

**NO COPY OF THIS TRANSCRIPT MAY BE MADE PRIOR TO 9-27-2017

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

* * * * *

IN RE: ATRIUM MEDICAL CORP. *
C-QUR MESH PRODUCTS LIABILITY * 16-md-02753-LM
LITIGATION * June 22, 2017
* 2:15 p.m.
*
*
* * * * *

TRANSCRIPT OF STATUS CONFERENCE
BEFORE THE HONORABLE LANDYA B. MCCAFFERTY

APPEARANCES:

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

Benjamin P. Lajoie, Esq.
Bailey & Glasser, LLP

Susan A. Lowry, Esq.
Upton & Hatfield, LLP

Via telephone: Russell F. Hilliard, Esq.
Upton & Hatfield, LLP

Anne W. Schiavone, Esq.
Holman Schiavone, LLC

Josh B. Wages, Esq
Blasingame Burch Garrard & Ashley

For the Defendants: Enjolique D. Aytch, Esq.
Elan S. Hersh, Esq.
Akerman, LLP

APPEARANCES CONTINUED:

For the Defendants: Pierre A. Chabot, Esq.
John E. Friberg, Esq.
Wadleigh, Starr & Peters, PLLC

Via telephone: Hugh J. Turner, Jr., Esq.
Akerman, LLP

Court Reporter: Susan M. Bateman, LCR, RPR, CRR
Official Court Reporter
United States District Court
55 Pleasant Street
Concord, NH 03301
(603) 225-1453

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

2 THE COURT: Okay. Let me just begin this
3 status conference by putting our case on the record with
4 our docket number.

5 This is the Atrium MDL litigation, and the
6 case number is 16-md-02753-LM.

7 And as we've handled all of these status
8 conferences, I'm going to ask those who are on the
9 telephone who are not part of lead counsel to please
10 mute their phones.

11 What we'll do is begin by having everybody who
12 is present introduce themselves and just state your name
13 and spell your last name for our stenographer, and then
14 what we'll do is as people speak, if they're speaking
15 via telephone, if they could just introduce themselves
16 and state their name for our stenographer.

17 Let's begin with Attorney Aytch.

18 MS. AYTCH: Good afternoon.

19 Enjolique Aytch, counsel for the defendants.

20 A-Y-T-C-H is the last name.

21 MR. HERSH: Good afternoon everybody.

22 Elan Hersh on behalf of defendants. The last
23 name is H-E-R-S-H.

24 MR. CHABOT: Good afternoon.

25 This is Pierre Chabot also for the defendants.

1 The last name is C-H-A-B-O-T.

2 MR. FRIBERG: Good afternoon.

3 John Friberg, F-R-I-B-E-R-G, for the
4 defendants.

5 MR. LAJOIE: Ben Lajoie for the plaintiffs,
6 L-A-J-O-I-E.

7 MS. LOWRY: And Susan Lowry for the
8 plaintiffs, L-O-W-R-Y.

9 MR. ORENT: Jonathan Orent for the plaintiffs
10 as well, O-R-E-N-T.

11 THE COURT: All right. Would those on the
12 telephone go ahead and begin introducing themselves,
13 those who are here as part of the lead counsel team. Go
14 ahead.

15 MR. TURNER: This is Hugh Turner on behalf of
16 the defendants, T-U-R-N-E-R.

17 MR. HILLIARD: Your Honor, this is Russ
18 Hilliard, plaintiffs' liaison counsel, H-I-L-L-I-A-R-D.

19 THE COURT: All right. So we only have two.

20 MS. SHIAVONE: Anne --

21 THE COURT: Okay. Go ahead.

22 MS. SCHIAVONE: Anne Schiavone,
23 S-C-H-I-A-V-O-N-E, as a member of the plaintiffs'
24 executive committee.

25 THE COURT: Okay. So we only have three then

1 via telephone and everyone else has identified
2 themselves.

3 All right. Let's just start with the joint
4 agenda. I've reviewed that. It looks as though we're
5 close to agreement on many items. As far as I can tell,
6 the only major area of disagreement is item No. 5 with
7 respect to lifting the stay of discovery, and you may be
8 able to update me with respect to paragraph 4 which may
9 play a role in my decision on paragraph 5.

10 So I suspect, based on what's written here and
11 the lack of any notice of any dispute, that the
12 protective order is well on its way, paragraph 1. Is
13 that accurate?

14 MS. AYTCH: That is accurate. We're 99.9
15 percent there. It's just the issue of a footnote
16 regarding the defendant Getinge AB reserving its defense
17 for lack of personal jurisdiction, but I think we're
18 hammering that out and then that should be filed with
19 the Court within a couple of days.

