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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

IN RE: ATRIUM MEDICAL CORP. C-QUR MESH PRODUCTS LIABILITY LITIGATION	1:16-md-02753-LM May 11, 2017 2:25 p.m.

TRANSCRIPT OF STATUS CONFERENCE
BEFORE THE HONORABLE LANDYA B. McCAFFERTY

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(Proceedings commenced at 2:25 p.m.)

THE COURT: Good afternoon, all. This is --

MR. HILLIARD: Good afternoon.

THE COURT: This is our status conference, monthly status conference, in -- and I'll just state the case name and docket number. I have a stenographer here who's taking down everything that we say.

In Re: Atrium Medical Corp. C-Qur Mesh Products Liability Litigation, MDL number 2753, MDL-docket number 1:16-md-02753-LM, all cases.

All right. What I think I'd like to do is just set out the ground rules again. I'm sure you remember them from the last hearing, but let me just do that so everyone is clear.

Those who are not part of the leadership team, please mute your telephone. And as this hearing proceeds, what I would ask everyone to do is to just state their name for the stenographer. And I think what I'm going to do is go through now and have counsel simply identify themselves for the record.

We'll start here with Attorney Aytch and we will proceed around the room. And then leadership counsel who are connected via telephone, I'd ask you to identify yourselves, spell your last name for our stenographer. And our stenographer, court reporter,

needs to know who is speaking so she can identify the speaker as this hearing proceeds. So if you could just remember to do that, that would be helpful.

So let's just start by identifying counsel.

Go ahead.

MS. AYTCH: Good afternoon. Enjoliqué Aytch for the defendant.

MR. CHABOT: Good afternoon. Attorney Pierre Chabot for the defendants.

MR. HERSH: Good afternoon, everyone. Elan Hersh on behalf of the defendants.

MS. LOWRY: Susan Lowry on behalf of the plaintiffs.

MR. MATHEWS: Todd Mathews on behalf of the plaintiffs.

MR. ORENT: Good afternoon. Jonathan Orent on behalf of the plaintiffs.

THE COURT: All right. Go ahead and identify yourselves as well or --

MR. LAJOIE: Ben Lajoie on behalf of plaintiffs.

MS. MENARD: Kate Menard on behalf of the plaintiffs.

MR. FRIBERG: Jack Friberg on behalf of the defendants.

THE COURT: Okay.

Go ahead on the telephone.

MR. HILLIARD: Russ Hilliard on behalf of the plaintiffs.

MR. TURNER: Hugh Turner on behalf of the defendant.

MS. SCHIAVONE: Ann Schiavone, S-c-h-i-a-v, as in Victor, -o-n-e on behalf of the plaintiffs.

MR. MATTHEWS: This is Jim Matthews, M-a-t-t-h-e-w-s, for the plaintiffs.

MR. SELBY: David Selby on behalf of the plaintiffs, S-e-l-b-y.

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

MS. HUMPHREY: Debra Humphrey for plaintiff.

THE COURT: Okay. Have we identified everybody then that's part of either plaintiffs' leadership team or defendants' counsel?

All right. Can everybody hear me who is via telephone?

MR. HILLIARD: I can, your Honor.

THE COURT: All right. Attorney Lowry, can you just say a few words, perhaps saying hello to Attorney Hilliard, who I understand is with us from Spain, so that we can make sure everybody can hear you.

You are sort of at the farthest point away from the telephone.

MS. LOWRY: Yes. Good afternoon, everyone.

Russ, can you hear me?

MR. HILLIARD: I can hear you just fine, Susan. Thank you.

And I'm sorry to have held up the proceedings.

THE COURT: That's quite okay.

All right. So if somebody cannot hear, please just let us know during the hearing.

All right. I have -- I'm looking at the agenda, the joint proposed agenda, and let me just cut to the chase.

As I see it, there look to be three major disputes that you've at least put before me in writing, but there is also a newly developed dispute that you want to put before me today.

My understanding is the three disputes, the areas, the topics, are ESI, litigation holds, and the protective order. And then the dispute you want to discuss with me that has not been put in writing is some dispute with respect to the coordination order that you want to propose.

Have I summarized the disputes that we need to discuss today? That would be numbers 1, 2, 5, and 6.

MS. AYTCH: That is correct, your Honor.

MR. ORENT: That's correct, although the way we briefed the ESI issue, it's sort of two subissues, I would say. The defendants and plaintiffs approached it somewhat differently. And so I think to the extent that they do encompass separate issues that they're worth discussing generally.

THE COURT: Okay. And what I'm getting at are just the agenda and broad topics --

MR. ORENT: Correct.

THE COURT: -- so -- but I appreciate that distinction especially as we get into the weeds on that one.

Okay. Any other items on the agenda that you think are worth mentioning, even if briefly, before we start trying to resolve some of the disputes?

The common benefit order I understand is assented to, has been filed. I will look that over and probably approve that in short order.

MR. MATHEWS: Certainly.

THE COURT: So --

MR. MATHEWS: Thank you.

THE COURT: Anything else?

All right.

MS. AYTCH: I don't believe so.

MR. ORENT: No.

THE COURT: Okay. Good. Let's -- you know, I think the one I'd like to start with is the protective order. And I know that's, I think, third, at least the way you've presented it.

And what I'm going to do is -- and this tends to be my approach in general with litigation. I tend to tell you where I'm leaning, what I'm thinking, and then that way you know what you're dealing with and you can persuade me why I'm wrong on something and I can at least give you a sense as sort of based on what you've written here, here's my thought, here's my leaning, tell me why I'm wrong. Okay?

So I'd like to do that to start with the protective order.

Okay. Now, let me just tell you my thoughts and then I -- you know, I have some questions.

I like the Court's form order with respect to procedure. When the procedures that are laid out -- let me be more specific -- paragraphs 7 and 8 are the meat of it.

So if you look at Exhibit B, which is the Court's just form order, which I know plaintiffs propose as the protective order in the case -- let me go to paragraph 7.

The way that is laid out is something that our court went over in great detail with one another and with our Bar in terms of laying out a procedure when there are disagreements or challenges to designations. And I don't see that as perhaps raising some of the burdensome issues or concerns that you've raised with respect to the designation of what is and isn't confidential.

So my feeling is that that section is -- paragraph 7 is definitely my preferred way to handle disputes with respect to designations. Okay?

Same thing with regard to paragraph 8. Now, I will note that the defendants' proposed protective order, I think it didn't -- you have 30 days within -- 30 days of the receipt of any document designated confidential to serve your objection. I believe the defendants' proposal gives you no -- there is no waiver. You can do that at any point.

MS. AYTCH: At any point.

THE COURT: That seemed very favorable to plaintiffs.

Our form, obviously, does not envision an MDL. This is not what this form was created for. But I do -- I do think the procedures for raising challenges and when you are going to file a document in court, the

procedure that is laid out, the way to handle that, is far superior, in my view, to this procedure laid out in the defendants' proposal.

So -- and I want to make sure I've got the paragraph on that. I think it is paragraph 8. It's laid out in paragraph 8.

MS. AYTCH: In the civil form, yes, it's paragraph 8.

THE COURT: Yes. So 7 and 8 are -- my preference -- and I'm guessing that isn't going to raise huge objections. You've got that case in federal court, our court, and it doesn't raise the same sort of burdensome type issues that I think the meat of this dispute does.

Tell me how I'm wrong on that. Go ahead. If I am.

MS. AYTCH: I would never say that you're wrong, your Honor.

The -- paragraph 7, you're right; defendants don't have any immediate challenges to that.

As we view paragraph 8, particularly paragraph 8a, the objection to confidentiality.

THE COURT: All right. Before you lay that out --

MS. AYTCH: I'm sorry.

THE COURT: -- let's everybody get there.

MS. AYTCH: Oh, I'm so sorry.

THE COURT: No, no, no. I'm interrupting you.

So everybody get there and let's just review that language so that everybody knows.

MS. AYTCH: It would be page 6 of Exhibit B, paragraph 8, subsection A.

THE COURT: And it's just 8a that you're going to talk about or are you also talking about B and C?

MS. AYTCH: I guess 8a and then 8c, but the issue raised would be the same one.

THE COURT: All right. Go ahead.

Everybody with us here? We're all on the same page, so to speak, or do you want a little more time?

Go ahead, Attorney Aytch.

MS. AYTCH: So just -- just practically thinking about this, the immediate concern comes to what the Court already has slightly hinted toward, the 30 days within the receipt of any documents.

I imagine that some documents, especially once the prior productions, will be quite voluminous and so just looking at in 30 days reviewing that and then essentially the way I would read this would be providing a list of sort of any documents that are going to be challenged. And then within -- following that 30

days -- I'm kind of skipping over the meet-and-confer --

THE COURT: Yup.

MS. AYTCH: -- but then going to and then within 30 days filing -- if there is still objection, which may not be, but then within 30 days of that, filing the motion.

THE COURT: I'm happy to take those time limits out.

MS. AYTCH: I was going to say or -- or I don't know if there would be some practical way to also deal with maybe the number of documents, if it can be done in stages or waves or something like that. That particular provision, honestly, I have not spoken directly to plaintiffs' counsel about, if there's any way to reach a middle ground on that.

But just looking at 8a and 8c, that that would be what I would consider.

THE COURT: I bet plaintiffs would agree with you on that.

MR. MATHEWS: Yeah. Judge, this is the part of the form that gave us particular heartburn with these times, but in the interest of getting this moving, we were willing to adopt the document.

THE COURT: Right. I don't think the time --

MR. MATHEWS: I'm perfectly fine with that,

honestly.

THE COURT: I don't think the time makes any sense in this context. And she's correct; the piles and piles of documents that you would have to review, 30 days makes no sense.

MR. MATHEWS: And --

THE COURT: So what I want to do, though, is lead you in the direction of coming up with protective order hopefully you can file within a certain amount of time and you both are in agreement on it unless, of course, there's something you want to litigate and I haven't been able to talk you into the protective order that I think I would envision approving.

But I -- the process in general, as laid out in paragraphs 7 and 8, I want to -- I want to keep that process.

MR. MATHEWS: Judge, I may suggest that what they have contained in their paragraph 5 of their suggested, that would be paragraph 5 of Exhibit A, deals with the timing issues.

THE COURT: Yup.

MR. MATHEWS: And, I mean, we would have absolutely no problem as far as timing goes with what's contained there in paragraph 5 of Exhibit A, which is page 5.

THE COURT: And the same would go for the latter time limit; you guys come up with some -- something that you both agreed on --

MR. MATHEWS: Certainly.

THE COURT: -- even if there's no specific time limit that you specify.

Okay. Now, where is -- with respect to filing in court -- 8c.

Yes. Just give me a second. I apologize.

Maybe it's in A. Maybe it's in yours.

MR. MATHEWS: Are you talking about filing under seal?

THE COURT: Yes.

MS. AYTCH: I was going to say I know it pretty well.

THE COURT: Okay.

MR. MATHEWS: Paragraph 11, page 9 --

THE COURT: And that's --

MR. MATHEWS: -- of Exhibit A.

THE COURT: Okay. I -- we can talk about that particular procedure later. I think it's more important probably to get to the heart of it, the meat of it, which I think is the -- in the defendants' protective order, the -- what constitutes confidential information, what's entitled to that designation.

And so, obviously, the standard order of this court, I'm familiar with the categories of information that are deemed confidential and I have looked at the defendants' proposed protective order and note some differences and note some language that I think is probably the subject of the specific disagreement, but I don't think you specified precisely for me the particular language you take issue with. I can guess, but what --

Would you like to just, first, tell me what portion of the definition of confidential is too broad? What portion is of -- something you'd like to either remove or edit?

