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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW HAMPSHIRE

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IN RE: ATRIUM MEDICAL CORP. \* 1:16-md-02753-LM  
C-QUR MESH PRODUCTS LIABILITY \* April 3, 2018  
LITIGATION \* 4:31 p.m.  
\*

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TRANSCRIPT OF TELEPHONE CONFERENCE  
BEFORE THE HONORABLE LANDYA B. McCAFFERTY

Appearances  
Via Telephone:

For the Plaintiffs:

Jonathan D. Orent, Esq.  
Motley Rice LLC

D. Todd Mathews, Esq.  
Gori, Julian & Associates PC

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James B. Matthews III, Esq.  
Patrick Garrard, Esq.  
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Anne W. Schiavone, Esq.  
Holman Schiavone LLC

David Selby II, Esq.  
Bailey & Glasser LLP

Appearances Continued:

For the Defendants:

Enjoliqué D. Aytch, Esq.  
Rebecca Ocariz, Esq.  
Akerman LLP

John E. Friberg, Esq.  
Wadleigh, Starr & Peters PLLC

Court Reporter:

Liza W. Dubois, LCR, CRR  
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P R O C E E D I N G S

THE COURT: Good afternoon, Counsel. This is Judge McCafferty.

MR. ORENT: Good afternoon, your Honor.

THE COURT: All right.

MS. OCARIZ: Good afternoon.

THE COURT: Okay. I'm going to have counsel identify themselves in a moment.

Let me just state for the record that this is an informal discovery dispute resolution. It was scheduled this afternoon to accommodate plaintiffs' and defense counsel.

And the case is In Re: Atrium Medical Corp., C-Qur Mesh Products Liability Litigation and the master file number, docket number, is 16-md-02753-LM.

And let me just have counsel introduce themselves. My understanding is that Attorney Orent and Attorney Aytch are both on the line and will be lead counsel for the purposes of this discovery dispute and, hopefully, resolution.

And let me just have all counsel identify themselves. Let me just ask counsel to please, before they begin speaking, use their last name so that our stenographer can -- court reporter can properly record who is speaking for our transcript.

1           And then if those of you who are not lead  
2 counsel would please just mute your phones -- do not put  
3 them on hold -- just mute your phones so that we don't  
4 hear the interference.

5           Okay. Counsel for plaintiffs, please identify  
6 yourselves and spell your last names for our court  
7 reporter.

8           MR. ORENT: Good afternoon, your Honor.  
9 Jonathan Orent, O-r-e-n-t, for the plaintiffs.

10          THE COURT: Okay.

11          MR. MATHEWS: Good afternoon. Todd Mathews,  
12 M-a-t-h-e-w-s, for the plaintiffs.

13          MR. SELBY: David Selby, S-e-l-b-y, for the  
14 plaintiffs.

15          MS. SCHIAVONE: Anne Schiavone for the  
16 plaintiffs, S-c-h-i-a-v, as in Victor, o-n-e.

17          MR. EVANS: Adam Evans for the plaintiffs,  
18 E-v-a-n-s.

19          MS. LOWRY: Susan Lowry, L-o-w-r-y.

20          MR. MATTHEWS: Jim Matthews, M-a-t-t-h-e-w-s.

21          MR. GARRARD: Patrick Garrard, G-a-r-r-a-r-d.

22          MR. WAGES: Josh Wages, W-a-g-e-s.

23          THE COURT: Defense counsel?

24          MS. AYTCH: Good afternoon, your Honor. This  
25 is Enjoliqué Aytch, A-y-t-c-h. And just a point of

1 clarification, my partner, Rebecca Ocariz, will be lead  
2 counsel today.

3 THE COURT: Okay.

4 MS. OCARIZ: Rebecca Ocariz for the  
5 defendants, O-c-a, R as in Robert, i, z as in zebra.

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

8 THE COURT: Okay. Is that it for defense  
9 counsel?

10 MS. AYTCH: It is, your Honor.

11 THE COURT: Okay. All right. And,  
12 Attorney Orent, are you going to be lead counsel for  
13 purposes of plaintiffs?

14 MR. ORENT: I will, your Honor.

15 THE COURT: Okay. All right. Good.

16 Okay. Go ahead. I've seen the two emails and  
17 I understand the nature of the problem and I'm happy to  
18 try to help you resolve it to the extent you need help.

19 So go ahead, Attorney -- Attorney Orent.

20 MR. ORENT: Your Honor, I am -- I am here  
21 today and perhaps calling this a discovery dispute or an  
22 informal dispute understates significantly the  
23 importance and the seriousness of -- of what is  
24 happening here.

25 What we have currently is the third in the

1 series of events of defendants violating court orders  
2 and making a mockery of the Rule 26 meet-and-confer  
3 process. They have spent the better part of the last  
4 year stringing plaintiffs along with a -- what we  
5 believe is a bogus personal jurisdiction defense.

6 After having come before the Court on multiple  
7 occasions seeking a date for a Rule 30(b)(6) deposition  
8 and fact witness deposition of the only individual --  
9 the only individual -- who provided any evidence in  
10 support of defendants' motion to dismiss, they have now  
11 pulled it. And the defendants, the way they pulled this  
12 deposition, your Honor, is particularly egregious.

13 We conducted a meet-and-confer to find out  
14 after more than a month of asking, or almost a month of  
15 asking whether this deposition would be conducted in  
16 English or some other language. Only after getting  
17 defendants on the phone today -- they didn't even tell  
18 us on the phone today when we were on a meet-and-confer  
19 call. We had to call your Honor. And still they didn't  
20 tell us that they were pulling the deposition.