20 THE COURT: All right. And the coordination
21 order, the same?

22 MS. AYTCH: The coordination order is done.

23 THE COURT: Excellent.

24 MS. AYTCH: And I anticipate that it will be
25 filed with the Court within the next day or two.

1 THE COURT: All right. And then paragraph 3.

2 MR. ORENT: I would just add I think we've
3 agreed with the protective order. I don't know if you
4 saw my latest e-mail.

5 MS. AYTCH: I have not. I'm sorry.

6 MR. ORENT: So I think we are in agreement now
7 on the protective order.

8 THE COURT: All right. So that just needs to
9 be finalized and filed.

10 And then paragraph 3, where are you on all of
11 those?

12 MS. AYTCH: Sorry. I was just getting there.

13 We, the defendants, owe the plaintiffs our
14 redline sleeves for the joint collection order. I think
15 that we are pretty much there. We need to get the
16 exhibits that it references, but otherwise I think we're
17 there, and as well as the enabling order. We're still
18 hammering out the other profile form and fact sheets,
19 but I don't anticipate that there's going to be an issue
20 that needs to be raised with the Court. I think that
21 we'll be able to come to a resolution on that. And in
22 the event that that's not the case, I'm sure a quick
23 telephone call as has been contemplated by CMO 3 will
24 get us there.

25 THE COURT: All right. So no need to discuss

1 paragraph 3 any further.

2 All right. Where are you with respect to
3 paragraph 4 in the ESI protocol?

4 MR. ORENT: Well, your Honor, I'm happy to
5 report that we have spent a lot of time working
6 together, and Mr. Hersh and Mr. Chabot, Mr. Lajoie and I
7 had a lengthy meeting yesterday, and I believe we've
8 reached agreement on an ESI protocol.

9 We have to put some final language together,
10 but prior to leaving the meeting we did put down a term
11 sheet which essentially itemized in plain English what
12 the process was going to be, and we all signed it so
13 that there is a record as to what the agreement is and
14 so it's now just a matter of putting it into the form
15 which I think will be relatively easy.

16 I think all sides made significant concessions
17 in order to get this done in this period of time.

18 THE COURT: That's great. That's very good
19 news, and that plays into paragraph 5. What I hear you
20 saying is that this status conference might be very
21 short. No, huh? Because it looks as though paragraph
22 5, and you quoted from case management order No. 3, that
23 the stay is to be lifted on general phase discovery once
24 the parties file and I approve a proposed ESI protocol
25 which looks like it's fairly close, a proposed

1 protective order which is essentially done, a proposed
2 coordination order which is apparently done as well, and
3 then the last thing that would be necessary is just a
4 discovery schedule.

5 And so we're close, it looks like, to lifting
6 the stay as to general phase discovery. Tell me why I'm
7 misguided in my view of that.

8 MS. AYTCH: I don't think you are, your Honor.
9 I know that we still have a deadline I believe of July
10 12th for all of these documents, and I don't anticipate
11 that we will reach that so any lift of the stay prior to
12 what is probably two weeks to a month off, I don't think
13 that there's grounds to necessarily do that prior to the
14 time when it would ordinarily arise under the case
15 management order, specifically where we still have to
16 hammer out -- although I think we're close and will
17 still meet that deadline -- with regard to the actual
18 general discovery documents, the plaintiffs' form and
19 the fact sheet.

20 As Mr. Orent stated, I think we need to nail
21 down the final precise language of the ESI protocol
22 which would also go into the general discovery.

23 So we don't believe that a lift of the stay as
24 of today is necessary since we're on track to have all
25 of this done and to the Court by the July 12th deadline.

1 THE COURT: And how are you on the discovery
2 schedule and putting that together? Is that --

3 MR. ORENT: We have left that till last.

4 THE COURT: You don't envision that being an
5 area of massive dispute?

6 MR. ORENT: I don't, your Honor. However, I
7 just want to raise a couple issues.

8 From a general principle, we don't necessarily
9 object to waiting for the orders to be entered for the
10 release of the stay. However, there are a couple of
11 things that we would like to be able to do in order to
12 maintain pace with the state court litigation.

13 So we're hoping that individual plaintiffs'
14 counsel could execute the attachments, the protective
15 order for example, to have access to the state court
16 documents if defendants wouldn't oppose that. Even
17 though you'll be ultimately producing them to us under
18 the ESI, if we could at least begin to look at them with
19 our state court colleagues, I know that they are in the
20 process of noticing depositions in the near term and
21 that would allow us to be on par with them and to be
22 able to be full participants. So that would be one
23 request.

24 I guess another request would be to the extent
25 that we want to at least have the ability to serve --

1 prior to our response to the jurisdictional motion to
2 have a record that we have served jurisdictional
3 discovery. We would like to at least have the form of
4 that jurisdictional discovery out there.