MR. MATHEWS: Yeah. So, Judge, what -- this -- the definition that they have included in their papers, which is paragraph 4 --

THE COURT: Paragraph 4, uh-huh.

MR. MATHEWS: -- just seems to be just about any and everything possibly related to the company could be considered confidential. And that's why we proposed what we did -- well, we like the language of what was included in the Court's form.

Certainly everything under the sun isn't confidential. If it deals with trade secrets, if it deals with some sort of compensation issues, things that

are typically of a confidential nature, we certainly agree with that and we think that's encompassed within our definition, but as we've seen in the state court action, they've produced something along the lines of 68,776 documents so far; of that only 1,756 have not been deemed confidential, which is --

THE COURT: What was the total number?

MR. MATHEWS: Sure. There's -- if these numbers are correct from the state court, 68,776 documents have been produced; 1,756 have not been deemed confidential. So that's 2.8 percent of what's been produced so far in the state court action.

That's the concern that we have with this all-encompassing language of paragraph 4. We will be here every week talking about confidential documents if there's this broad of a scope.

So that's why we think that it --

THE COURT: Unless you call up Attorney Aytch and say, gosh, these 10,000 documents seem like they've been overly -- you've been overly inclusive here and would you consider removing it. And maybe she would agree to do that.

But, again, you know, I -- I understand the argument that you're making.

MR. ORENT: Your Honor, if I might just add

for a moment, first of all, just to back up.

We see all of these issues as not being necessarily separate issues, the four issues that we're going to be dealing with today.

THE COURT: Uh-huh.

MR. ORENT: I think that if the Court looks at these issues collectively as opposed to one at a time, it'll see that there are three essential themes to these -- these disputes.

The first is that the defendants are suggesting that we adopt the orders of the court or as orders of this court orders that were in effect in the state court or in other litigation settings without regard to the fact that these same orders have resulted in multiple years of litigation and controversy around them. We think that we should learn from what's already been done and build off of it.

Second, these three orders seem to suggest that -- or don't take into account the fact that the defendant is in a superior position of information relative to what documents they have, who the custodians are, all of these things, and the defendants' suggestions all presuppose that the plaintiff is on an equal footing with them.

And then, finally, each of the defendants'

proposals adds a layer of time and motion practice into the process of discovery that goes beyond the extent of what we would ordinarily consider in MDL motion practice.

And as that relates to this specific --

THE COURT: Uh-huh.

MR. ORENT: -- issue, the confidentiality designations at paragraph 4 and the resulting designations in what has already been produced in state court, we've had some discussion on this already with the defendants and particularly the -- the nonpublic information, things that may be detrimental to the company; when we're talking about e-mail, the defendant considers all e-mail as confidential.

So if there's an e-mail that says, we made a bad product, there's no confidential privilege associated with that e-mail, but the defendants would mark that document as confidential subject to protective order in this particular instance.

And so the burden has been placed on the plaintiffs, in a situation where we're ultimately going to be dealing with hundreds of thousands, if not millions, of pages of discovery to go through each and every document and request that they be de-designated, where the privilege is as deemed appropriate in prior

case law from this district and from the First Circuit as well as elsewhere, usually consider it to be the defendants' obligation to -- or whoever the party asserting the privilege is to make an affirmative showing that that document is privileged and confidential and that that is the exception rather than the rule.

What this is doing is seeking to create the general rule that everything is confidential and then we have to raise the issue on a document-by-document basis to force a showing that a particular document is not confidential.

That adds layers to every process that follows from this. So depositions necessarily become more complicated; motion practice before this Court; the deadlines that we would have for summary judgment; for briefing on motions to dismiss; Daubert motions, things of that nature, that happen in the ordinary course, all of a sudden, we're now dealing with entirely confidential sets of information that require several weeks of additional time for briefing to get the documents filed under seal to have the Court make decisions about sealing before we can even get to hearing.

So it creates this paradigm where we're no

longer in an open court setting; where we're now litigating as part of the regular course to have documents de-designated or marked confidential, kept, and we're no longer proceeding in the normal course of litigation.

And that's what our concern is, is that that confidentiality agreement creates confidential as the rule and not the exception.

THE COURT: All right. I -- I neglected to tell you my opening sort of thoughts on it.

My opening thoughts, as I read through it, were that the defendants had a strong argument with respect to burden and they've gone through and litigated and developed a protective order and then produced thousands of pages of documents pursuant to that protective order.

And, ultimately, the idea, certainly in the manual and other literature with MDL cases, is that there be cooperation with respect to those kinds of issues and coordination so that there's not duplication.

And so while I understand what you're saying, I think I need you to know at the outset, as I read through, you know, your one-page argument, I'm sympathetic to the burden argument on the defense side.

But that having been said, I'll let you

respond, Attorney Aytch.

MS. AYTCH: I'm going to kind of hit all of the points, if that's okay with your Honor.

First, starting off with the definition, part of our position is that we don't see necessarily how the definition of form order and the definition of our order are necessarily different, although ours is more distinct.

The definition of the form order would require relying on case law in order to determine what is confidential, personal information as contained in some cell phones, some e-mail addresses, some addresses of Atrium employees who are not parties to these cases as well as what constitutes trade secrets, nonpublic financial information, nonpublic information related to product design, development, and sales, such that looking at the case law of this district and of this court would be trade secrets, personnel records, and other commercial information which is a broad catchall.

THE COURT: Uh-huh.

MS. AYTCH: True enough, our form order has that same catchall --

THE COURT: Uh-huh.

MS. AYTCH: -- but we go through it more specifically because not in the state court, actually,

there has never even been a call, to my knowledge, that says, hey, these documents are confidential, will you de-designate them. That particular process --

THE COURT: These documents are not confidential or --

MS. AYTCH: Are confidential. I'm sorry.

In state court, to my knowledge, there has yet been a conversation with defense counsel that says, hey, you designated -- and I'm just taking these numbers, I can't rely on them unless Elan can tell me quickly -- hey, you designated 68,000 documents as confidential; we say 10,000 are not; will you de-designate. That's the process that's called for in both of these stipulations and that has not yet happened in state court.

So to suggest that the confidentiality order is somehow driving a bunch of litigation in state court is foreign to me.

However, just the pure definitions, this form -- I'm sorry -- the nonform order, our protective order, I feel like is just more specific regarding the categories which just gives the parties and the Court more direction as in terms of what is confidential.

THE COURT: Can we stay on that point --

MS. AYTCH: I'm sorry.

THE COURT: -- before you go to the next

point?

MS. AYTCH: Okay.

THE COURT: Are you okay with that?

MS. AYTCH: Yes, of course.

THE COURT: And I'm looking specifically at your definition. And I agree with you, there's a lot of overlap and yours simply, in many cases, has just more detail.

I did, however -- I want to ask you about certain layers first. Let me just start with proprietary information.

I think of trade secrets. What -- proprietary information, what does that mean? That seemed broader to me than just a trade secret.

MS. AYTCH: It may be, your Honor.

Specifically, proprietary information tends to get into anything even beyond a trade secret, but we do specify that, such as like budget information, sales information. That may not exactly be trade secret, but something that's particularly confidential within the company that's nonpublic that deals with the workings that if it were in the hands of a competitor may be used against the company, which is the goal of a lot of the confidentiality agreements and protective orders within this context of litigation.

THE COURT: Okay. I will tell you that I read that and thought, okay, now am I going to get litigation around what that means at some future date. And it seems broader to me than necessary. Perhaps that could be clarified.

But moving down -- and I'm just raising language that I thought seemed broad.

MS. AYTCH: Okay.

THE COURT: In the category, I think, of what our standard court order, protective order, describes as commercial information, I think you have specified several categories that would fall under that.

And one of them is "nonpublic information which, if disclosed, could result in a competitive disadvantage and adverse effect on the producer in the marketplace, an adverse effect on existing or contemplated business relationships of the producer" -- up to that point I was okay until I got to "or other harmful effect," and wondered what that would mean. That seems, again, rather broad.

So that was one clause that I thought could be narrowed or removed.

And then there were areas that I think our protective order does not deal with. And let me just -- there are two.

"One is material prepared by or provided to a party with the expectation that such material would not be publicly distributed."

I have no clue what that means and how that would -- typically this is -- this description is as to certain records. These are the types of records, Judge, that, you know, are confidential because. This is written with the intent of the producer? Again, it was something that I just -- it's unfamiliar to me and I felt like it was so vague, broad, that, to me, that if you were willing to negotiate that somehow that you might have more agreement from plaintiffs on the language.

Because I really think the confidential information definition that they've provided does overlap, absolutely, with ours. But, again, I'm pointing out those specific -- that specific language that I think is not in ours and is somehow problematic.

MS. AYTCH: I will tell you what I contemplate --

THE COURT: Uh-huh.

MS. AYTCH: -- when I hear that language and it may be captured by the following clause, which is materials that are deemed confidential under Federal Drug Administration guidelines.

So such material -- or sometimes we have e-mails from physicians who have used the product that are asking about something specific with regard to their use with regard to a specific patient. So it will have the patient name, patient history things, like that within the context of an e-mail. A physician probably would not want that information --

THE COURT: Right.

MS. AYTCH: -- to be public with regard to their patient and their conversation. So that's one thing.

However, I will grant to the Court that materials that are deemed confidential under federal -- under FDA guidelines and HIPAA, that could -- something like that could also fall there.

But that's the kind of material that I envision when I read that language.

THE COURT: Okay. Well, that's much more narrow than what I -- how I read that.

MR. MATHEWS: And we have no objection at all to the FDA, HIPAA --

THE COURT: Okay.

MR. MATHEWS: I think we're probably under those same requirements not to disclose that anyway.

MS. AYTCH: I'm sorry. My co-counsel just

raised another area.

Sometimes other people show us their proprietary, their trade secret information in terms of bidding, in terms of comparison and things like that. Such information also they would not expect to be public.

MR. CHABOT: As when they're, for example, bidding to provide supplies or something like that.

THE COURT: Okay. I think you could specify those limitations and then the language isn't this sort of broad, expansive definition of confidential and it's getting more like the definition that the plaintiffs have, frankly, proposed.

So the materials that are deemed confidential under FDA guidelines and HIPAA statutes and/or regs would cover a big portion of what we talked about. And then you could also just add a sentence that would be specific to your -- you know, your company; that you -- proprietary information that has been -- or trade secrets that have been provided from our companies, that kind of thing, or some -- some phrase that would cover that that's not so broad that it would look like it might cover anything.

So if you're willing to, I think, remove or edit that language to narrow it, to me, we're going a

long way toward mimicking what's in the proposed -- what's in the plaintiffs' proposal.

There's one last one that is not in ours and that is broad as well, it's information which would subject a party or entity to annoyance, embarrassment, oppression or undue burden or expense.

That reads very broadly. So that one is another one that I --

MS. AYTCH: You're correct, your Honor. That language comes directly from Rule 26(c)(1), where the Court for good cause can issue a protective order. And so that's kind of a catchall which we borrowed just from the federal rule.

But your -- you're correct in suggesting that it is a larger catchall and immediately to my mind, I don't think of a document. But that's where that language comes from, your Honor.

THE COURT: Okay. All right. So you're willing -- it sounds like you're willing to negotiate, edit around some of the broad language that at least from my review of the two competing proposals, I've just pointed out the areas, frankly, where I think the defendants' proposal is too broad and they seem willing to step back and narrow that and work with you on that language.

And proprietary information, again, I think maybe some limiting language there to explain what you mean by that would be helpful as well.