21 It was only after we got a -- a -- had a  
22 discussion with the clerk to schedule this call that the  
23 defendants called me up and told me that they learned  
24 before our meet-and-confer that Mr. Reinhard Mayer was  
25 not going to make himself available for a deposition now

1 or in the future.

2 And so given the seriousness and  
3 persuasiveness of this conduct, we think that there are  
4 three sanctions that are warranted in this particular  
5 case.

6 First, your Honor, we think that Reinhard  
7 Mayer's affidavit should be stricken from the record and  
8 that defendants' motion to dismiss for lack of personal  
9 jurisdiction of Getinge AB should be denied with  
10 prejudice, your Honor.

11 Second, we think that -- Defendant AB's answer  
12 to the master complaint should be stricken.

13 And, third, we think that entry of default  
14 judgment against Defendant AB on behalf of all  
15 plaintiffs in this MDL is warranted.

16 Now, as I said, the defendants are already in  
17 violation of two court orders in addition to what we've  
18 seen today, the two court orders being with regard to  
19 producing a privilege log and giving us dates for  
20 depositions of individuals.

21 So this is a very, very, very serious issue,  
22 your Honor, and I cannot understand how -- how upset  
23 plaintiffs are and how sanction is warranted because of  
24 the quite -- quite open flagrance at which the  
25 defendants are violating this Court's orders.

1           So let me bring some context to the Court for  
2 this deposition and to the need for it and who Reinhard  
3 Mayer is.

4           So as your Honor is well aware from the  
5 April -- excuse me, from the June 6th declaration of  
6 Mr. Mayer and defendants' motion to dismiss, Mr. Mayer  
7 rare was the former CFO of Defendant AB.

8           Importantly, though, defendants chose him as  
9 their affiant and 30(b)(6) witness at a time when they  
10 knew he was retiring. Mr. Mayer indicated back in April  
11 of 2017 that he was going to be retiring. Nonetheless,  
12 in June, the defendants filed a motion to dismiss based  
13 entirely on facts within Mr. Mayer's affidavit. We went  
14 through a briefing process and in their reply brief,  
15 defendants once again replied -- relied entirely on  
16 Mr. Mayer's affidavit.

17           We then went through a series of issues that  
18 in November this Court issued an order allowing the  
19 plaintiffs to take jurisdictional discovery. Between  
20 the months of December and February, the plaintiffs came  
21 to the Court on multiple occasions seeking assistance in  
22 scheduling the deposition of the 30(b)(6) witness and  
23 the fact witness, Mr. Mayer, and we sought the Court's  
24 assistance.

25           And I would just like to point the Court to



1 the agenda, which is docket item number 447. And on  
2 page 2 of that docket agenda item dated 2/15/18, we --  
3 we raised the 30(b)(6) notice issue.

4 We had also previously, at the court's docket  
5 item number -- well, I guess the docket item depends on  
6 which case it was pulled from, but from the March status  
7 conference there were issues related to documents and  
8 the depositions. And earlier back yet still there were  
9 other items and times where the scope of this discovery  
10 was sought and fought hard for. So this was a  
11 deposition that was long in coming. Plaintiffs have  
12 been seeking this deposition for months.

13 Beginning on March 8th, plaintiffs began  
14 asking the simple question, your Honor, as to whether or  
15 not this deposition would be conducted in English. We  
16 sent multiple additional attempts to find out whether or  
17 not the deposition would be conducted in English and we  
18 were not given any indication.

19 This afternoon we conducted a meet-and-confer  
20 with defendants on what we believe are ten -- or about  
21 ten discovery abuses, including failure to give us  
22 documents in connection with the deposition, in  
23 connection with requests for production served, and met  
24 and conferred on prior to the February status conference  
25 and your Honor is well aware of the document issues.

1           However, what your Honor is not aware of is  
2 that out of the 76 requests for production, we only  
3 received 77 documents by the date that was provided to  
4 us with an indication that there may be some -- some  
5 number more to come.

6           So we have the situation coming into today  
7 where we're asking for a date for deposition -- excuse  
8 me. We're asking whether the deposition will be in  
9 English or not. This is a foreign deposition that we  
10 have been seeking for many months.

11           And we then are seeking documents and other  
12 materials to do this deposition. We conducted a  
13 meet-and-confer to find out whether or not the  
14 deposition will be in English. The defendants refused  
15 to give us an answer and then we asked to call the  
16 Court. The parties all remained on hold while Ms. Lowry  
17 contacted the Court. At no point in time during this  
18 period did the defendants raise the fact that they were,  
19 in fact, aware that Mr. Mayer was not going to be the  
20 deponent and would not avail himself of jurisdiction in  
21 this court in support of his affidavit.

22           When Ms. Lowry then learned that the -- that  
23 the Court wanted an email, the sides parted ways and the  
24 parties then began the purpose of constructing their  
25 emails. At that point -- only at that point, several

1 minutes later or a half-hour later, whatever it was --  
2 did defendants call me and say that they learned this  
3 morning, hours and hours before we had met and  
4 conferred, that -- that they were aware that this  
5 witness was not going to be coming forward.

6 And, quite frankly, your Honor, given the  
7 number of other issues and the lack of candor defendants  
8 have displayed towards the plaintiff and the tribunal  
9 here, I think that one needs to look very skeptically  
10 into whether or not defendants, in fact, just learned of  
11 it this morning.