5 And then the final thing would be to the
6 extent that the state court does actually serve notice
7 of deposition, to get the negotiation process for dates
8 going. We would like to be able to cross-notice those
9 so that we can be active participants in the scheduling
10 of those depositions as opposed to requiring the state
11 court folks to wait a few weeks for us to put these
12 final items together.

13 So these -- with those three exceptions, we
14 are fine with waiting on the discovery stay.

15 THE COURT: Okay. And notice of depositions
16 was one. Then there's jurisdictional discovery, two.
17 And then was the third that you simply wanted to just
18 have access -- once the protective order is approved,
19 access to the state --

20 MR. ORENT: Correct. To be able to coordinate
21 truly with our state court colleagues and look at the
22 documents in a substantive way, understanding that the
23 production aspect of that for our own purposes is going
24 to be later on, but at least allow us to be able to meet
25 in Georgia with our colleagues and look at the

1 documents.

2 THE COURT: All right. And so what you're
3 asking for then is essentially you want a couple of
4 weeks early access at most it sounds like.

5 MR. ORENT: Correct. My concern is that to
6 the extent that the state court is getting ready to
7 serve deposition notices or is going to be working
8 toward specific depositions, we don't want to be far
9 behind them. I think for purposes of coordination this
10 few weeks might be necessary to make sure that we're up
11 to speed and able to be active participants so that
12 we're not doing depositions twice.

13 THE COURT: And the state -- knowing that
14 you're two weeks away from finalizing, the state
15 wouldn't allow you just a little leeway in terms of
16 scheduling?

17 MR. ORENT: Well, I think that they've been
18 waiting for a little bit and that they are to some
19 degree moving ahead because of their bellwether
20 schedule, and I think that -- and I certainly don't want
21 to speak for them. I know Mr. Wages and Mr. Matthews
22 aren't available today, but it's my understanding that
23 there's a fairly aggressive bellwether discovery
24 schedule and that they want to be sure that they're
25 going to be able to get the process going.

1 So in terms of deposition notices as far as
2 we're standing, I don't think it's a matter of actually
3 taking the depositions in this couple weeks but I think
4 it's getting the notices out so that we can start
5 negotiating dates for the depositions so that -- you
6 know, we are in the summer months, and I expect that
7 there will probably be a lot of back and forth with
8 people's vacation schedules and things of that nature to
9 nail dates down.

10 Simply what we would like to do with that is
11 file a cross-notice so that we can be a participant in
12 those negotiations for the dates.

13 THE COURT: Okay. And tell me -- so you would
14 need to see the discovery and have access to the
15 discovery to set up those dates?

16 MR. ORENT: No. I'm treating those as two
17 separate issues. I'm sorry.

18 THE COURT: Okay. All right.

19 MR. ORENT: The discovery I think is -- part
20 of the process of selecting who goes first and in what
21 order for the depositions, those strategic decisions are
22 already being made at the state court level. And for us
23 to be able to input our preferences into the scheduling
24 the order as to which deponents might go first, those
25 sort of things, I think it would be helpful if we could

1 look in on the documents and be a part of that
2 interaction.

3 Again, this would be -- we would sign the
4 protective order and we wouldn't be able to take any
5 documents with us, but we would be able to actually see
6 the contents of them for purposes of these discussions.

7 THE COURT: Okay. And tell me a little bit
8 more about the jurisdictional discovery.

9 MR. ORENT: Well, as your Honor is aware, we
10 have received a motion from Getinge on the issue of
11 personal jurisdiction in the United States. And as part
12 of our response we anticipate suggesting that
13 jurisdictional discovery is necessary to some degree in
14 light of certain facts that were raised, the affidavit
15 that was presented. So what we would like to at least
16 do is get that process going and in motion.

17 If your Honor is not inclined to allow us to
18 actually formally serve it, we could alternatively
19 attach it to our responses as though it was -- as though
20 it will be served, but we would like the opportunity to
21 at least get it out there so that we can make the record
22 as to what we would be asking for.

23 THE COURT: But I'm sure you could put that in
24 some sort of letter alerting them as to what you're
25 going to be looking for when you actually file it.

1 The thing that confuses me a little bit is
2 just that we're talking about two weeks, but what's your
3 position with respect to these three items?

4 MS. AYTCH: With respect to item No. 1, as
5 your Honor intimated, I just feel like with the
6 protective order if we're going to be submitting it
7 within a few days, and then your Honor will take
8 whatever time that the Court needs in order to make any
9 comments or finalize that, that that may even be in
10 advance of two weeks and so then the execution of
11 Exhibit A would naturally follow.

12 I still don't know that the protective
13 order --

14 THE COURT: When you say 1 -- I just want to
15 make sure because I numbered mine probably differently
16 than presented. When you say 1, what do you mean?

17 MS. AYTCH: I'm sorry. I'm talking about the
18 idea of having Exhibit A of the protective order
19 executed in order to review the documents from state
20 court.