But those are the areas of difference between the two. And so if they're willing to deal with you on that language, it seems to me that what -- the end product is very similar, maybe a little beefier, but similar to our court order, which is your proposal Exhibit B.

So what -- any response to that? Any disagreement with that?

MR. MATHEWS: No. I don't disagree with -- if the definitions are more structured or -- as the Court's pointed out here, I think my concern over the number of documents designated as confidential so far in the state court action probably goes away because it's certainly a tighter format than my understanding of what's going on in the state court.

And so I think we can negotiate. I think we're meeting in person next week and maybe we can figure this out at that meeting as well.

THE COURT: Okay.

MS. AYTCH: Before we do so, your Honor, I would like to address just that final issue that I find in terms of Mr. Orent's third point and the point

Mr. Mathews just brought up, adding a layer of time in motion practice, where I don't actually read a difference too much and, if I do, in the form order --

THE COURT: Uh-huh.

MS. AYTCH: -- is actually more onerous.

Where I do believe that the form order attempted to account for kind of larger-scale litigation is in the reading room provision, which is paragraph 4. And if I am reading it correct, and I recognize that I don't always practice in New Hampshire, so forgive me if I'm interpreting this incorrectly, the reading room would allow for almost -- like a large-scale document production where unlike paragraph 3, where each document has to be reviewed by an attorney or party appearing *pro se* who has in good faith determined that the documents contained information protected by disclosure, the reading room allows a larger document drop and then all subject to kind of a premise or presumption of confidentiality.

And after the preview of documents, the party seeking discovery here, the plaintiffs, may specify those -- may specify those documents for which copies are requested which would still require that same meet-and-confer. Here are a large range of documents because we didn't want to go through and redact every

e-mail, every cell phone number, we need to get it to you quickly, here are large documents with the presumption of confidentiality, please let us know which ones you deem should be de-designated. Most of them, honestly, if it's something like that and you want copies, you need it to do a motion, we can redact it rather than redacting I don't know how many pages of 68,776 documents.

But the reading room provision of the form order essentially has the same procedural meet-and-confer presumption of confidentiality that it seems is problematic from the plaintiffs -- from their perspective with ours. So --

THE COURT: That is my understanding of our reading room provision, but tell me why she's wrong about that.

MR. ORENT: So, your Honor, this sort of -- as I -- as I indicated earlier, there's a large overlap between these issues and this is one of those -- those points.

By way of background, in prior briefs in state court, the defendant has gone through and explained what their process is for production of material. And the way the defendants describe it is that they have an initial list of individual lawyers actually read through

each and every document and then they have a second tier of lawyers review each and every document.

How that relates to this matter is that when the defendants go through the documents now twice before giving them over to the plaintiffs -- this was their basis for providing I think there was six months or something like that in the initial production -- but this is the opportunity that the defendants have to mark a document as confidential or not confidential. We don't think that the reading room provision applies if they're going to have two layers of attorney review prior to producing them to the plaintiff. That is ample opportunity, ample time, for them to go through, identify if a document is subject to a particular privilege and on a case by case basis make such an assertion.

And so that's one of the issues that's underlying the ESI dispute in state court and it's -- it's an issue with regard to the protective order.

So we don't necessarily see the reading room provision as applying to the way that they've been producing documents and the way we anticipate them producing documents here in the federal action.

THE COURT: Well, obviously the reading room provision is in your proposal. So you have made a

proposal to me in which you propose that this is one of the possible objections, this kind of large-scale presumption of confidentiality disclosure and then meet-and-confers and working things out.

So --

MR. MATHEWS: Right.

THE COURT: -- how do I resolve that?

MR. MATHEWS: The provision of the reading room specifically says disclosure of a large number of documents that may contain confidential documents but that have not yet been reviewed and designated confidential.

But what we're understanding is that these are undergoing twice review before they're made available to us in any format, whether it's in the reading room or not.

Now, if we're talking about these 67,000, 68,000 documents that have been provided in state court, then certainly we don't think that those would be subject to a reading room because they've already been reviewed by them.

If we're talking about the millions of pages that should be coming from here forward as we work out this ESI issue, putting those into the reading room that haven't been reviewed we're perfectly fine with.

But I think that's the distinction because we do have this large batch from the state court that have been reviewed by the defendants already.

THE COURT: Okay. But if, in fact, that's the presumption, that they're just going to be able to just hand them over, then why wouldn't they want exactly the same terms in terms of marking things confidential? With that pile of documents, if you will, why isn't that a reasonable request that it be exactly the same with respect -- so they don't have to triple review.

MR. ORENT: Well, your Honor, I think the concern is this, is that the defendants have taken the position that they're going to review each and every document again through this two layers for future productions.

So what they're trying to do is have this -- so there is an additional time component because if you're going to review documents before you produce them to plaintiffs for relevancy as well as responsiveness, then they have an obligation to make a confidentiality designation while they're reviewing the document.

If the defendants, alternatively, are going to do what we suggest, which is to run the TAR or the keyword analysis and then produce the documents without a delay of six months for this two-layer review, that's

a wholly different story and it eliminates -- so what we're doing is we only have one layer here.

If we do what the defendants suggest, it's two layers of review, then we get everything marked as confidential and then have to de-designate.

So if the defendants don't put eyes on them beforehand, that's what the reading room provision is for is for when there's such a large scale and we want to produce documents immediately that we're going to produce them to you with the understanding that if we produce something that should not have been or wasn't marked at the outset, we're not making a mistake to our disadvantage.

THE COURT: Uh-huh.

MR. ORENT: And so what we want is just an even playing field in terms of they're either going to produce the documents after review or what we would hope would be is allowing the computerized systems to work more efficiently and have a single opportunity. But we can't create this twofold set.

THE COURT: Okay.

MS. AYTCH: So still I'm not understanding if they're asking to strike the reading room provision in the proposed order --

THE COURT: I think they're saying the reading

room doesn't apply to that pile of documents that's already been --

MS. AYTCH: That's already reviewed.

THE COURT: Yeah.

MS. AYTCH: And one other thing is that the defendants have made a number of document productions now, four or maybe five. I'm sorry. I'm turning to look at Elan, for the record.

THE COURT: That's okay.

MS. AYTCH: Not all of those went -- well, first, not all of them, every single document, went through two levels of review. Some only went through one level of review. And then some, within our recent document production made in early April, did not go through any. It was exactly what this reading room would contemplate because those are the nature of documents, that we do not intend to have privileged information.

So the suggestion that this provision either comes in or comes out, I guess, is my concern that we still -- even in instances -- and maybe that's what the plaintiffs are saying, well, in certain instances it would apply and in certain instances it would not apply, but to completely remove it, I think would then require us to go back to the default of paragraph 3 and we would

then have to look at every single document and make a confidentiality determination.

But, again, just to hit the reading room and then to hit your -- the last point in order for the parties to go forward, some kind of protection where there is a presumption if we're just doing a large-scale document production is the thing that the defendants are concerned about.

THE COURT: Okay.

MR. ORENT: Your Honor, we're -- we're fine. We always include clawback-type provisions and we certainly want to work with defendants on their concern there.

We also have no problem if the defendants are not going to make a distinction between responsive and relevant and produce all of the material to us without going through these layers of review, we have no problem with everything being put into a reading room.

So, you know, we want to work with the defendants to get everything produced as quickly as possible so that we can get eyes on documents. We just don't want to create a delay on the front end and then a delay on the back end.

THE COURT: Okay. All right.

Does that make sense to you?

MS. AYTCH: That makes sense. I mean, we wouldn't be doing that, as I mentioned, that there are certain categories of documents that you can look at that you may not have to eyeball every single one, but I believe that we'll get into it later in one of these other disputes, that we absolutely stand on the fact that there are document requests and the responsiveness review to those document requests is the state of the law and it's part of the Federal Rules of Civil Procedure and discovery procedure, so we would not be waiving our right to do something like that if we have a reading room or some other similar provision.

THE COURT: Okay. All right.

Well, based on what we've talked about with respect to the protective order, do you think you could hammer one out that is a combination of both and have a meeting of the minds and get it to me in short order within the next two weeks? Is that something you could do?

MR. MATHEWS: I do believe we can do that with some more -- just a little additional guidance from the court.

THE COURT: Go right ahead.

MR. MATHEWS: On one last issue which I've raised earlier, which is a filing under seal issue.

THE COURT: Yes.

MR. MATHEWS: I think that could be a sticky situation for the parties, so if the Court has some guidance on that, that would be nice.

THE COURT: Yes, I think I --

MR. CHABOT: I believe it's paragraph 7 of Exhibit B, your Honor.

THE COURT: You knew exactly what I needed. Thank you. Paragraph 7 of Exhibit B. All right.

Okay. Yes. Okay. All right. So tell me what you need the direction on. I like paragraph 7a and b.

MR. MATHEWS: Yup. And I just wanted to make certain that the Court -- because it conflicts greatly with what's contained in --

THE COURT: Uh-huh.

MR. MATHEWS: -- Exhibit A, I just wanted to make absolutely certain that the Court's --

THE COURT: That's what I would like.

MR. MATHEWS: 7.

THE COURT: Yes.

MR. MATHEWS: Perfect. Thank you.

THE COURT: And the defendants aren't fighting too hard on that. You seem to --

MS. AYTCH: In the beginning, we --

THE COURT: -- be okay with that.

MS. AYTCH: Right. In the beginning, we conceded that point.

THE COURT: Okay. Good. Excellent.

MS. AYTCH: Your Honor, may I get clarification?

In your original Case Management Order 3, I believe that a submission of the protective order was due June 12th. Is that now kind of bumped up?

THE COURT: No. Thank you for reminding me of that. I'm just trying to help the parties get to a protective order sooner --

MS. AYTCH: Okay.

THE COURT: --rather than later, but June 12th would probably be the drop-dead date.

MS. AYTCH: Okay.

THE COURT: But if you can get it sooner, that's great. Thanks for asking.

One other thing, the issue of this Court, this judge, maintaining jurisdiction to enforce the protective order in perpetuity, that's not -- that's not something I want to see in the protective order unless you tell me why I need to have that kind of, you know, infinite jurisdiction.

I'm thinking that the terms would survive and

remain in effect as an agreement between the parties after the conclusion of this MDL and in that way, to the extent there are violations of it, you would bring that in the appropriate -- before the appropriate judge and it would become at that point a violation of a contract.

Now, tell me why that's wrong. It's nothing either of you really addressed or had any disagreement about. It's just my own preference not to have jurisdiction over something in perpetuity.

MR. MATHEWS: Judge, the only issue that I would foresee is if the MDL resolves without the state court actions resolving and we have people that are subject to the MDL order that's inconsistent with the state court order, then there might be some issue with destruction of materials, that type of thing. But as you point out, that seems like it would be an issue for the state court judge --

THE COURT: Uh-huh.

MR. MATHEWS: -- to deal with at that point.

THE COURT: Well, and, frankly, just bringing it to your attention so that you can indicate -- I think currently the way it's written it could be read as in perpetuity.

MS. AYTCH: You're absolutely correct about the defendants' proposed, but the language in the form

order, paragraph 11, obligations on conclusion of litigation --

THE COURT: Uh-huh.

MS. AYTCH: -- in A -- subsection A, order remains in effect, I believe that's the exact language that your Honor is looking for and the defendants don't have any problem with it --

THE COURT: Terrific. Okay.

MS. AYTCH: -- so we'll make sure that that language gets into the final order.

THE COURT: Perfect. Okay. I think I can put the protective order to the side for the moment. I think --

MR. MATHEWS: Yes.