12 Regardless, this is a corporate witness that  
13 we have long sought after. They now have their only  
14 piece of evidence is unsupported hearsay. And given the  
15 seriousness of this, your Honor, as we said earlier, we  
16 think that the three sanctions I mentioned, that is,  
17 striking of the affidavit and a denial of the  
18 defendants' motion to dismiss with prejudice is  
19 warranted; a striking of the defendants' answer for the  
20 lack of bad faith; and a grant of default judgment is  
21 warranted under these circumstances.

22 On that I will answer any questions your Honor  
23 might have.

24 THE COURT: I'd like to hear from  
25 Attorney Ocariz.

1 MS. OCARIZ: Yes, your Honor.

2 THE COURT: Go ahead.

3 MS. OCARIZ: Mr. Orent has raised a number of  
4 issues. The majority of them will be addressed through  
5 the Court's informal discovery process or are otherwise  
6 being briefed. The only issue that plaintiffs have  
7 raised today concern the 30(b)(6) corporate  
8 representative of Getinge AB for jurisdictional  
9 purposes.

10 Reinhard Mayer was to be the corporate  
11 representative. He is the former CFO of Getinge AB.  
12 And we learned today, late morning, that we have lost  
13 control over Mr. Mayer. He is no longer cooperating and  
14 he's no longer willing to appear voluntarily.

15 Since learning of this, we have been  
16 diligently working to find a replacement corporate  
17 representative and, as we set forth in our email, intend  
18 to inform the plaintiffs as soon as we are able to do  
19 so. Yesterday the plaintiffs requested 120- to 150-day  
20 continuance of jurisdictional discovery and the  
21 defendants have indicated that we are amenable to such  
22 an extension in concept.

23 With respect to the sanctions, given that  
24 Mr. Mayer is a former employee, we intended to produce  
25 him, we in good faith designated him, we came up with

1 dates for him, and we -- we simply are unable to produce  
2 him. He is no longer cooperating. In that  
3 circumstance, clearly, we do not feel that sanctions --  
4 striking of an answer or any type of entry of a default  
5 judgment -- is warranted.

6 With the extension the plaintiff is seeking,  
7 there is ample opportunity for Getinge to identify and  
8 prepare the appropriate corporate representative and  
9 Mr. Orent has indicated the plaintiffs' intention to  
10 pursue service on Mr. Mayer through The Hague  
11 Convention.

12 Ms. Aytch, do you have anything to add to  
13 defendants' position?

14 MS. AYTCH: Your Honor, I would just reiterate  
15 what Ms. Ocariz said in the beginning.

16 We do take extreme issue with the sequence of  
17 events as the way plaintiffs' counsel has stated them.  
18 However, in this emergency setting, when we have been  
19 unable to go through your informal process and brief  
20 these issues, two of them on the formal motions that  
21 plaintiff has raised and -- or, I'm sorry, we did  
22 respond to one -- the other one on the formal motion  
23 that plaintiff has raised in addition to the informal  
24 process that our understanding is that the Court is  
25 seeking to move the conference in order to accommodate

1 plaintiff request to have an all-day hearing to tackle  
2 these ten issues. We would ask the Court to reserve  
3 judgment until the defendants can brief that portion of  
4 it where this emergency hearing was called solely on the  
5 issue of the 30(b)(6), which, as Ms. Ocariz stated, we  
6 learned of just this morning.

7 THE COURT: Okay. Let me just state --

8 MR. ORENT: Your Honor --

9 THE COURT: Mr. Orent, just hold on for a  
10 second.

11 Let me just state that I am -- I am  
12 considering this afternoon a very limited issue. I'm  
13 considering only this question of Mr. Mayer's sudden  
14 unavailability and what the parties can do about that in  
15 the short run.

16 I am not considering, Mr. Orent, some omnibus  
17 motion for sanctions with respect to striking affidavits  
18 and issuing defaults. I'm not -- I'm just not going to  
19 hear that right now. That is beyond the scope of this  
20 emergency phone call, which the parties requested, I  
21 think within the last two hours, this afternoon. So I'm  
22 accommodating this rather brief, discrete issue.

23 And as summarized in emails, the issue  
24 involved Mr. Mayer and involved the frustration on  
25 your part and plaintiffs' part, which I think is

1 understandable, that suddenly you find out that not only  
2 can't you know whether the deposition is going to be in  
3 English, but you -- you no longer have a deponent.

4           So I -- that's the issue I'm dealing with with  
5 respect to this limited last-minute informal request for  
6 a hearing. So let's limit our comments to this 30(b)(6)  
7 issue.

8           And my question is to Attorney Ocariz, which  
9 is I understand your representations, which leave you in  
10 a tough position because, obviously, you've agreed to a  
11 deposition on a certain date and you agreed to the scope  
12 of that deposition, and everybody understood that the  
13 deponent was one Reinhard Mayer.

14           How quickly will you be able to come up with a  
15 substitute deponent? Because it seems to me you have a  
16 date, you understand the scope, and obviously Reinhard  
17 Mayer had filed a declaration in the case, but there may  
18 be other individuals who you could designate swiftly,  
19 such that you could continue to comply with the  
20 deadlines that have already been reached. And it's not  
21 clear to me why the 30(b)(6) deposition has to be  
22 completely rescheduled in light of this -- in light of  
23 this set of circumstances.