21 I guess the question there is that all prior
22 orders contemplated both the coordination order and the
23 protective order being approved and entered at that
24 time. But again, those two documents are both for the
25 most part ready to be filed.

1 So as to No. 1, I again just don't see the
2 need to lift the stay immediately given that it's kind
3 of right on the cusp of being ready.

4 THE COURT: So that's access to the state
5 documents?

6 MS. AYTCH: The state court documents.

7 THE COURT: Okay. Do you agree with that?

8 MR. ORENT: I guess if I could just get some
9 clarity from the Court in terms of the process for
10 actually the lifting of the stay, and maybe this would
11 take care of all of the three concerns that I have.

12 Once these three documents are entered, do we
13 then file a motion to lift the stay or is it sort of --

14 THE COURT: Well, as long as you're in
15 agreement what you could do is take care of those two
16 documents, I will promise you expedited review, and you
17 could attach an agreement to lift -- a partial lift of
18 the stay.

19 And again, we're only talking about a window
20 of a week or two before the stay would be fully lifted
21 as to the general phase discovery.

22 MR. ORENT: Okay.

23 THE COURT: So if you want to file something
24 that you would agree -- once those two documents are
25 filed, the coordination and your protective order, and

1 the exhibit is ready to go and signed, and I will
2 promise you expedited review of those, and by expedited
3 I don't mean three months. I mean a day.

4 I'll look at it and I'll study it, I'll
5 consult with my law clerks, and I will get you very
6 quickly an endorsed order if there are no problems so
7 that you can move forward.

8 And if you then would send up -- to the extent
9 you want to lift something early, ask for, you know, an
10 agreed upon partial lift of the stay with respect to the
11 state production, and you can word that however it would
12 satisfy you. I will also give you expedited review of
13 that and promise to get you that in a quick turnaround.
14 So that would address some of your concerns about ready
15 access.

16 MR. ORENT: And I think -- with regard to the
17 other two items, I think your Honor has provided I guess
18 enough guidance that we are comfortable as long as we
19 are not prejudicing ourselves in any way by having not
20 served jurisdictional discovery in advance of responding
21 to the motion.

22 I guess there is some case law requirements,
23 and the folks who are in the weeds on the brief can
24 speak to this, but certainly a plaintiff can't rest --
25 they have to aggressively seek jurisdictional discovery

1 I believe is part of the requirement. I want to just
2 make sure that we're not foregoing that by agreeing to
3 put it off.

4 So if everyone is clear that we're not waiving
5 anything and that we are fine to include it in our
6 response as attachments to the brief, then we have no
7 issue, but I just want to be careful that we're not
8 waiving anything in response to the motion to dismiss.

9 THE COURT: I'm not familiar with that law. I
10 assume I will become familiar with it.

11 Do you have any problem with the concept of
12 what he's described? He really because of the stay
13 can't serve any formal notice with respect to discovery
14 on this issue, but he could send you certainly an
15 informal letter so you have a heads-up as to what he
16 ultimately will file, and by doing it that way he's not
17 going to see some sort of waiver argument. Does that
18 make sense?

19 MS. AYTCH: Right. We will not assert a
20 waiver argument as to the lack of discovery. And if you
21 send it via letter, that's fine.

22 THE COURT: I don't know the law in that area,
23 but I can't imagine that would be a strong argument.

24 Okay. Let me ask, is there anything else that
25 you need to discuss?

1 MR. ORENT: No. I think we've made a lot of
2 progress. I think the in-person meetings were very
3 helpful.

4 THE COURT: Good. I think it would make
5 sense, and especially once we start in on early
6 discovery, some of this early litigation, it would be
7 nice to have the state court liaison present for our
8 monthly status conferences, even if only by phone, just
9 to give me an update from, you know, plaintiffs'
10 perspective as to that portion of the case.

11 Where is the state court litigation right now?

12 MR. WAGES: Your Honor, Josh Wages. I'm
13 partners with Jim Matthews who is state court liaison
14 counsel.

15 I misunderstood the Court's instruction and
16 didn't know that I was supposed to speak up as I'm not a
17 member of PEC myself, but I can give the Court a brief
18 overview of the status from the plaintiffs' perspective
19 of the state court litigation if you prefer.

20 THE COURT: That would be very helpful, and
21 then I can let the defendants, you know, update me with
22 respect to their perspective on it. But go ahead, Mr.
23 Wages.

24 MR. WAGES: Thank you, your Honor.

25 Just very briefly, there are some outstanding

1 motions pending in the state court litigation I believe
2 by both sides that relate specifically to issues in the
3 state court involving proper parties, some outstanding
4 discovery matters that I don't believe directly impact
5 anything that's happening currently in the MDL.