THE COURT: -- we're pretty good and the defendants have, I think, been willing to compromise on some of the broad terminology and the definition of confidential in paragraph 4 of their proposal and I think you'll be able to work something out that I would approve.

Okay. So protective order we can check off the list.

Now, I see ESI and the litigation holds as so related, I think obviously the litigation holds issue is more narrow.

How do you want to address those two? Would you rather just talk about litigation holds in general and I can tell you sort of where I -- what my take is, based on reading your one-page argument, or we can just start with ESI and you could also -- we could sort of see if we can resolve some of that today.

It's probably unlikely, based on the nature of the dispute as I read it and perhaps litigation holds is something more narrow that I can just give you a sense of where -- how I think I would rule based on what you've given me.

Any proposals?

MR. CHABOT: I hope it's not too presumptuous, your Honor, but we have divided responsibility to argue those two different issues between Attorney Aytch and myself.

THE COURT: Okay.

MR. CHABOT: So she's doing litigation holds. I was going to argue the ESI issue.

THE COURT: Is it okay to save the ESI issue? It's really the bigger issue. You're okay with that?

MR. ORENT: Absolutely, your Honor.

THE COURT: So we can just deal with the litigation holds issue.

I have read what you've submitted and what --

it strikes me that -- that you're both right; that -- it seems to me that plaintiffs are saying, hey, at a minimum, Judge, we want the date, we want the person, and we want the category of ESI we're talking about. And that seems reasonable to me, based on what I have read and what you've submitted and I read the cases that you cited.

It also seems reasonable that defendants are saying but the litigation holds themselves, the notices themselves, the holds, those are privileged and we're not going to agree to include litigation holds in our pile of production.

There's a mention of an issue of spoliation that's not obviously -- it's a one-page argument. It's not really developed and it seems to be limited just to the date, the late date of the hold, but I would obviously need to hear a lot more about that issue before I could ever sort of widen what I'm -- what I'm -- at least thus far what I think makes sense, which is date, person, category.

And it seems to me that from what I'm reading on the defendants' side, they're willing to give you some of what you're asking for in a limited way with -- working cooperatively to provide written answers to, you know, how the litigation holds impact their data

retention and they're willing to identify possible custodians and that sort of thing.

So that's sort of just a preview for you of where I come out on this. So let me hear from -- Attorney Orent, are you --

MR. ORENT: I am, your Honor.

THE COURT: Go ahead.

MR. ORENT: So we agree with your Honor's analysis of the law in recognition that primarily we're looking for information as to the name of the individual, the dates that those individuals received the litigation holds, the material that they were requested to protect from destruction.

We are also interested in the actual litigation hold.

THE COURT: Uh-huh.

MR. ORENT: The reason for that is in a letter dated April 19th, 2017 to Attorney Josh Wages from Attorney Aytch, she notes that that in 2017, Atrium used from Hudson to Merrimack and that none of the product from the Hudson facility was maintained.

Now, that's an important issue that we'll deal with as this litigation unfolds, but essentially what they're saying is that none of the C-Qur mesh devices, prior to the move, were retained in their custody.

We also know from answers to defendants' interrogatories, second set of interrogatories, dated April 12th, 2017, that the latest litigation hold was issued on April 12th, 2017 and that for certain departments like mesh manufacturing a litigation hold had not occurred between January 9th, 2014 and April 12th, 2017. And so during that period, we know that evidence was lost and/or destroyed from Attorney Aytch's April 19th letter and we know that there had not been a litigation hold between those two dates for certain departments. On other departments, we know that there was a 2016 litigation hold, for example, in mesh regulatory, but we don't know why that department was singled out.

So we know that information is missing and very relevant material is missing during the period where litigation had already commenced.

We know that a litigation hold for certain departments had not been issued in over three and a quarter years, and that, to our read of the case law, raises the level, the specter, of necessity or allows us to meet the legal threshold to actually get the contents of the litigation holds, based on these two documents that were authored in April by Attorney Aytch.

THE COURT: Okay. And you've argued that

you're entitled to the April 20 -- the most recent one, April 2017 --

MR. ORENT: April 12th --

THE COURT: April 12th.

MR. ORENT: -- 2017 and also the prior ones that predated the -- the move and then the one that happened -- there was a single one that happened September 26th, 2016, after the move, prior to this April 2017.

THE COURT: Okay. And why are you entitled to those holds prior to?

MR. ORENT: So if information was -- if the defendants were told not to destroy physical evidence, electronic evidence, and disregarded it, we're entitled to that information; and, likewise, if the litigation holds prior to those dates did not alert the appropriate people that they were responsible to retain information, it was ultimately lost on the move, I think we're entitled to know that information.

And so this is really the first step in the inquiry as to what happened and why there is material that is missing based on the move.

THE COURT: Okay. And you know the dates of all prior litigation holds?

MR. ORENT: I know the dates based upon

defendants' answers to interrogatories, so I'm presuming that those are full and accurate as of today.

THE COURT: Okay. And so there's April 12, 2017, and then there's September 26, I think, 2016, and then the two prior?

MR. ORENT: For some departments, there are three prior. There was a January 9th, 2014, a March 19th, 2013, and a March 6th, 2013, which also raises the question as to why senior management was given a litigation hold in March of 2013, but it didn't filter out to mesh manufacturing for another year or so.

THE COURT: Can you say that again?

MR. ORENT: So --

THE COURT: Explain that to me.

MR. ORENT: Based on these answers to interrogatory, we know that senior management was given a litigation hold in March of 2013; we know that from these answers to interrogatory, certain departments within defendant did not actually get a separate litigation hold until January of 2014, almost a year later.

THE COURT: Okay. All right. Okay. So the Atrium move -- I'm sorry. Go ahead, if you need to confer.

MR. ORENT: The Atrium move occurred in 2015.

THE COURT: All right.

MR. ORENT: And, to date, we don't know the individuals that received those litigation holds.

THE COURT: Okay. You're going to argue the litigation hold?

MS. AYTCH: I am.

THE COURT: Okay. So they're arguing that you've conceded that there have been -- there's been spoliation?

MS. AYTCH: No.

THE COURT: Okay.

MS. AYTCH: That issue has not even been raised with the state court and with this litigation. There has been no motion, there has been nothing beyond the letter.

The request for -- all this is is mesh exemplars, not the mesh itself that came out of the plaintiff, which the plaintiff had a duty to maintain and could have maintained. These are mere other examples and other products of this same type. The request for that came from the plaintiffs in May 2016, so not even quite a year ago.

So, again, not only is there not even a motion or issue before the state court in which this litigation about spoliation -- there definitely has been no ruling

by that court with regard to spoliation.

Moreover, the reason that plaintiffs have articulated that they need this information is solely in order to develop an ESI protocol; nothing more and nothing less. The ESI protocol would not pertain to physical product samples of the mesh itself, even if that were to be germane to that issue.

The information that they need from the litigation hold notice in order to draft an ESI protocol -- again, the sole purpose at this stage in this litigation for that -- would be given by the information that the defendants are willing to give. They already have, apparently, the information they seek because they have our state court responses to interrogatories. So they have the dates, they have the departments. And to the degree that they are seeking what types of documents that that litigation hold pertained to, we have not been unwilling to provide that information.

So, again, the reason that they're trying to get at what they've conceded under case law is our attorney work product information. They have not made that demonstration, nor have they made the demonstration that there's no other way to get that information, considering plaintiffs' counsel just read to the Court

that information.

And with regard to the number of litigation hold notices, of course defendants have a duty to update the client regularly and say, hey, okay, here's another hold, here's another hold, hence the number of dates and the departments within senior management also contains all of these departments.

So in addition to that, it's going to senior management of each of these departments, in order to just briefly address Mr. Orent's concern that senior management got something that may be mesh manufacturing.

And, again, they have all of our organizational charts, or most of them, I believe. We have one supplemental production that has the entire organizational history. It also has --

(Music begins playing on conference call.)

THE COURT: Someone was inspired by your argument and started playing the piano.

(Off-the-record discussion.)

THE COURT: All right.

Okay. So you were -- you were on a roll. You keep going.

MS. AYTCH: I'm so sorry. I completely lost my train of thought, but I think I'm getting it.

The information that they need -- I'm sorry,

your Honor.

The information that they need in order to develop the ESI protocol, the names of the custodians, the -- the departments, things like that, they have through the information that the Court asked us to exchange earlier in the form of their -- in our IT infrastructure, in the form of our organizational documents.

So, again, the basis for the reason for the request of this information in order to develop an ESI protocol, the defendants feel a demonstration has not been made that they don't have information sufficient to do that, in addition to the defendants' offer to provide the information that they need, short of giving over our work product in the form of the actual litigation hold itself.

MR. ORENT: Your Honor, one of the concerns that we have is that the defendants are now saying and have suggested that we have the corporate organizational charts and, therefore, we don't need any additional information for production of an ESI agreement. And that is right at the heart of the concern about -- that I mentioned before. It presumes that we're on equal footing with the defendants. The corporate org charts indicate everybody who works in two, three very large

companies. The defendants, as part of their Rule 26 obligations, know who each of the relevant custodians of information are, whether they are just document custodians or hold relevant and responsive information.

The defendants are trying to shift that burden to the plaintiffs by saying, we've given you the org charts of the entire company and, therefore, we've fulfilled our entire burden.

We think that the information originally relative to the litigation hold information is another way to get the precise answer to the question of who are the people within your companies, three defendants, that have relevant and responsive information, period.

Now, as part of this process went on, we want to know, because it's pertinent to ESI discovery, what their policies and procedures are and what measures they took to safeguard information along the way. It's all very pertinent to the types of information we seek and the protocols we designed to get that information.

During the course of this process, we learned that samples were no longer maintained and we learned of these dates of the ESI production.

Now, without reading too much into those separate facts, it raised the concern that perhaps data also was not being preserved and without the -- the

subject matter of -- and the full detailed information relative to those -- those litigation holds, we're concerned that we're not going to be able to adequately explore what information was preserved, what information wasn't, relative to the ESI process.

Now, with regard to the defendants' offer to ask questions, written questions, we had initially deferred on the issue of a 30(b)(6) deposition because we thought that this exchange, this informal exchange of information, would be the best way to get from point A to point B and get discovery moving in these cases.

Sending written questions adds time to the fact -- to this issue. We're going to create weeks of delay where we could be looking at documents, we could be moving things along. If these litigation holds are simply don't destroy documents X, Y, and Z, take all measures to preserve them, there's no prejudice against the defendant to identify for us with particularity all of the information we've sought.

And I understand that in these filings the defendants made these concessions, but we still have some significant concerns relative to the data and we're on equal -- we're not on equal footing with regard to information.

So the defendants know what data they have and

what data they don't; they know who the custodians of that data are; and we're just looking to get that information in as clean a way possible, as quickly as possible. And that's, quite frankly, why we seek the litigation holds in the first instance.

THE COURT: You're willing and, in fact, have given dates of the litigation; they know those?

MS. AYTCH: Correct.

THE COURT: So that's -- you're willing to provide that.

You're willing to provide the people -- the people that would have been provided with that litigation hold?

MS. AYTCH: They definitely have the departments. Is that the --

MR. HERSH: Can I --

THE COURT: Is that something you're seeking, the actual individuals and their names within the company?

MR. ORENT: Correct, your Honor. And we believe that --

THE COURT: So that's not something you've provided them, within this department are these employees?

MR. HERSH: No, your Honor. And if I may,

Elan Hersh on behalf of the defendants.

Attorney Orent is -- may be correct when he says we may know better who the custodians are. And our position is we've identified those custodians. We went -- we collected and reviewed documents from those custodians in state court. There were 26 custodians, hundreds of thousands of records, and that's the large ESI and additional documents that we're going to produce when we can resolve the other disputes.