24           Is that something that is -- is a potential  
25 reality, that you could keep this deposition on

1 schedule?

2 MS. OCARIZ: Yes, your Honor. That is --  
3 that is precisely what we are endeavoring to do. Our  
4 preference, and I think everyone's preference, would be  
5 to move forward with replacement deponent on the date  
6 already selected.

7 We have already begun the process of trying  
8 to -- to reach out to replacements and we are -- we're  
9 hopeful to have that, but -- you know, as soon as  
10 possible. Obviously it's a priority for us, it is a  
11 priority for the client, and that's -- that -- that's  
12 what we're working towards.

13 THE COURT: Was there any notice ahead of time  
14 that Mr. Mayer would operate in this fashion, just  
15 suddenly fall off the radar? Because I understand -- I  
16 remember there were agreements or at least discussions  
17 about him visiting the United States, being in New York  
18 at a certain time, I believe it was in May, and he was  
19 agreeable to undergoing a deposition in May and the  
20 two -- the parties were disputing that and plaintiffs  
21 wanted it sooner than May and wanted to -- and were  
22 willing to travel to Amsterdam.

23 What -- what -- how much notice did you have  
24 of Mr. Mayer's situation?

25 MS. OCARIZ: So, your Honor, at all times



1 during trying to schedule this 30(b)(6) deposition and  
2 the accompanying individual deposition of Mr. Mayer, we  
3 were under the impression and the understanding that he  
4 was appearing, he was appearing voluntarily, and we were  
5 actively working around his schedule. You know, since  
6 he has left the company, he is now employed at another  
7 company and that was -- those were some of the issues  
8 that we were dealing with with scheduling.

9 As I represented to the -- to the Court, late  
10 this morning was when we received word that -- again,  
11 that we lost control over Reinhard Mayer.

12 THE COURT: And you didn't have any notice of  
13 this prior to today, of this loss of control over him?

14 MS. OCARIZ: So loss of control, no. I had  
15 some understanding that the client was trying to work  
16 some things out with Mr. Mayer, but today was the day  
17 that we received the confirmation that he -- he was no  
18 longer cooperating.

19 THE COURT: Okay. And have you been in  
20 conversations with your client about a fast track  
21 30(b)(6) replacement for Mr. Mayer?

22 MS. OCARIZ: We absolutely have. We have  
23 emphasized to them that this is of paramount importance  
24 for this litigation.

25 THE COURT: Okay. And can you simply agree at

1 this point that the deposition, when it's scheduled,  
2 will be conducted in English?

3 MS. OCARIZ: That will -- that will --  
4 unfortunately, that will have to depend on the witness.  
5 You know, the -- the witnesses that we have reached out  
6 to, I think that that is realistic. However, because it  
7 is a Swedish company where I imagine that most of the  
8 employees' primary language is Swedish, you know, I --  
9 I'm not in a position to make that representation  
10 without knowing who the witness will be.

11 I will tell you that we are endeavoring to  
12 approach English speakers, simply because it will make  
13 it easier for -- for everyone, but -- but that would be  
14 a question that I would want to pose to the individual  
15 witness to ensure that they are comfortable providing  
16 testimony that would bind the company in English.

17 THE COURT: And, Attorney Orent, just dealing  
18 with this question of the language of the deposition, if  
19 it's not in English, what happens? Do you -- do you  
20 hire a certified translator for the deposition? What --  
21 what goes on in that situation?

22 MR. ORENT: That would be the case, your  
23 Honor, is that we would have to make accommodations to  
24 have it translated.

25 However, I just want to mention again, though,

1 that there's no substitute for the affiant. That is,  
2 Mr. Reinhard Mayer, in support of defendants' motion,  
3 testified upon personal knowledge and that the entire  
4 affidavit was based solely upon his personal knowledge  
5 and experience and that we are now being deprived of the  
6 opportunity to cross-examine the individual who provided  
7 these foreign declarations in his personal capacity.

8 So there is no other deponent that can do  
9 that. They, again, made this decision.

10 Now, the other open question is I know  
11 defendants are working with Swedish counsel and, quite  
12 frankly, having gone through this with defendants for  
13 this length of time, I -- I'm not sure that Swedish  
14 counsel didn't know or foreign counsel didn't know  
15 before today or that Ms. Ocariz is just learning about  
16 when Swedish counsel knew. And again, your Honor, we  
17 knew in April that this individual was going to retire  
18 and this is -- has always been an issue that's been out  
19 there and one that the defendants chose to live with  
20 anyway.

21 We've made preparations based on the personal  
22 knowledge of Mr. Mayer and are -- are disturbed by this  
23 chain of events. Again, and at no point today did  
24 defendants call us prior to us contacting the Court to  
25 let us know of this chain of events, which I find

1    incredibly challenging to -- to accept their good faith  
2    answers when we've talked about this issue and they --  
3    they purposefully did not raise these issues with us on  
4    a meet-and-confer phone call. I -- it is beyond me why  
5    only upon calling the Court for intervention on the  
6    simple question of whether the deposition will be in  
7    English or a foreign language that the defendants  
8    wouldn't in all candor tell us what they had heard this  
9    morning, if they hadn't -- wouldn't have already  
10   volunteered it earlier.

11           So I think the largest point is still  
12   unaddressed, your Honor, which is the bad faith with  
13   which the meet-and-confer was conducted and all of this  
14   process that we have to wait and this is indicative of  
15   the entire process in which we have been dealing these  
16   last several months. And it underscores my frustration,  
17   quite frankly.