6 But of interest to the Court I believe is the
7 status of the bellwether process. The parties had
8 submitted their proposed bellwether protocols to
9 establish initial trials in the state court proceedings.
10 They had a few -- the parties had a few areas of
11 disagreement, but Judge Temple has resolved those
12 matters and has determined that the bellwether protocol
13 will move forward and the anticipated date of trial at
14 this point is July of 2018.

15 So we're on a fairly tight time frame in terms
16 of getting all that we need to be done between now and
17 July of 2018.

18 Judge Temple required both parties to identify
19 two cases each, and those four cases will move forward
20 with case specific discovery, depositions, individual
21 discovery of doctors, medical records, things of that
22 nature, and those cases will be worked up and will move
23 forward to trial.

24 We only exchanged our respective bellwether
25 nominations on Tuesday of this week. That was done late

1 Tuesday. So we now know what the four cases are that
2 will move forward, and the process is intended to --
3 once we get through the case specific discovery process
4 and the motions process, whether any of those cases or
5 all of those cases remain following dispositive motions
6 and the various other motions practice, that there will
7 be an additional I guess vetting process whereby the
8 judge, Judge Temple, will decide which two of those four
9 cases will then proceed to trial.

10 And it's my understanding based on the order
11 that it is Judge Temple's expectation that one of those
12 cases will go to trial in July, and then after that case
13 is tried and there is a resolution or a decision in that
14 case, then Judge Temple will decide when the second case
15 will move forward to trial. And of course the
16 bellwether process being intended to provide both
17 parties some insight and information about how these
18 cases are able to be worked up individually, what are
19 the issues, and potentially at least give the parties an
20 idea of whether there's an ability to resolve these
21 cases once there is some of that information, but that's
22 essentially where we are.

23 We do have some outstanding discovery matters.
24 But based on my understanding of what's happened in the
25 MDL, which Mr. Orent reported to me yesterday, we may be

1 able to come to a similar type agreement with respect to
2 some of those issues, but I don't want to get too far
3 into those because that's something that we haven't
4 discussed with defense counsel at this point.

5 THE COURT: Okay. All right.

6 Remind me again, how many state cases are
7 there?

8 MR. WAGES: Currently, your Honor, I believe
9 that there are a total of approximately 22 cases that
10 were filed as of let's say last month.

11 Our firm recently filed, along with Mr.
12 Hilliard's firm, a consolidated complaint in the state
13 court that I believe includes five or six additional
14 plaintiffs. So we're talking roughly 25 to 30
15 plaintiffs total. Enjolique may have a more definitive
16 number than that, but that's my understanding, your
17 Honor.

18 MR. CHABOT: The Caldwell case which was
19 recently filed was ten plaintiffs plus two consortium
20 plaintiffs. So there was twelve. That was filed. I
21 don't believe it's been served, but we have seen a
22 courtesy copy from Attorney Wages.

23 MS. AYTCH: Correct. And then the Downey
24 plaintiffs, which were collectively -- those are single
25 plaintiff cases that have been consolidated for pretrial

1 purposes only, but those are the ones from which we
2 selected the bellwether. So it's nine of those.

3 There is a Gorham complaint. That is a total
4 of six plaintiffs with one consortium plaintiff, but
5 that's one case.

6 And then there is a Brown complaint that has
7 four plaintiffs, and then there is a Hayward complaint
8 that has three plaintiffs.

9 THE COURT: All right. Go ahead.

10 MS. AYTCH: Mr. Wages did a great job
11 summarizing.

12 I will also just alert the Court that in
13 addition to all of the dates that we have a preliminary
14 pretrial conference for the first bellwether case June
15 1, 2018, and then from a prior order from Judge Temple
16 actually he wants to see the first trial around August
17 of 2018.

18 THE COURT: Okay. All right. And how is it
19 that the parties go about selecting the bellwether
20 cases? Are there guidelines with respect to that or do
21 you just simply confer and pick the two that you think
22 work best?

23 MS. AYTCH: There was litigation about how we
24 would go about it, but in the end what we decided is
25 that we would narrow the pool to the initial nine and

1 then the defendants would pick two and then the
2 plaintiffs would pick two and that's how we got to the
3 four, but there weren't actual specifications regarding
4 any characteristics as to those bellwethers.

5 THE COURT: Give me a general sense of how
6 picking the bellwethers goes from plaintiffs'
7 perspective, from defense perspective.

8 Is plaintiff selecting what would be its
9 strongest case? If you were to choose one as opposed to
10 two each side, would you simply be just choosing your
11 strongest case? How would you go about determining your
12 bellwether cases?

13 MR. ORENT: For plaintiffs we've done a number
14 of different things depending upon the court we're in
15 and just sort of what the request from the Court was.

16 I've been in state court in New Jersey, for
17 example, where Judge Higbee used to on a couple of
18 occasions provide some guidance to the parties as to
19 certain requirements as to what a bellwether might look
20 like in terms of certain features and characteristics of
21 the case.