So we've also produced organizational charts to them so that they can, if they want, identify additional custodians who weren't part of the original group of 26 key custodians. And so we do feel that we have identified the key individuals with the relevant data.

So, you know, we've -- we've agreed to explain how the litigation hold goes into effect, we've produced 1,500 pages of documents, organizational charts, IT policies, data maps, things that the plaintiff -- plaintiffs requested, and we've also said that we're willing to answer written questions to the extent they -- they have additional questions about how the hold affects our data retention policy.

So we feel that we have -- we have been very cooperative.

And so I just wanted to -- I wanted to add that to the conversation.

THE COURT: Okay. So when you say person, they've given you department and then they've given you, I assume, titles. So you would know titles of individuals or groups of individuals within organizational charts?

MR. ORENT: So, your Honor, they've produced organizational charts of everybody within the company and what department and what their titles are, but that doesn't tell us who has relevant, responsive information. We know under Rule 26 the defendants are obligated to provide us information as part of their disclosure process of who has relevant, discoverable information.

The defendants are also in the ordinary course -- if these are work product as parts of a privilege log, you would expect them to produce the name, the date of the communication, and who the communication is from if it's work product. They've not offered to provide us the individual names of those people. We think we're entitled to that.

And by way of example, every deposition I've ever been to where a plaintiff is being deposed, the defendants always ask, have you met with your attorney.

The existence of that meeting, the amount of time it took, and the date of that meeting in preparation are not privileged. What is privileged is the content.

The defendants are now seeking to not provide information relative to the timing -- well, I guess we do have the timing, but not specific to individuals.

So we know that a litigation hold was issued on 4/12/17, but we don't know that John Smith and Jane Doe and Paul Allen all got it. We're entitled to know that information, I believe.

THE COURT: I -- and I --

MS. AYTCH: I --

THE COURT: The thing that I'm having trouble with is this seems like an issue that could be litigated and you may be absolutely entitled to what you're seeking later as part of some sort of production that's been made and you want to seek further information. But with respect to developing this ESI protocol, why hold that up with this dispute when they're willing to give you broad categories? Not specifics, but, you know, obviously you've got broad categories and they're willing to answer questions.

And I think if as you go through there is something that you absolutely need for your -- to develop and agree on any ESI protocol, it seems to me

that that's ripe for meet-and-confer and getting me back on the phone if need be in an emergency situation so I can help you work through that.

But with respect to litigation holds, it seems to me that the burden has -- hasn't been met at this point. I'm just telling you my take on the case at this point, the issue at this point. It just seems somewhat premature.

MR. ORENT: Okay.

THE COURT: I'm not -- so what I would say is in the Court's vernacular, denied without prejudice --

MR. ORENT: Okay.

THE COURT: -- to submitting the argument in the future for the actual litigation hold and some of this detailed information surrounding the litigation holds. I'm not denying that --

MR. ORENT: Okay.

THE COURT: -- in the case; I'm just saying right now it seems a little premature to be seeking that and it seems like it might be a stumbling block to getting an ESI protocol put together. So that's where I'm at on litigation holds.

Does anybody else want to say anything else with regard to that? Because then we can move to the ESI --

MR. ORENT: Can I ask a question, your Honor?

THE COURT: Yes, of course.

MR. ORENT: And that is so our -- are we entitled now to the identities of the individuals who got the holds? Because that actually does implicate ESI.

THE COURT: In terms of custodians?

MR. ORENT: In terms of custodians, exactly. Because, again, what happened in the state court was the defendants came to the plaintiffs and said, you tell us who the custodians you want are. They didn't say, here are the 25 people or 26 people with the most information. They did -- defendants, to their credit, did add one individual, but we don't know the entire universe of individuals in this company that had relevant, responsive information. That's never been disclosed. It was here are the 26 individuals, here are the 11 keywords that you're going to use.

Clearly, in a company with this many hundreds of people where they gave litigation holds to multiple departments, there's a lot more individuals that have relevant, discoverable information than that and giving us corporate org charts isn't the solution to that. That's not telling us who has information; it's saying here's some information that you can use to maybe narrow

who might. But I think --

THE COURT: But why couldn't you in the first instance say we want every name of every -- you know, for custodians, we want everybody in that department.

MR. ORENT: So --

THE COURT: That would be a lot of people. And maybe they're not going to want to give you every name and so they'll tell you, actually, here's why you don't need all those names; it's because these are the actual individuals that you need to be, you know, seeking info from and you narrow it at that point. But you start out with, you know, a broad request for people under a certain department that they've at least told you received this litigation hold.

MR. ORENT: Well, so this gets actually to the core issue --

THE COURT: Okay.

MR. ORENT: -- of ESI now, which is that's the approach that we have articulated and wanted to go for.

If you'll recall last time, your Honor, I said we didn't want to do a custodian-by-custodian approach. That is, we felt that we were entitled to the information from all of the relevant custodians and the way that that is done is by, in our request modes, would be using technology-assisted review to cull from

everybody who might have responsive information.

THE COURT: Right, right.

MR. ORENT: The defendants, on the other hand, said, no, we want the plaintiffs to pick the relevant individuals and we will then search within those individuals using a subset of keywords within that.

So what the defendants are doing is they're saying, we're not going to tell you who has the most information; you tell us who has the information you want and then we're going to work on some small set of keywords within that set, so we're going to narrow the funnel down to the documents that plaintiffs actually get.

So what we're suggesting is that we don't have enough information -- we're not being provided the information to even go upon that route. What we're saying is that we prefer as plaintiffs to do a broad-based request and broad-based search across the companies.

The defendants have come back to us time and again in their letters and said, that's not practical; there are too many people that work at this company. They say that in their papers before the state court on their supplemental brief that was filed a week or so ago.

And so -- so the issue that you've identified is actually an ongoing issue that is -- the very heart of this matter is that there is this inequality of information.

And I think Rule 26 contemplates allowing us to be on an equal footing, knowing who those relevant people are, knowing who the relevant custodians are, so that we can all make informed decisions together. But without the identities of those individuals, we can't do that.

THE COURT: I don't know. That's not --

MS. AYTCH: May I respond, your Honor?

THE COURT: That's --

MS. AYTCH: I'm sorry.

THE COURT: Yeah. And eventually let me just --

MS. AYTCH: I'm so sorry.

THE COURT: -- say I -- I'm not -- I'm just not persuaded that you have to have the names at this point. It seems to me something that you would narrow down through your process. You ask for -- they've given you organizational charts. That's -- ultimately they're telling you, this is how we divide our company up.

And so ultimately you ask for -- you want everybody in this department and that department because

of what they've told you about these letters and about how their data retention policies work and then it's incumbent upon them to explain to you why they aren't going to hand over every single individual within that department.

And that -- that seems more reasonable to me than starting out with -- how is starting out with names of individuals going to make your ESI protocol easier?

MR. ORENT: Well, I guess that's the argument that we've been making with defendants. And so to the extent that that's your Honor's thinking, we're absolutely happy to do that --

THE COURT: Okay.

MR. ORENT: -- and we are in total agreement that that's the way that the discovery process should work and that we not be limited to X number of individuals.

So if that's your Honor's feeling on the matter, we're absolutely willing to --

THE COURT: Well, I'm not sure. I -- I may have said something that ultimately I didn't mean to say because I ultimately probably don't understand the TAR process and the ESI protocol as you're developing it.

So I don't want to say something that might appear to people more in the know that I'm saying more

than I really meant. I'm trying to decide this question of whether or not you really need -- in terms of developing an ESI protocol, whether you really need anything more than what you've got and what they're willing to give you by way of answering written questions. That's where I'm at right now.

And I know, Attorney Aytch, you were trying to get in there, so go ahead.

MS. AYTCH: It seems like you've already touched on the points that I was going to make, which is asking -- again, asking for our litigation hold is not the best method, especially because it is our work product, to get at this information.

We do have Rule 26(a)(1) disclosures that we must make and it's the case -- I believe your Honor already said you read it -- Gibson versus Ford Motor Company. The court recognizes that these litigation holds drafted by counsel involve their work product and are often overly inclusive.

So, therefore, asking for the name of everyone in the department to whom a litigation hold went isn't necessarily the information that it seems that plaintiffs are trying to get at if they're asking us, which they can ask us, who are the relevant people with information.

And that was the only point that I was going to make, but it seems like your Honor has already honed in on that.

THE COURT: So let me just be clear what you're willing to provide. They've got dates, so you obviously will provide that. And on the organizational charts, you will certainly let them know who those litigation holds were directed to within the company, within your organization --

MS. AYTCH: In the departments and things that --

THE COURT: Yes.

MS. AYTCH: Yes.

MR. HERSH: I'm sorry. The departments to which they're -- the litigation holds are --

THE COURT: Well, you've got to tell them who got them without obviously putting names to your disclosure --

MS. AYTCH: Yes.

THE COURT: -- but some general direction --

MS. AYTCH: That's also the information that they have.

THE COURT: Okay. So they --

MR. CHABOT: In the interrogatory.

THE COURT: -- so you clearly don't have a

problem with that.

MR. CHABOT: Correct.

THE COURT: And the other issue was they needed categories of ESI that were sort of covered. You're willing to --

MR. HERSH: (Nods head.)

THE COURT: That's no problem.

Okay. That -- I completely agree that they -- the plaintiffs are entitled to at this stage.

With respect to the litigation holds themselves, I'm not ready to say that those should be turned over. I just haven't heard enough.

And with respect to spoliation, obviously that's something that would require much more, much more evidence before I would consider that a litigation hold, which is otherwise privileged, should be turned over, disclosed.

So I think litigation holds is a narrow issue that we can -- we can resolve and have resolved. Anything else about litigation holds that we need to talk about before we get to the more difficult issue, the ESI protocol?

Okay. All right. So the ESI debate. All right. I -- I understand -- let me just give you my sort of -- and, honestly, in this respect, I would say I

am the layperson in the room probably because I'm going to need to be educated as we go through this step by step as to what kind of procedures and protocols you're looking for.

And I'm willing to read manuals, I'm willing to read articles, anything you think would help me understand the scope of this debate and help you get from point A to point B. I'm willing to do the homework. Thus far, the homework has involved really reading one page each of your arguments.

And with respect to this ESI argument, I felt like the -- they kind of went across each other. It was hard for me to really pinpoint precisely what the dispute is.

But I think, big picture -- and, again, breaking this down into sort of layperson's language, as I understand it, plaintiffs want this TAR, this computer-assisted software, to run throughout your entire company, okay, run through the entire company and ultimately it is targeted, you target the software such that it's somewhat smart and intelligent in the way that it goes through the company and you use this procedure to ultimately come up with a pile of documents that are already -- already meet some sort of relevancy standard because the TAR process has deemed them worthy of being

in this pile.

Defendants are saying, no, no, no, we're open to TAR, but that would be later; that would be after we have done this more -- I think -- more conventional custodian by custodian keyword approach to going through the documents and finding relevant documents, getting ESI hits, if you will. And then they -- they go through your requests and they're going to give you what ultimately they deem responsive to the request for production of documents.

So at least the first big debate, as I see it, is the way in which you want to handle the initial ESI hits.

MR. HERSH: Collection.

THE COURT: Collection. Thank you for the terminology. Is that --

MR. ORENT: It's close.

THE COURT: Okay. Go ahead.

MR. ORENT: If I might just correct one -- one item, which is --

THE COURT: You can correct more than one.

