23 something? Attorney Mathews.

24 MR. MATHEWS: The last housekeeping item.

25 THE COURT: Yes.

1 MR. MATHEWS: In terms of the agenda as we
2 proposed it, is that the same format you would like to
3 continue or if there's an issue in a particular agenda
4 item, would you like comment from the plaintiffs and the
5 defendants so you're familiar with what the issue is?

6 THE COURT: Yes, that would be helpful. And I
7 don't know, was I that specific? I know I laid out a
8 procedure.

9 MS. AYTCH: You were.

10 THE COURT: I did limit it to five pages.

11 MS. AYTCH: Correct.

12 THE COURT: And I want to have some ability to
13 understand what the dispute is, so if you can provide me
14 that and be as efficient as you possibly can in
15 presenting that to me. I'm not going to fight you over
16 a few pages, I promise. If it takes you a little longer
17 to make it clear to me what the dispute is, I'd rather
18 understand it, all right?

19 MR. ORENT: Thank you, your Honor.

20 MS. AYTCH: Thank you, your Honor.

21 THE COURT: Thank you very much to plaintiffs
22 for all the work you did on the lead counsel agreement.

23 Anybody on the phone who would like to say
24 anything before we end the conference this?

25 MR. TURNER: No, your Honor. Thank you again.

1 THE COURT: Yes. Thank you, Mr. Turner, and
2 Attorney Selby, Attorney Evans and Attorney Schiavone.
3 All right. Excellent.

4 Thank you all very much. We're adjourned.

5 (Hearing concluded at 3:25 p.m.)

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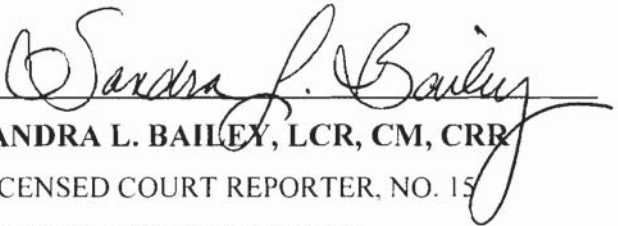
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C E R T I F I C A T E

I, Sandra L. Bailey, do hereby certify that the foregoing transcript is a true and accurate transcription of the within proceedings, to the best of my knowledge, skill, ability and belief.

Submitted: 4/20/2017


SANDRA L. BAILEY, LCR, CM, CRR
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