22 I've been in other courts where you're given
23 instructions that sort of it needs to be in the middle
24 realm. It's not to be your worst. It's not to be your
25 best. There's a lot of different parameters.

1 I've done things where you essentially pick
2 whatever you want, each side, and then you cross-strike
3 each other's cases so that you're left with not the best
4 of your best but sort of somewhere in there, and then
5 I've seen the Court select. Each party makes some
6 nominations essentially and then does presentations to
7 the Court as to what they think is a good case and why a
8 case should fit in.

9 I would say for plaintiffs one of the things
10 that I always look for is a case that is focused on the
11 issues where there aren't a lot of collateral issues
12 that would need to be sorted through and so that we can
13 focus on the core issues of defect and causation so
14 we're not litigating a lot of side issues that may not
15 have any clear-cut relevance.

16 So we look at more of a case that allows us to
17 put a focus on the issues as opposed to best and worst I
18 think would be the way I would describe it.

19 But usually -- I would also add that I've
20 engaged in dialogue with defendants and oftentimes we're
21 able to come to an agreement on an approach, whichever
22 it might be, and then work with the Court to create a
23 process that works for everybody.

24 THE COURT: Do you have any different take on
25 that?

1 MS. AYTCH: No, and I was going to say what
2 Mr. Orent said regarding the latter is how Judge Temple
3 is having it. We selected two each to create a pool of
4 four, and then only if we're unable to agree on which
5 two should go to trial would we be making presentations
6 to Judge Temple. So it still contemplates that the
7 parties will get together from those two after having
8 worked it up and decide on which are the best cases to
9 try.

10 THE COURT: And how about mediation in an MDL?
11 How is mediation scheduled?

12 MR. CHABOT: In the state court litigation
13 Judge Temple has entered an order so that after the
14 first two bellwether trials he will be scheduling a
15 mandatory mediation.

16 MS. AYTCH: Exactly. Within 30 days.

17 THE COURT: So typically it doesn't happen
18 until after you've done a bellwether trial?

19 MR. CHABOT: I'm not sure that was always the
20 case.

21 MS. AYTCH: I --

22 MR. ORENT: Well -- I'm sorry.

23 MS. AYTCH: No, you go ahead. We've already
24 spoken out.

25 MR. ORENT: I've seen it done both ways.

1 And in fact I know that Judge Land encouraged
2 mediation in the Mentor ObTape MDL, and the process I
3 thought, the initial go-around, and this is going back
4 multiple years, was very valuable in that you learned a
5 lot about the cases and what the obstacles might be.

6 I would not be opposed to any discussions,
7 mediations, or anything that would provide information
8 to the parties along the way.

9 What I would simply say is that what we would
10 like is something that goes in parallel as opposed to a
11 linear chronology of events so that we can pursue
12 discovery and workup and separately a mediation track.
13 But I think that there is value in sitting with the
14 other side and understanding what their views are of the
15 core issues in the case and what obstacles might look
16 like, and that might help inform the decisions on
17 bellwether selection as well.

18 So from the plaintiffs' perspective I think
19 we're always open to that possibility. If we aren't
20 able to reach a resolution, at least it can provide
21 information to both sides.

22 THE COURT: How many cases now do we have?
23 Are we closing in on 50 at this point or -- and I was
24 going to check in with you about the future how many
25 you -- I certainly checked in with you on February 24th

1 at the first hearing and you had sort of differing
2 views. I think the defense thought maybe up to 500.

3 MS. AYTCH: Correct.

4 THE COURT: The plaintiffs thought as many as
5 a thousand as I recall.

6 MS. AYTCH: Correct.

7 THE COURT: Have you changed your views on
8 that?

9 MS. AYTCH: We still believe around 500. In
10 terms of currently how many filed, probably between 45
11 and 50, but I think around 45 is where we currently
12 stand.

13 THE COURT: Okay. And so you think at some
14 point we'll have as many as 500?

15 MS. AYTCH: As I'm evaluating the, you know,
16 objective information that I have, I think it's probably
17 around 500. I recognize that the product is on the
18 market and plaintiffs will always probably have a better
19 gauge of how many cases they're going to bring than the
20 defendants have, but I would still think around that.

21 THE COURT: And you still think a thousand?

22 MR. ORENT: Well, I think somewhere in between
23 perhaps.

24 It is our hope that folks are being judicious
25 in the cases that they file and are, you know, filing

1 cases with real injuries. By all indications that is in
2 fact what is happening now. Folks are taking the time
3 to vet their cases, which is a good thing from the
4 plaintiffs' perspective. The more folks do that the
5 more confidence we have in what this litigation is going
6 to look like. That may result in some number fewer, but
7 I think we're still in that 500 to a thousand range.