MR. ORENT: The technology-assisted review is used after the initial collection. So the determination of what is relevant and not relevant runs after the documents have been put into a repository where they can

be actually searched. They're not like -- they're not live searched on the defendants' networks.

THE COURT: So how do you get that first pile? How do you get that? How do they provide that?

MR. ORENT: So the defendants have the obligation to produce or to talk to their client about getting what is potentially relevant and potentially responsive from all of the relevant custodians that they are aware of. And then from that point --

THE COURT: And they -- they determine relevance at this first stage how?

MR. ORENT: Well --

THE COURT: What are they using, the master complaint?

MR. ORENT: Well, they should determine -- it's not relevance, it's -- well, I guess it's who has potentially relevant information so that they can appropriately do a search.

Some companies send a survey out to their clients and say, who does X, Y, and Z. Other companies do a whole variety of different things. But that's really between defendants and their client as to how they identify sources of potentially relevant information.

What it is, though, is that once the

defendants identify all of the sources of potentially relevant information, that information is uploaded into their platform. That also includes noncustodial sources.

So, for example, the defendants gave us a listing of their databases. So some of the databases might be used for call notes with sales reps; others might be used for FDA complaints; others might have QA/QC implications or manufacturing implications; but they have a series of databases.

So the databases would be -- would be moved, migrated, or information would be culled from them as well. And so all of this information would now be in a -- in a repository from which the defendants would feed a seed set of information that is relevant and the computer, through a series of give-and-takes with plaintiffs, would work to come up with a universe of documents that is relevant and responsive or potentially relevant and, therefore, discoverable. And the defendants would then turn over this large volume of material identified by the computer to us. And presumably, that would go under the reading room provision unless they undertook an individual analysis, in which case they could designate confidential or not confidential on an individual document basis.

THE COURT: Okay. I just want to make sure I understand this.

So the defendants are responsible in the first instance for discovering all the different sources of potentially relevant information, so obviously that's overinclusive and they do that however they do that. And that -- those sources are then -- what happens with that information, the various sources? They then --

MR. ORENT: They then provide the information to defendants' counsel that is uploaded into their -- their software.

THE COURT: Okay. And --

MR. ORENT: Now, I should --

THE COURT: -- what is that software? I mean, is that --

MR. ORENT: In this case, the defendants have stated that they're using Relativity. But I should say that this process to some degree occurs regardless of whether TAR is used or keyword searches are used.

THE COURT: Correct.

MR. ORENT: The collection process is the same regardless.

MR. CHABOT: I just want to interject that we identify potentially relevant information, but that doesn't mean every scrap of potentially relevant

information is then sort of forensically preserved and imported into a review database. I think that's one of the fundamental issues about this dispute.

You know, we don't go get every place where potentially relevant information might be. You know, we use a targeted method and, again, it's sort of our method, but the idea that you have to go get every scrap and then collect it, you know, we're -- I -- I don't know the precise amounts. I don't think any of us knows the precise amounts yet.

But I think they're probably talking about hundreds of terabytes -- a terabyte is a thousand gigabytes -- you know, potentially up to a petabyte of total information that might be held at all of the companies in all of the sources and that the collection and hosting of that information on our database would be -- of all of that -- would be just ruinously expensive.

MR. HERSH: So if I may also interject --

MR. CHABOT: Yes, please.

MR. HERSH: The way that Attorney Orent is talking about the collection and the process today is very different than what I've heard previously. And what I interpreted previously was what I believe your Honor also interpreted, running a TAR across like a -- you know, our entire network to try and gather, you

know, in some active way everything that is potentially, you know, responsive to the TAR terms.

But the -- what I'm hearing Attorney Orent saying today is we need -- you know, we need to define the data sources and then those data sources are collected, the data sources are processed, which is also another very expensive step, that's where metadata is extracted, documents are pulled out of container files, out of zip files, and there's a per gigabyte charge for each of those things.

So our position is we are -- we may be -- we may be open to using TAR, at which point we've already collected, processed, a certain identified universe of potentially responsive documents.

We were opposed to what we thought the plaintiffs were proposing, which was this vast sweep of documents across our entire network using this TAR approach and TAR, really, is not a collection tool. It's a tool used to assist in the review process.

So to the extent that we can come to an agreement on what the data sources are, and that includes custodial and noncustodial sources, that's, I think, the biggest stumbling block to getting this ESI proposal moving forward.

And our position is that the 26 custodians

that we originally collected documents from should form the basis of our large production. The plaintiffs can use organizational charts to identify potentially other relevant custodians. We've always been open to adding custodians, to -- to a reasonable degree, and then also identify potentially noncustodial sources, such as certain databases.

But all of that information must be collected in a forensically sound manner. It must be by a vendor, there's a collection charge; it must be ingested into a processing tool, which is where that extraction of information comes out and there's a per gigabyte charge there; it must be uploaded to a review repository, which has monthly hosting fees; and then it must be reviewed by attorneys, which is the most expensive part.

And it's been estimated that a single gigabyte of data could potentially cost, depending on attorney review rates, you know, 30,000 documents -- $30,000, excuse me. And I can, you know, point you to the Sedona conference materials that list that amount.

But it's -- it's ruinously expensive to do this over a broad, you know, a very large category of documents. So to the point -- to the extent we can zero in on data sources that we believe have relevant information, that's our goal.

MR. ORENT: Your Honor, this now goes back to the issue that we were talking about earlier, which is the identification of those custodians.

The defendants presumably have collected and are aware of the individuals with the most knowledge across the company. When this whole process started, we had originally discussed -- back at that first hearing there was discussion about a 30(b)(6) deposition.

THE COURT: Yes.

MR. ORENT: That was -- part of the purpose of a 30(b)(6) is to make -- is to provide answers as to some of these underlying questions, but the burden shouldn't be on the plaintiffs in the first instance to identify the custodians with the most information. What is difficult for me is that we've been given hundreds of names in corporate org charts and the defendants have said, here are the 26 people we've already produced in state court.

We've also seen -- based on the underlying -- some information that we've been provided, we know -- you know, for example, there's only, I think, 19,000 pages of e-mail have been produced in the state court litigation.

So we know that there's a lot more out there. We know that there's more than 26 people. There's

probably two or three times that that have relevant information to this case. But we've not been given the identities of those information -- of those individuals and have been told, you tell us what you want.

And so the defendants have that information by way of knowing who's been there, who -- who -- presumably they talk to their client and their client readily knows who these individuals are that worked on and had experience with each of the products that are in issue in these cases.

So it shouldn't be the plaintiffs' obligation to come forward and essentially guess on org charts who the people with information might be. The defendant knows this information. It's part of their obligation and there shouldn't be a burden shift to them.

THE COURT: Okay. Now, they've said, we define our data sources, we -- some are custodial, some noncustodial, and then we send it out, it's collected, it's processed. He just laid that out.

What part of the process as he just described it to me do you take issue with?

MR. ORENT: Where the stumbling block is is not on anything within the process except for the who. That is --

THE COURT: Okay. So they've named 26

individuals and that's after negotiating and working with the state court folks. All right. And so, really, it's just a question of -- the problem as your -- as you see it is on the front end, figuring out who the people are that are going to have the information, that are going to be the hits, if you will, that you need.

MR. ORENT: That's the first stage of it, correct.

THE COURT: Okay. All right. So how -- how -- they've said 26. How do you know there are, you know, 60? How do you know that?

MR. ORENT: Largely by experience, your Honor, and having done cases against companies in medical device cases, having looked through and seen the org charts and see that we're talking about approximately eight or nine years, and then potentially some developmental years before that, of relevant custodians, that the chances of there being only 26 individuals that are involved in a product is extremely unlikely when you look at all of the sales representatives and the regional managers and you look at regulatory and the folks who do the safety and efficacy and you look at all of the various departments of people who have to interact, marketing, across three companies -- and keep in mind, the 26 are only from one company. We still

haven't heard from the other two defendants as to the relevant custodians.

Additionally, the time period is different in this litigation versus the state court litigation. We have more years on the back end or the close end to us.

So the two don't have an identical overlap and we're still being told it's the same 26 people.

THE COURT: Okay. Have you said that you got 26 and that's all you get?

MR. HERSH: No.

MR. CHABOT: No. And, your Honor --

THE COURT: I need to know what it is I have to decide because what I'm hearing in terms of a dispute, it ends up you're not really disputing the process. As he just laid it out, you don't really take issue with what he just said. You agree that TAR then comes in when they've basically done the original collection, initial collection processing and they've got a pile of potential doc. You don't -- you don't -- you're not saying TAR comes in at the front end, right?

MR. ORENT: Correct. And, your Honor, just to be clear --

THE COURT: Okay.

MR. ORENT: -- that's why I think that we're not challenging that and that's why I think our papers

reflect what we thought the issue was going to be today, which is somewhat different than the issue that the defendants briefed in their letter, because I thought that once we get past the issue that we -- we enumerated in our papers, that when we meet on Friday at defendants' offices that we might be able to overcome this last issue.

So that's why the issue that we framed we thought was more important and ripe for court determination, to be quite honest with your Honor.

THE COURT: Okay. And I did find that these were sort of going past each other. I think they're both dated the same date. We need to fix that, obviously, so that what you give me is something that is actually in dispute and it's something that I can decide because I think ultimately we're going to have to figure out this informal process such that you give to them your letter; here, Judge, these are the issues as we see them. Then they can see what you claim to be the nature of the dispute. I'm guessing you didn't see this until after --

MR. CHABOT: I think that's right.

THE COURT: -- after you had already written and submitted your letters.

MR. ORENT: Correct.

THE COURT: So I think what that means is that the dispute might be a little more narrow, maybe even a little easier -- easier to solve because I think that what you have is a willingness on this side of the table to probably, you know, adjust this issue of custodians and work with you on that.

To the extent you look at the charts and you look at the info they've provided document -- documentation on with respect to organization, you could point out that it just seems that there should be custodians under this department.

Again, I'm speaking with -- out of context, really, because I'm not in the middle of it, in the weeds on this, but it seems to me that there hasn't been enough meet-and-confer with respect to really what the dispute is.

And so I'm listening to what ends up being an issue that I don't think I really even have to decide. I don't have to decide whether TAR comes in on the front end, which I'm thinking, frankly, I need to hear more briefing on it. I might need to hear from experts. I have no idea how to decide that complicated question without more info. I just don't -- I don't have any familiarity with it. But, ultimately, that's not -- that's not really the dispute from your perspective.

And so I am not inclined -- I'm not sure exactly what it is I'm supposed to decide. I -- I obviously read your letter, but --

MR. ORENT: So, if I might, your Honor, the issue, as we saw it, was whether or not whatever approach we take to the discovery of ESI, whether it's TAR or keyword search, it then gives a particular result. And we want to know what the rules of the game are; that is, are we entitled to everything that the computer kicks out or when we start doing paper discovery, are we only entitled to those documents that are found by TAR and responsive to individual requests for production?

Likewise, for requests for production, are we entitled to everything in the company that that produces or only those things that are produced as a result of ESI hits?

The reason that this has come up is because this has been the issue that's been litigated over and over in state court is currently the scope of briefing there, and, quite frankly, the defendants have taken in our meet-and-confer process the same position as they're taking in the state court. We want to learn from what's happening in the state court and we want to just know, you know, how do we fashion this as we go forward. We

want to be very transparent with the defendants about what our concerns are and what we want to do is we want to avoid a position where we're given only those documents that are both responsive to ESI searches and responsive to RPDs.

MR. CHABOT: Your Honor, I can knock one of those two issues right out, which is that we've never taken the position anywhere that our discovery obligations are limited to the results, reviewed or otherwise, of these ESI searches.