18           But to go back and answer your question, my  
19   understanding is that perhaps the defendants might be  
20   able to pay the costs of -- of a translator.

21           THE COURT: That's what I was thinking by  
22   way of some sort of reasonable, fair sanction for this  
23   last-minute situation that you're placed in, but I want  
24   to give Attorney Ocariz the opportunity to disagree with  
25   that, object to that.

1           But let me just say with respect to  
2 Mr. Mayer's declaration, that was attached to their --  
3 the defendants' motion to dismiss for lack of  
4 jurisdiction, which I denied without prejudice and this  
5 deposition is about the corporate entity. It's a  
6 30(b)(6) deposition. So I'm not seeing the reason why  
7 the outrage at the sudden, you know, lack of opportunity  
8 to cross-examine Mayer as opposed to anybody else that  
9 the corporate entity puts forth. Obviously what Mayer  
10 has said in a declaration are facts that the corporate  
11 entity gave to their counsel to submit to the Court, so  
12 you would obviously be able to cross-examine or ask  
13 questions, depose whatever corporate representative they  
14 come up with.

15           So I'm not finding that argument particularly  
16 compelling, Mr. Orent, and what I'm -- what I'm  
17 wondering is if Attorney Ocariz and Attorney Aytch and  
18 defense counsel can give you a new 30(b)(6) deponent and  
19 stay on track as agreed for the April 25th trip to  
20 Amsterdam -- have you already purchased tickets for that  
21 trip, plane tickets? Have plaintiffs' counsel already  
22 purchased tickets to fly to Amsterdam at the end of this  
23 month?

24           MR. ORENT: We have not, your Honor.

25           I would just add, though, your Honor, we had

1 also noticed this as a personal deposition of Mr. --  
2 Mr. Mayer. So there were two notices and there were  
3 going to be two depositions, the 30(b)(6) and his  
4 personal deposition.

5 MS. OCARIZ: Your Honor, this is  
6 Attorney Ocariz.

7 When Mr. Orent and I spoke earlier, he  
8 indicated that the plaintiffs intended to pursue The  
9 Hague Convention in order to depose Mr. Mayer and if  
10 that remains plaintiffs' intention, they'll be able  
11 to -- to examine him on the affidavit and anything else.

12 And as the Court recognized, yes, that  
13 affidavit was the basis for a motion to dismiss that was  
14 denied without prejudice.

15 THE COURT: Well, at this point what we're  
16 talking about is the 30(b)(6) deposition. It sounds as  
17 though you're agreeable to giving and providing a new  
18 date in short order.

19 Is that accurate, Attorney Ocariz?

20 MS. OCARIZ: That is accurate. I -- I'm  
21 making full representations to the Court that this is  
22 our top priority.

23 THE COURT: Okay. And would you be agreeable  
24 if -- if, in fact, the deposition is not in English, to  
25 providing and paying for a certified translator so that

1 this will not be a hurdle or a concern that plaintiffs  
2 will have to worry about between now and whenever  
3 you've -- you finally decide on the date for the  
4 deposition?

5           If -- obviously, if you -- if you provide  
6 somebody who speaks English, the issue is off the table.  
7 But if, in fact, you provide somebody who cannot speak  
8 English, that would be something that -- an expense that  
9 seems to me to be a reasonable expense to be borne by  
10 your client.

11           MS. OCARIZ: Your Honor, if it does turn out  
12 to be the case that -- that we require a translator, the  
13 defendants will -- will arrange for a translator and pay  
14 for that expense. And we will also advise plaintiffs'  
15 counsel if that is necessary so that they can plan  
16 accordingly.

17           THE COURT: Okay. All right.

18           And April 25th, 2018 is currently the date for  
19 the deposition. At this point I would like to see that  
20 date remain the date for the new deponent.

21           I don't see any reason why you would want to  
22 change that date, Attorney Orent, if you get a new name,  
23 but if you do decide you want to change that date, that  
24 would be something that counsel could agree on. I think  
25 that I'm very sympathetic to plaintiffs' desire to have

1 this deposition sooner rather than later, so my  
2 inclination would be to see this deposition happen as  
3 scheduled April 25th, 2018.

4 MR. ORENT: And we would agree with that, your  
5 Honor. We would want to be able to pick the translator  
6 and proceed, provided that -- and we would like the  
7 commitment from the defendants that they will produce  
8 both the documents necessary, if this individual is in  
9 possession of any relevant documents, as well as --  
10 because it will change sort of the outline of the  
11 deposition -- as well as the documents requested  
12 previously as part of the deposition notice in advance.

13 And, quite frankly, your Honor, there is one  
14 other thought that I'm having, which is -- would be fair  
15 is instead of having plaintiffs incur the costs of  
16 traveling to Europe for the deposition on the 25th that  
17 perhaps it would be just and proper to have the  
18 defendants bring this individual to the United States  
19 for an April 25th deposition. That's just one other  
20 thought that I'm having.

21 MS. OCARIZ: Your Honor, I -- I clearly  
22 appreciate and hear the plaintiffs' frustration with  
23 this turn of events. It is not our desired outcome  
24 either and we are really jumping over hurdles and doing  
25 what we need to do simply to identify deponents that we



1 can use as substitutes. I -- I -- I do not -- we are  
2 not going to be in a position to agree to bring them  
3 here at this point when we don't even know who they are.

4 With respect to the production of documents,  
5 those involve issues some of which we discussed in the  
6 meet-and-confer that will be briefed up in the  
7 one-pagers.