8 THE COURT: Okay. All right. And ultimately
9 right now I have pending a motion to dismiss personal
10 jurisdiction. Do I have anything else?

11 MS. AYTCH: A pending motion to dismiss on
12 fraud-based claims.

13 THE COURT: Right. All right. And you think
14 there may be some discovery with respect to one of the
15 motions.

16 With respect to the fraud motion to dismiss,
17 that one is a purely legal argument?

18 MR. ORENT: Correct. It can be decided I
19 believe on the papers.

20 THE COURT: Okay. All right. Okay. It
21 hasn't been brought to my attention, it's not ripe yet,
22 and as soon as it becomes ripe it will be sent up to me
23 and I will try to pay close attention. I can't promise
24 expedited rulings, and I don't know that you would want
25 that, but I do want to, you know, keep this case moving

1 and it's a top priority in terms of getting you legal
2 rulings.

3 So to the extent there are ways for you to
4 shorten that ripening process, it will get to me sooner.
5 So just understand that.

6 Is there anything else that we should discuss?

7 MR. ORENT: If I might just add, your Honor,
8 one of the things that Mr. Hersh and I discussed is the
9 way that the personal jurisdiction motion would play
10 into our discovery plan, vis-a-vis ESI, for example, and
11 I think we're in agreement on sort of the general way
12 that this will go in tandem. In other words, aside from
13 jurisdictional discovery the plaintiffs are going to be
14 focusing initially on the Atrium defendants as opposed
15 to Maquet and Getinge, and so to some degree we'll be
16 able to proceed as the Court is evaluating the issues.

17 And because none of these claims are truly
18 dispositive I don't know that the Court needs to feel
19 any pressure or sense of urgency on the issues if the
20 Court is inclined to take more time. We want the Court
21 to just be aware that we are not counting on the Court
22 in terms of those two issues that are ripe for briefing,
23 and that the case and the discovery plans and things
24 largely can proceed.

25 THE COURT: Understood. Okay.

1 So general phase discovery should start
2 then -- it should start before the next time I see you.
3 Is that right?

4 MS. AYTCH: Maybe a little after.

5 THE COURT: Oh, yes.

6 MS. AYTCH: I think we're only a couple weeks
7 away from the next one. So I mean I think you should
8 have, your Honor, all of the submissions by then.

9 THE COURT: Okay.

10 MS. AYTCH: But I don't foresee it being
11 another week or two off from that point.

12 THE COURT: Okay. Unless something happens,
13 unless there's some immediate dispute, it may be that
14 next month's meeting could be via telephone so you
15 wouldn't have to make the -- it's up to you.
16 Particularly if it is a status conference as simple as
17 this one. It sounds as though it was resolved very
18 recently, but to the extent you don't feel you need to
19 come in person, I'm happy to have you on the phone.
20 It's totally up to you. So just let my case manager
21 know.

22 Describe to me -- just because you are here
23 and we are essentially done with the disputed matters, I
24 can just inquire with you in general. Describe to me in
25 general terms what you agreed on with respect to the ESI

1 protocol. I don't need to get in the weeds on it, but I
2 wouldn't mind having just a general understanding of
3 ultimately what you agreed on.

4 MR. ORENT: Your Honor, we prepared a term
5 sheet, and I'm happy to share it with your Honor, or I
6 can just read it into the record. I don't know if the
7 defendants have a preference.

8 MR. HERSH: Why don't you present it to the
9 Court for review.

10 THE COURT: I can just look at it and give it
11 back to you. This is more for my own interest.

12 MR. HERSH: Sure.

13 (The Court reviews term sheet)

14 THE COURT: Okay. I've read that. Go ahead.

15 MR. ORENT: So the basic premise is that, your
16 Honor, we're going to be executing an agreement that is
17 fairly comprehensive beyond what you've seen on the term
18 sheet in terms of describing the types of metadata, the
19 sources from which will be searched, as well as the
20 technological ways of production.

21 We have most of the documents there I think
22 for those items. What we had left at last was this
23 middle section on the search, the actual search
24 protocol, and how that will be executed.

25 And so in terms of the actual document, it's

1 really taking these terms and importing them and putting
2 them into a paragraph that is waiting for it.

3 THE COURT: Okay.

4 MR. ORENT: And so really I don't know how
5 long we spent yesterday, but we spent tens of hours
6 working on this collectively, certainly two in-person
7 meetings, and both sides I think made substantial
8 concessions over the course of the process. It was a
9 very I think open and cooperative session.

10 THE COURT: All right. So you've widened the
11 scope in terms of the number of people, the terms, the
12 custodians, but you wanted a finite group, and so I saw
13 that concession. There's a limit essentially to the TAR
14 process will be used on a finite set of documents.