THE COURT: Okay.

MR. CHABOT: We recognize that we are going to go in, we are going to do our targeted, reasonable search for potentially responsive information when we get the requests, and we are going to turn over that information probably before the ESI searches even happen, which is what happened in the state court. And I'm not sure I'm understanding why this is being described as a dispute that's occurred in state court. I don't believe it has.

The second issue with respect to whether or not we're just going to turn over the whole lump of things that get generated by the computer-assisted review or, you know, whatever term you want to call it, you know, we -- we are insisting on our right to conduct

a responsiveness review. I'm sure we cited the Hynes case, your Honor, which I think has probably the clearest statement of -- Hyles, I'm sorry, H-y-l-e-s. It's Southern District of New York and the citation is 2016 Westlaw 4077114.

Again, I think that it's relatively well accepted that we can't be forced to just turn over everything that's responsive to a search term. In fact, I think probably the best example is maybe the Bombardier case that plaintiff cited in their brief, where I think that precise position was described as bordering on being baseless. I just don't think it is supported under the Federal Rules of Civil Procedure.

If you look at -- for example, your Honor, Rule 26(a)(1) has evolved since it was initiated in 1993. In 1993, Rule 26(a)(1) required parties to just automatically turn over every document that was relevant to a claim or defense that had been particularly pleaded. I'm paraphrasing, but there was a much stronger initial disclosure obligation. And if you look at the authority describing why it changed -- and here I'm citing 8a Wright & Miller Federal Practice and Procedure, Section 2053.

They basically say that the 2000 amendments to Rule 26(a)(1), which is our initial disclosure

obligation now, which is to identify those documents that you believe you have reason to know you're going to use to support a claim or defense at the time and then to supplement those as your understanding of the case evolves. That limitation to the initial disclosure rule was because the -- I was trying to just get a quote here, your Honor. I apologize.

THE COURT: That's all right.

MR. CHABOT: The most vigorous and enduring criticism of the initial rule was that it might require a party to volunteer harmful material without a discovery request.

You know, I think that -- I think that we're entitled to know what the plaintiffs think is relevant rather than trying to divine what they think is relevant, which can be sort of a shifting concept in a products liability case of this sort of scope.

And so I do think we are going to stand on our ability to respond to a request for production, to identify this document is responsive to that request and this document is responsive to that request, and not to simply use a computer-assisted program as a proxy for just relevance and turn all of that information over.

THE COURT: Okay. How does the TAR get used in your process?

MR. CHABOT: We would look at using TAR because it -- once we've collected -- we've identified the targeted sources, we've gathered them, we've got them in our database, we can use TAR to figure out if it does a good job of basically substituting for a first-level human review, making the -- sort of the initial yes or no calls, you know --

THE COURT: How do you determine whether it does or not?

MR. HERSH: Based on certain -- so it extrapolates the coding that humans do, based on the seed set. So they would do a seed set, review a coded, and then the computer would learn from that. Then you would review what the computer has coded and make modifications where necessary, the computer learns from this iterative approach --

THE COURT: Uh-huh, uh-huh.

MR. HERSH: -- and that's how -- that's how it works.

But to get to the -- to go back for one second, keywords -- you know, there's a vast, you know, universe of ESI out there. Keyword searches are used to identify potentially responsive information; it's not to identify responsive information. It was never contemplated in the state court that we would just be

turning over everything that was hit on a keyword search term. That's why we asked for six months to do it.

And so we've always been of the position that you use the keyword search terms as a funnel and, you know, you funnel down -- however many documents down to a smaller subset and you review that subset for responsiveness to plaintiffs' request for production that you produce and that's the predominant way this is done in most courts that I'm aware of.

Now, in -- maybe in plaintiffs' experience, because he deals with huge companies, the burden is too great and that's where the TAR thing comes in, but we've always been of the position that we need to review the documents to see if they're responsive before -- before they're produced.

MR. ORENT: Your Honor, I just want to point out that this again implicates the issue of the confidentiality designations in that the defendants are insisting on the front end that they review each document, yet are seeking to and have, to date, greater than 97 percent of documents that they have marked and reviewed have been marked as confidential, which is our concern, and that if they're going to do so, which is their prerogative, then they would not be able to avail themselves of the reading room provision. And, you

know, that's plain and simply our point with regard to that issue, that it's an election.

Going on to this issue of responsiveness versus relevance, this is hotly contested and all we want to know is what the rules of the game are because we don't want to be playing by a different set of rules. If what the defendants is suggesting is, in fact, the case and we know that on the front end going into it, quite frankly, we're going to give you 200 requests for production that have very specific subparts and then they're going to spend all eternity, you know, trying to answer, but they're going to be very detailed and they're going to be very specific or, you know, we can do this other approach. But if I know what the route is going forward, I know how to -- how to phrase my requests for production.

And that's all I'm looking for at this point is just an indication from the Court as to what strategy we need to employ because this is -- is pertinent to the ESI searches that are going to be done. That is, do we agree to ten search terms that might be more broad and generate 270,070 hits -- excuse me, 270,000 hits or do we need 85 search terms or do we use TAR. Those questions are directly tied to what we get at the end result and how we --

THE COURT: Uh-huh.

MR. ORENT: -- serve that document that goes with it, the request for production.

And so, really, I just need a read from your Honor as to what the ground rules are --

THE COURT: Yeah.

MR. ORENT: -- so that we can play within that.

THE COURT: Let me ask just a basic question about meet-and-confer. Obviously there's been a month between. Have you had the weekly phone call that you envisioned?

MR. ORENT: We have, your Honor.

THE COURT: Okay. So you've conferred weekly.

MS. AYTCH: Weekly. Sometimes --

THE COURT: Okay.

MS. AYTCH: One time I was out, so twice weekly.

THE COURT: And with respect to this ESI question, how many conversations have been had between the parties about this?

MR. ORENT: I would imagine three or four.

THE COURT: In the last month?

MS. AYTCH: Every weekly call --

MR. MATHEWS: Almost every conversation.

MS. AYTCH: -- it's come up.

THE COURT: Okay. So you've been trying to work this out. Okay.

MR. ORENT: But from -- from plaintiffs' --

MR. MATHEWS: Go ahead.

MR. ORENT: But from plaintiffs' perspective, once we understand, you know, the Court's thinking on an issue like this and the way -- the way I've sort of come to understand it is from the simple Venn diagram that the state court has used -- and I'd be happy to give a copy to your Honor, the defendants have seen this as well -- is what -- is what universe is going to be -- sorry about that.

THE COURT: Okay. I can give you what my sense of this is.

First of all, let me just say there are two things that you wanted, the plaintiffs wanted: One was an order from the Court that the defendants were obligated to identify and produce responsive materials under Rule 26 and 34 and that their obligations were not fulfilled just by the ESI search.

Defendants concede that one; they agree in that they have never envisioned their obligations as limited solely to the ESI. So that's -- I think that issue -- there's no need for any ruling from me on that.

You both, frankly, agree on that.

With respect to the issue of compelling the defendants to produce all relevant documents that they identified through an ESI search regardless of whether those documents were requested in a specific request to produce them, I am -- I am not inclined to grant that. That does not -- that seems to impose on the defendants a burden that is extraordinary and I am not inclined to grant that at this point.

So that, again, is denied unless -- now, the defendants specifically said they wanted further briefing, they wanted the opportunity to have further briefing. I presume in the event that I was inclined to require you to undergo such a broad --

MR. CHABOT: Yes.

THE COURT: -- determination of what is or isn't relevant -- you may see a document that you think is perhaps relevant, but it hasn't been requested and your argument is they should make their request, they should tailor their request to those things that they believe are relevant and then you produce those.

MR. CHABOT: Correct, your Honor.

MS. AYTCH: Correct.

THE COURT: That -- that just seems -- and, again, I know this is an extraordinary case in terms of

the nature of this MDL, but, again, you can bring to my attention issues as they arise in this -- as you do start beginning to actually conduct discovery. And I am, you know, open to hearing, you know, further issues that -- of concern that you want to have me help you resolve, but at this stage, I'm not inclined to give you that order.

So is -- is that the extent of the dispute that is before me today?

MR. ORENT: That -- that is from plaintiffs' perspective, your Honor. That guidance is extremely helpful because it will allow us to understand what the Court's thinking is likely to be in the event that an individual instance comes up.

THE COURT: Yeah.

MR. ORENT: So that gives us the ability to negotiate with the defendants on certain issues that have been holding us up to understand where the Court is coming from so that we can, when we craft our documents, take that into account and that's something that the state court folks didn't have the advance understanding of. And so even if we simply request as part of an RFP, you know, all documents responsive to keyword search terms with the following hits, you know, we might do something like that. And so we know now at the front

end to do that and so that's extremely helpful, your Honor.

THE COURT: Okay. Good.

Okay. Is there anything else with regard to the ESI dispute that we need to talk about?

MR. CHABOT: No. It sounds like there's going to be more discussion on this in the future, but I don't think it's for today.

THE COURT: Okay. Now, I know the coordination, there was an issue about coordinating the state litigation.

MS. AYTCH: Yes.

MR. MATHEWS: Your Honor, if I may, real quick, back to the ESI issue, we're having an in-person meeting next week specifically on the ESI issue.

THE COURT: Okay.

MR. MATHEWS: We have June 22nd, I think, as the next hearing date.

MS. AYTCH: Correct.

MR. MATHEWS: We thought that it may be -- either in the June or July hearing date -- it might make sense to carve out a chunk of a morning to have this dispute over ESI heard and briefed and dealt with and then in the afternoon to conduct perhaps the science day, like we had discussed at the last hearing. And

maybe there's not going to be an ESI issue come June or July, but if we could carve that out for the Court, that might help us to continue moving that issue along.

THE COURT: All right. But I don't want to reserve a time for a dispute and thereby encourage it.

MR. MATHEWS: Understood. Understood.

THE COURT: But I'm happy to restructure the day and all you need to do is talk to my case manager. If you are both in agreement on restructuring it such that, you know, you have time to argue something more formally, you can speak to her and I will certainly be accommodating in that regard.

But with respect to the ESI issues, my hope would be that you could come up with your protocol and begin -- you know, begin the process of actually getting -- getting some documents and conducting further discovery, ongoing discovery, as opposed to -- I'm not understanding where there may be remaining large disputes.

MR. HERSH: Today was actually somewhat revealing to me on several fronts.

I believe, and I don't want to speak for plaintiffs, but that they've moved off the position that was part of the several talks we've had, which was -- you know, they're not going to do a custodial-based

approach. TAR is something that's done on the front end to capture documents on the system. And then keyword searches, they seem more open to today than in the past.

So just having this conversation has been somewhat enlightening and I feel confident that we're coming much closer to a resolution on the ESI issues. I could be wrong.

MS. AYTCH: I -- I want to clarify just, again, going back to Case Management Order 3. By the June 12th deadline is when an ESI protocol was supposed to be submitted or I guess if we could not come to a resolution then the briefing.

Is that still the plaintiffs' understanding?

MR. MATHEWS: Yes.

MS. AYTCH: Okay. So --

MR. MATHEWS: Yes.

MS. AYTCH: So you were then talking about potential briefing, if necessary, by the June 12th date.

MR. MATHEWS: I was just throwing it out there to get something on the calendar, but I understand the Court's position on that as well. And June 22nd would certainly be aggressive.

THE COURT: Okay. Good.

What about the coordination dispute?

MR. ORENT: The coordination dispute, in

plaintiffs' opinion, and I shared this with defense counsel, I think it's largely academic at this point, to be perfectly honest with your Honor.