8 THE COURT: I'm sorry, what was the last thing  
9 you said, Attorney Ocariz?

10 MS. OCARIZ: That Mr. Orent raised some issues  
11 with respect to a document production and I just said  
12 that to the extent that there are any disputes, those  
13 will be issues that will be raised in the one-pagers.  
14 There were some issues raised in today's meet-and-confer  
15 that I am assuming will also come before the Court in  
16 the form of the informal discovery process.

17 THE COURT: Okay. I do -- so there are  
18 documents with respect to the deposition of Reinhard  
19 Mayer that you're disputing whether or not you need to  
20 produce before the deposition?

21 MS. OCARIZ: With respect to the 30(b)(6),  
22 yes.

23 THE COURT: Okay. And that -- that dispute  
24 will remain the same whether it's Reinhard Mayer or  
25 Reinhold Niebuhr.

1 MS. OCARIZ: That is correct.

2 THE COURT: Okay. All right. So -- and  
3 obviously if the deposition stays on track on  
4 April 25th, 2018, they would -- plaintiffs would need  
5 to receive these documents in advance of that deposition  
6 and in advance enough to prepare properly for the  
7 deposition.

8 So, hopefully -- and I don't know when our  
9 hearing is scheduled, but hopefully you can bring this  
10 to my attention in enough time for me to help you  
11 resolve that -- that issue.

12 Now, whenever we get into formal litigation,  
13 it takes time. But if you can present it to me in an  
14 informal way and in a way that, you know, presents the  
15 discrete issue to me, joins the issue, and each side is  
16 able to review the other side's presentation and make  
17 sure that you're not talking past each other in your  
18 documents before I see them -- and, again, this is  
19 something I talked to you about at our last status  
20 conference; I would like to come up with a -- perhaps a  
21 more formal resolution of this issue, which is -- and it  
22 happened again today, quite frankly -- I'm given an  
23 informal email and then I -- I have a sense of what the  
24 issue is, I get to the telephone with plaintiffs'  
25 counsel and defense counsel -- and, frankly, this time

1 it was plaintiffs' counsel enlarging the scope of what  
2 it is I think I am hearing.

3 So it's an issue of simply making sure I  
4 understand what the issues are and making sure you're  
5 not talking past each other in the documents that I see  
6 in advance of whatever issue -- you know, hearing you  
7 need and whatever the issue you need me to resolve. I'm  
8 going to be more effective if I have a clear sense of  
9 what the dispute is.

10 So I would be -- I am perfectly happy to try  
11 to help you resolve some of these issues informally if  
12 you can get me letter briefing that is meaningful in  
13 advance and I can give you a real strong sense of how I  
14 would resolve that issue. I'll give you an informal  
15 resolution and then, obviously, if you need to -- need  
16 formal litigation, we'd have to come up with an  
17 expedited briefing schedule to accommodate your --  
18 your deposition date.

19 I am -- I am inclined to -- depending upon  
20 what happens, and obviously counsel should meet and  
21 confer, but I -- I would look favorably upon plaintiffs'  
22 request that your client bring whatever deponent to the  
23 United States. That seems reasonable on many different  
24 levels.

25 In fact, I will tell you that I thought the

1 original dispute you were having over Reinhard Mayer and  
2 his availability in May in New York City, I was inclined  
3 to say that is far more reasonable because that means  
4 less people have to travel; that means less expense for  
5 everybody. And, ultimately, if you're in the -- you're  
6 in the situation of trying to put this together last  
7 minute, I think planning the travel and how you get this  
8 individual to the deposition is more in your control,  
9 frankly, and it seems fair under these circumstances.  
10 In light of what has happened, it seems fair that --  
11 that the defendant should pay for the travel to send the  
12 deponent, whoever you choose, whether it's one or two  
13 or, you know, three 30(b)(6) individuals to the  
14 United States for the deposition. That does seem fair  
15 to me. I'm -- I'm not ordering that at this stage, but  
16 I do want you to know that that is my strong  
17 inclination, based on everything I've heard.

18 I know from this conference that -- and I  
19 appreciate that the defendants are willing to pay for  
20 the translator. I think it's also reasonable that  
21 plaintiffs should be able to pick the translator. So  
22 that would be my inclination on that issue.

23 And then I think the documents need to be  
24 provided well in -- far enough in advance so that  
25 plaintiffs can prepare for the deposition and so I'd

1 want to resolve those issues for you sooner rather than  
2 later.

3 Is there anything else I need to help you with  
4 in the short run with respect to this 30(b)(6) issue,  
5 Attorney Orent?

6 MR. ORENT: Not in the instant time. I just  
7 want to reserve plaintiffs' rights to file a formal  
8 issue relative to striking the prior pleadings and doing  
9 more formal issues if we believe it warrants it.

10 THE COURT: Okay. All right. Obviously you  
11 can do whatever you see fit with respect to formal  
12 litigation on that issue.

13 Anything else with regard to the 30(b)(6)  
14 issue that I'm to resolve or help you resolve today,  
15 this afternoon, Attorney Ocariz?

16 MS. AYTCH: Your Honor, this is actually  
17 Attorney Aytch. I just did want to seek clarification.

18 I know it's the Court's preference to keep the  
19 April 25th date because that's when everything -- that's  
20 when everything is currently set. If we are able to  
21 arrange for the deponent to come to the U.S., is the  
22 Court still married to those dates as with the time  
23 frame, it would likely be easier to have a deponent, you  
24 know, in -- more -- closer to their residence than  
25 coming over here. Do we have any latitude with regard

1 to those dates if we're able to get them to come to the  
2 U.S., just so we have the parameters?