15 MR. HERSH: Correct. That was important to
16 the defendants to identify a finite universe of
17 documents to subject to TAR. And the plaintiffs made a
18 concession in that they're willing to focus on the
19 documents previously collected from Atrium and only seek
20 a few custodians from Maquet, and that we would focus
21 the TAR process on those items, and that would be the
22 major ESI production in this matter. And then to the
23 extent there is additional discrete requests for ESI, we
24 would handle them in whatever manner the defendants see
25 fit provided we give notice to the opposing side as to

1 how we conducted the collection, review, and production
2 process.

3 THE COURT: And how do you go about sharing
4 information between the state and the MDL? Is there any
5 sharing at all? Presumably you would see more, that's
6 your goal, than what was produced in the state court
7 litigation. So that pile of more, do the state
8 litigants get access to that at all or no?

9 MS. AYTCH: I mean, the pile of more is with
10 regard to a date limitation that is present here, that
11 is the defendant's position, and the state court
12 litigation is not.

13 THE COURT: Okay.

14 MS. AYTCH: So that is essentially what the
15 more would be.

16 THE COURT: Okay. All right.

17 MS. AYTCH: I don't think that there's
18 otherwise because we did -- if I'm wrong, correct me,
19 but --

20 MR. HERSH: Correct. We have a date
21 limitation in the state court cases regarding the scope
22 of ESI that's not existent here.

23 THE COURT: Okay. All right.

24 MR. ORENT: I think a couple of the other
25 issues were that we are happy to have the defendant's --

1 I think validation was another issue where we had
2 originally wanted -- plaintiffs had originally wanted to
3 participate in the validation process, and because of
4 some of the concessions that the defendants made we were
5 willing to allow them to simply certify in a certificate
6 that the validation process has been completed as per
7 the specifications that we had agreed upon.

8 There are a lot of moving parts I think in
9 this agreement, but I think it's one that both sides
10 feel very comfortable with.

11 THE COURT: Okay. Excellent.

12 All right. Go ahead.

13 MR. HERSH: One of the other things we agreed
14 upon which plaintiffs felt very strongly on, and I think
15 they've made some concessions, was that we would use the
16 state court documents produced to date as the seed set
17 for TAR. And so, you know, I think that was an area
18 where both sides made concessions. They originally
19 wanted a certain number of documents that hit on the
20 search terms, and then we said, no, only the documents
21 that we've determined were responsive and produced, and
22 so we were able to come to agreement on that.

23 THE COURT: All right. And how long do you
24 think that this process will take if you had to ballpark
25 it?

1 MR. HERSH: I would say -- and this could be
2 an area where we may disagree, but I would say a couple
3 months to a few months.

4 THE COURT: Okay.

5 MR. ORENT: I haven't had the opportunity to
6 discuss this with my colleagues, but it is my hope that
7 we can work on some sort of rolling basis that allows
8 everybody to get what they need out of it and continue
9 the dialogue.

10 THE COURT: All right. Excellent.

11 Okay. Is there anything else we should
12 discuss?

13 MS. AYTCH: Nothing from the defendants.

14 THE COURT: And you're going to put together a
15 discovery schedule, a proposed discovery schedule?

16 MS. AYTCH: That's why I was just writing down
17 those responses because I also didn't know. I know that
18 was the primary reason that the parties waited to
19 discuss the discovery schedule because we know that the
20 ESI portion of discovery would drive that schedule and
21 that we needed to hash that out, which the Court
22 recognized just got done very recently, but I imagine
23 that we'll have those discussions and then be able to
24 come to an agreement with regard to the discovery
25 schedule.

1 THE COURT: All right. Well, I commend both
2 sides for having hammered this out, having reached
3 agreement, having compromised. You don't see a lot of
4 compromise happening these days in some other public
5 venues so I'm very happy about that and glad at least at
6 this point I don't have to become an expert in TAR and
7 ESI protocols.

8 So I will either see you at our next status
9 conference or talk to you on the telephone. I'll let
10 you make that call.

11 Again, if you need me for some reason on short
12 notice, you know how you can make that happen. I'll be
13 very, very open to that. As long as you both agree,
14 I'll make it happen. All right?

15 MS. AYTCH: Thank you, your Honor.

16 MR. ORENT: Thank you, your Honor.

17 THE COURT: Any questions from anybody on the
18 phone?

19 MR. HILLIARD: No, your Honor.

20 MR. WAGES: No thank you, your Honor.

21 MR. TURNER: No thank you, your Honor.

22 THE COURT: All right. Great. Well, we will
23 then cut you off happily.

24 All right. Court's adjourned.


25 (Conclusion of proceedings at 3:05 p.m.)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T E

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

Submitted: 6-29-17


SUSAN M. BATEMAN, LCR, RPR, CRR
LICENSED COURT REPORTER, NO. 34
STATE OF NEW HAMPSHIRE