We have two very different versions of a draft at this point and to be quite honest with your Honor, I think the biggest hindrance is that we don't know how it's going to work out in actuality. And so the defendants have a much more restrictive proposal than the plaintiffs.

And what the plaintiffs had originally proposed was a simple one paragraph, the parties shall essentially do everything that they can to coordinate. We didn't want to bind ourselves and still don't want to bind ourselves to something that someone else has done in terms of discovery instruments, in terms of depositions, for a whole variety of different reasons, including the lack of complete overlap between years and products.

So we -- we suggested doing something from a very broad 10,000-foot perspective and if the defendants feel that there is something that we are not doing appropriately or that -- that -- that there are inefficiencies in that process, then they should come to us, we should meet and confer on it, and come up with a solution rather than crafting an order that is overly

restrictive on the front end.

And I -- I still am of the belief that we should continue to work together, that there's not necessarily a need to coordinate. It's in both of our best interests to continue to work with the state court. I think it's probably evident to everybody that I speak very regularly with Mr. Matthews and his colleague, Mr. Wages, in the state court litigation and that we do many things together. There are some things that we do differently. And we'll continue to do that. But we don't want to expend twice the money and twice the resources on the plaintiffs' side. That's not in our clients' interests and it's also not in defendants' interest. So it's in everybody's interest to move it along.

And I think if we focus so much on the order as opposed to the practicality, we're sort of missing the mark. And so from plaintiffs' perspective --

THE COURT: It's an art, not a science.

MR. ORENT: Exactly.

THE COURT: Okay.

MS. AYTCH: Before I begin, do you mind if I show the Court the orders?

MR. ORENT: No. In fact, I have the red lines with the --

MS. AYTCH: I do -- I do as well. You can show her your version. I was going to pass it to you first to verify.

MR. ORENT: No, no, I trust you.

MS. AYTCH: Okay. If you wanted plaintiffs' version -- this, your Honor is defendants' initial version. The red lines that you see are plaintiffs' strikes. When the plaintiff went through and gave comments, then the comments on the side are defendants' comments to the plaintiffs' red lines.

But you don't necessarily need to get into that today --

THE COURT: Are you --

MS. AYTCH: -- but I wanted --

THE COURT: -- close to resolving it, having.

MS. AYTCH: I think as --

THE COURT: -- gone through the red lines.

MS. AYTCH: -- as the plaintiff, as Mr. Orent has said, I think in a thematic way we're probably at an impasse and need guidance from the Court.

Unlike plaintiffs' position, the defendants don't see this as academic quite at all. We think this is a very practical application with regard to discovery, noting plaintiffs' point that the Court has kind of already given some guidance with regard to

coordination with depositions, but beyond that, with regard to other discovery, there is not that.

And as the Court may recall, it's always been the defendants' concern from the initial conference from our joint papers that prior to producing the documents from the state court litigation, we would like some type of formality, some type of specific structure, as to how it would be coordinated to reduce any kind of duplication.

And so the idea of we'll just do our best not to, without any kind of guidance or specificity, is really where the impasse is coming from an academic perspective from the plaintiffs, but a practical perspective from the defendants.

So the competing orders, just at a bird's-eye view, is a one paragraph versus, you know, some more what I would call meat on the bones.

As the Court will see, if the Court looks at the red line version, there are certain strikes that the plaintiffs have made that the defendants are okay with; there's other strikes that the plaintiffs have made that you'll see from the comments that the defendants are not okay with. But I think if the parties had some guidance as to whether or not the Court really did mean coordination in a more global, goal-oriented way, rather

than a more specific let's decide how coordination would work, that would probably get the parties in a greater posture to coming up with an order.

THE COURT: Okay. Now, again, help me with this a little bit, but I'm quite sure that the manual encourages goal-oriented --

MS. AYTCH: It --

THE COURT: -- coordination.

MS. AYTCH: -- does. Specifically, it speaks about it at a couple of different points.

So the manual, in Section 11.423, that specifically other practices to save time and expense -- one of the bullet points on page 56 and 57 specifically talks about coordination, coordination orders, coordination of common discovery. It's a couple of paragraphs, so I won't burden the court reporter with reading that off.

Also, again, on the manual at Section 20.14, Coordination between Courts, specifically talks about avoiding duplicative discovery, how to go about that in coordination orders. That's at page 227 and 228.

THE COURT: Yes, to the extent you need guidance from me, I would be inclined to support a coordination order that was more helpful and more specific, more goal-oriented up front.

So with that in mind, I'm hoping that you can reduce the red lines and come to some sort of proposal. And to the extent there are red line issues you just can't resolve, you can, I think, submit that pretty easily to me in a document like that with those limited red lines that you can't agree on and then I can -- I can decide.

Does that make sense?

MR. ORENT: It does, your Honor.

THE COURT: Okay.

MS. AYTCH: Yes.

THE COURT: All right. What other issues?

MR. CHABOT: I think that's all on my agenda, your Honor.

I don't know about yours.

THE COURT: All right. The master complaint, master answer, and then you seek my approval, formal approval via a short, endorsed order; is that how that works? I think that's how we envisioned it in the --

MS. AYTCH: For the short form complaint, correct. Although the parties, I believe, have come to a complete agreement on that, we do need to seek the Court's approval of that short form complaint.

THE COURT: Not with respect to the master complaint and master --

MS. AYTCH: The master complaint, my understanding, is what it is that's filed and then we're preparing for our master answer and our responsive motion.

THE COURT: Okay. So there's no Court approval that you'd be waiting for with respect to those two.

MS. AYTCH: No, just the short form complaint.

THE COURT: Okay.

MR. ORENT: That's correct. And we've reached full agreement as --

MS. AYTCH: And we've reached agreement.

MR. ORENT: -- as my colleague suggested.

Likewise, we've reached agreement on the plaintiff profile form, plaintiff fact sheet; we're close on the enabling order and then we have a little bit of work to do on the defendant fact sheet, but I am optimistic that we'll reach agreement on those items by the next hearing.

THE COURT: Okay. And then before the next hearing, I think it makes sense in terms of timing, just make sure that I think you somehow see one another's responses so that they can be, I think, somehow more in sync and then this process will be -- I'll have more time to think about it and be clearer on what the scope

of the disagreement is.

So -- go ahead.

MS. AYTCH: I believe, your Honor, we were also going to ask if the letters, as you received them, in terms of the form and the general length with our letterhead, we were --

THE COURT: Perfect.

MS. AYTCH: Okay.

THE COURT: Perfect.

MS. AYTCH: Okay. We were concerned about the one-page limitation and --

THE COURT: No, no, no. It was perfect --

MS. AYTCH: Okay.

THE COURT: -- and it was just a perfect combination of fact with law and citations --

MS. AYTCH: Okay.

THE COURT: -- and it was just enough for me to know how little I knew about a certain topic. And I was thinking, ultimately, reading these, at least with respect to the ESI, okay, I am going to need a full-on hearing here. I'm going to need perhaps my own expert to -- you know, a neutral who's going to tell me which way to go on this.

It doesn't appear that I'm going to need that, at least as of yet, and so I take a deep sigh of relief.

And my hope is that you can work out your ESI protocol without me having to become too much of an expert in that process.

Obviously, as individual disputes arise, they're in a context, a factual dispute or a discovery dispute that I can decide. But with respect to rather large issues like what is the ESI protocol going to be, that was something I felt like I needed -- I would probably need more briefing on. I'm glad to help you get to a point, though, where it looks like at this point there's a possibility you can do it -- do your protocol without any Court intervention at all.

So, yeah.

MR. CHABOT: Your Honor, can I -- just a housekeeping matter.

We were hoping that we might be able to get speed passes for our colleagues from out of state. I apologize for doing this on the record, but if it's okay with you, having a -- you know, a court say it's okay for out-of-state counsel to get EZ passes to get access to the court, to bring their electronics in so they can have an iPad instead of all the paper that you see Attorney Aytch lugging from Florida to here.

THE COURT: What do you mean by EZ pass? Translate that for me into --

MR. CHABOT: In New Hampshire, admitted counsel and previously -- I can show you.

THE COURT: Just your Bar card?

MR. CHABOT: It's an ID card that they give you at the front -- at the clerk's office.

THE COURT: Absolutely.

MR. CHABOT: Okay.

THE COURT: I'm happy to have you have that. I think you should have that. This is where I keep all my manual -- I don't lug the document around, believe me.

MS. AYTCH: I got in a bit of trouble last time with my iPad, so conformed to --

THE COURT: Yeah --

MS. AYTCH: -- the rules this time.

THE COURT: -- I can't go anywhere without my iPad either. So -- and I'm sure that New Hampshire counsel can help make that process happen, but you have my permission.

MR. CHABOT: Thank you, your Honor.

THE COURT: And just speak to my case manager. If there are any snags along the way, I will take care of them for you. Just let her know what it is you need and I'll make that happen.

MR. CHABOT: Much appreciated, your Honor.

MR. ORENT: Thank you, your Honor.

THE COURT: All right.

MR. MATHEWS: Judge, last time we were here, we briefly mentioned the need for or perhaps the Court's desire for a science day. Has the Court given any more consideration to that?

THE COURT: Well, I -- I haven't been presented with an issue yet where I feel the need. I was feeling that need, obviously, with the ESI issue, but until I have a need for it, I'm not seeing science day as something that would be imminent. But if you think just a general introduction to the products and how they work and the science behind them -- I mean, I'm obviously making this up as I go along.

Thinking out loud, if you think there's a science component that would help me frame every other issue that comes up in the case and it would be early in the case, I'm happy to have you guys confer -- meet and confer and propose that.

But science without context is going to be lost on me probably too early in the case, but -- but, you know, I'm open to a proposal, a joint proposal on that.

MR. MATHEWS: We'll meet and confer about it.

THE COURT: Okay.

MR. MATHEWS: Thanks.

THE COURT: All right.

MR. ORENT: And, your Honor, also, I guess as a matter of housekeeping, my recollection is Case Management Order 3 requests a joint discovery plan --

THE COURT: Yes.

MR. ORENT: -- by the 12th.

THE COURT: That's after you do your answer, your -- your complaint, your answer, and then I think you file that.

MR. ORENT: Correct. The deadline, though, was set at, I believe, June 12th.

MS. AYTCH: Correct.

MR. ORENT: And I'm not sure, but I think we calculated that to be the same date as the master answer. Is that wrong?

MS. AYTCH: The master answer is May --

MR. CHABOT: May 29th.

MS. AYTCH: Well, May 31st, because May 30th is Memorial Day. So it is a couple weeks after the master answer.

Is that okay?

MR. ORENT: Yes. So --

THE COURT: And if you need an extension on that and you're working toward a discovery plan that I'm

literally going to just approve because you both agree on it and you need an extension, just know that I will grant you that.

MR. ORENT: Okay. We will be in touch with the Court and let the Court know, but we seem -- these weekly meetings seem to be helping, so -- and I think today was helpful for everybody to better understand the other side's positions and I think we've all moved a little bit off of our original positions. So --

THE COURT: Uh-huh.

MR. ORENT: Thank you, your Honor.

MR. CHABOT: Thank you.

MR. HERSH: Thank you.

MS. AYTCH: Thank you.

THE COURT: Thank you all very much.

So we're going to end this call unless anybody on the call would like to say something.

I hear nothing. Therefore, this hearing is adjourned and --

MR. HILLIARD: Thank you, your Honor.

THE COURT: -- we will hang up unless you want more of that Muzak.

Take care.

MR. HILLIARD: Thank you.

(Proceedings concluded at 4:42 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: 5/25/17

Liza W. Dubois

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