3 THE COURT: Well, ultimately, I think I would  
4 let Attorney Orent make that call. He may prefer a  
5 deposition sooner rather than later. But if counsel can  
6 agree on that issue, my -- my thought is keep that date  
7 close to the April 25th date, but if it has to go into  
8 May, certainly not -- not too far away from the April  
9 25th date, but if counsel needs leeway on that, I -- I  
10 would tend to think that, you know, reasonable, minor  
11 extensions would make sense.

12 What I would hope is that Attorney Orent is  
13 not at this point, you know, inflexible on this and is  
14 able to get past I think the upset over some of the  
15 issues that concern him today and work with you and  
16 Attorney Aytch in putting together what will be a time  
17 frame for this new deposition that is very close in time  
18 to April 25th and would accommodate some of these issues  
19 of concern about travel and expense.

20 So you're asking for clarity on that. I'm not  
21 sure I can give it to you at this point. I'm not going  
22 to hold you to April 25th as, you know, the only date on  
23 which you can do this, but I do think that plaintiffs  
24 would be reasonable to request that the deposition occur  
25 within a two-week, three-week time frame at the latest

1 to keep that deposition on track.

2 Is that helpful?

3 MS. AYTCH: We completely understand, your  
4 Honor. We will not go beyond that date, but just with  
5 the travel, I wanted to have an understanding.

6 Thank you so much.

7 THE COURT: No problem.

8 MR. ORENT: And, your Honor, for the  
9 plaintiffs, we're certainly willing to be accommodating  
10 in that regard.

11 I would just make one other request, which is  
12 previously it was represented that Reinhard Mayer was  
13 coming to the United States in May. And to the extent  
14 that defendants have his travel itinerary and have  
15 information relative to his whereabouts, that's  
16 certainly not confidential information. We would  
17 appreciate it if defendants would share his  
18 accommodations so that we can serve him while he's in  
19 the United States and avoid the six-month delay of going  
20 through The Hague, which can be somewhat concerning.

21 So I would throw that out there as well for  
22 the Court and for the defendants. It would be our hope  
23 that we would be able to get that information so that we  
24 could serve him in the United States quickly and take  
25 his deposition almost immediately, your Honor.

1 THE COURT: I have no problem with that. Let  
2 me ask Attorney Ocariz.

3 Any problem giving Attorney Orent the -- your  
4 understanding of when he's coming to New York and making  
5 that a possibility? I mean, this is a person who has  
6 been on the schedule since February and signed a  
7 declaration and you have been relying on, obviously, as  
8 the 30(b)(6) deponent and suddenly he's obviously making  
9 himself unavailable. These are unique circumstances.  
10 It seems only fair that you could provide this  
11 information to Attorney Orent.

12 Do you have any problem with that?

13 MS. OCARIZ: Unfortunately, your Honor, we  
14 don't have any specifics as to his travel. When we were  
15 considering producing Mr. Mayer in the United States in  
16 May, we had basic, vague dates and we had a city, but  
17 that's it. That's -- that's all that we know. I don't  
18 know what his specific travel plans are, where he's  
19 staying, who he's seeing or what he's doing.

20 THE COURT: Okay. Well, as long as you would  
21 be willing to just simply share with Attorney Orent what  
22 you do know, I think that would be helpful, particularly  
23 in light of forgoing The Hague Convention and that whole  
24 process.

25 Okay. So we have, at least I think, resolved



1 in the short run the 30(b)(6) issues.

2 And let me just -- I know that this issue is  
3 not ripe and it's not in front of me right now, but  
4 there is a plaintiffs' motion that's been referenced to  
5 enforce the Court's order requiring defendants to  
6 produce a privilege log and it also seeks sanctions for  
7 what plaintiffs are describing as willful violation of a  
8 court order.

9 Now, the defendants have not had an  
10 opportunity to respond to this. I have skimmed through  
11 that and I'm reading a letter that's attached to it from  
12 Elan Hersh to Attorney Orent and that letter indicates  
13 that -- that there was what looks to be an informal  
14 agreement that -- or understanding with you sometime in  
15 the fall that defendants would have 90 days after their  
16 final ESI production to provide you with the privilege  
17 log.

18 Now, I realize that this is not ripe and I  
19 realize you may not even be prepared to address it. I  
20 just will tell you that one -- number one, if defendants  
21 had brought this by way of a letter brief on an  
22 emergency basis to the Court, the Court would have  
23 helped defendants and plaintiffs resolve this issue.  
24 One of the frustrations I think Attorney Orent is  
25 articulating is that there was no attempt made on

1 defendants' part to get this issue resolved.

2 But it does read as though, at least what I'm  
3 reading from Attorney Hersh's letter, is there was some  
4 understanding on defense counsel's part that there was  
5 an informal agreement of 90 days and a minimum of 90  
6 days after that last ESI production. I know there's a  
7 dispute about when this last ESI production was going to  
8 be made, but I just want to -- and, again, this isn't  
9 ripe, I'm not necessarily asking for a response, but I  
10 am saying to plaintiffs' counsel that if, in fact, that  
11 is the defendants' response, that we were under the  
12 understanding, based on communications between counsel,  
13 that we would have a minimum of 90 days and that was  
14 before the judge went and ordered us to do an  
15 item-by-item privilege log, I would be very sympathetic  
16 to that argument.

17 And so I just -- I just want to put that out  
18 there in this setting because ultimately this is a case  
19 that I want to help the parties resolve. I don't want  
20 to see it go completely off the rails because counsel  
21 are, you know, upset with one another and screaming  
22 about sanctions and willful misconduct when ultimately,  
23 I -- I'm reading your pleading -- and, again, this is  
24 your pleading; I haven't even had an opportunity to read  
25 the defendants' response. But I'm just a little

1 concerned about the -- the strength of the allegations  
2 of willful misconduct in light of what I'm reading in  
3 Attorney Hersh's letter.

4           So I'm going to wait until I get the response  
5 from defense counsel, but my preference would be to  
6 resolve these issues so you do not have to litigate  
7 sanctions and motions to compel, so that I can help you  
8 on an informal basis. You can give me more meaningful  
9 letter briefing and I can resolve these issues for you  
10 short of our monthly status conference. We don't have  
11 to wait until the monthly status conference to have a  
12 phone conference. I'm happy to help you resolve these  
13 issues if you can put them in front of me in a  
14 meaningful way.

15           And, ultimately, I think had defense counsel  
16 gone ahead and just, you know, put this issue in front  
17 of me -- and, again, I don't want to prejudge it, but I  
18 do want to say I think I would have been sympathetic to  
19 giving you more time than just two weeks to respond to  
20 that item-by-item privilege log discovery order.

21           So I know Attorney Orent is not happy that  
22 there was -- there was no extension requested and so,  
23 ultimately, he's -- he's putting you on notice, we  
24 expect it in two weeks, and there was no effort on your  
25 part, and that's the basis of part of his motion for

1 sanctions, but I just put that out there because I want  
2 counsel to be aware that I don't want this case off the  
3 rails. I want to help you resolve it short of, you  
4 know, very expensive, costly, and extensive and  
5 time-consuming, inefficient litigation around issues  
6 that I think I could resolve for you on a more informal  
7 basis.

8 MR. ORENT: Your Honor, if I might just  
9 respond very briefly. Again, this is Jonathan Orent.

10 The -- there was no agreement. In fact, in  
11 October 5th, if you look at defendants' own October 5th  
12 letter, it says in the very terms of the letter,  
13 Mr. Orent informed me that I did not -- you know, I'm  
14 paraphrasing now -- that he did not have the authority  
15 to enter into such an agreement. So, categorically,  
16 there was no agreement.

17 And if you look at defendants' letters over a  
18 period of time, and I think we've included some of  
19 those, the description of the October 5th discussion  
20 changes over time and it moves from an acceptance that I  
21 did not have the authority to bind plaintiffs. And  
22 there is no subsequent documentation anywhere that says  
23 we ever agreed to that. And it morphs in defendants'  
24 own language, in defendants' own papers, to become there  
25 was this agreement.

1           So we vigorously dispute that we've ever  
2     been -- ever given them any -- any extension. And,  
3     quite frankly, when we said, you know, we want it in two  
4     weeks, this is the local -- you know, in our motion we  
5     cite the local rule. There was no "we'll do it as soon  
6     as possible"; there was a "we'll do it in July," which  
7     is essentially noncompliance in -- particularly in light  
8     of the fact in the hearing that we had back in March  
9     where the Court recognized that the defendants could  
10    simply just run a report and in a matter of a half an  
11    hour or less produce this log, because it's just the  
12    metadata.

13           And that's the issue, your Honor. And I hope  
14    as your Honor looks at both defendants' papers and our  
15    papers, your Honor is mindful of the fact that we don't  
16    believe that there was ever an agreement. There's no  
17    document that suggests that there is an agreement, yet  
18    defendants have taken this position without -- without  
19    us ever agreeing to it.

20           THE COURT: Okay. Well --

21           MS. AYTCH: Your Honor --

22           THE COURT: The issue's not -- obviously not  
23    ripe and the defendants haven't even had an opportunity  
24    to respond.

25           But go ahead, Attorney Aytch.

1 MS. AYTCH: I'm sorry, your Honor. I was just  
2 going to reiterate that, that I recognize that you said  
3 that the issue is not ripe. We have not had a chance to  
4 respond. And so I would like to take you up on that  
5 invitation to actually get our response, where we will  
6 not only inform the Court of the tenacity of this issue,  
7 including why the defendants did not have an opportunity  
8 to bring this report on an informal basis.

9 THE COURT: Okay.

10 MS. AYTCH: But I do appreciate the Court  
11 reserving judgment on that so that we can get our  
12 response on file.

13 THE COURT: Well -- and I do reserve judgment  
14 on it. I just simply wanted to indicate a little bit of  
15 concern that this case would be going off the rails on  
16 an issue like this.

17 So I will -- I will wait then. We'll have,  
18 obviously, formal litigation on this and you'll have a  
19 full and fair opportunity to respond to that.

20 And I think everything is concluded.

21 Is there anything else anyone would like to  
22 say before we get off the telephone?

23 MS. OCARIZ: Nothing from the defendants, your  
24 Honor.

25 THE COURT: Attorney Orent?

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MR. ORENT: Nothing, your Honor.

THE COURT: Okay. Thank you.

Court is adjourned.

(Proceedings concluded at 5:26 p.m.)

C E R T I F I C A T E

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

Submitted: 4/11/18

Liza W. Dubois  
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