

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
June 14, 2018
2:03 p.m.
*

TRANSCRIPT OF STATUS CONFERENCE
BEFORE THE HONORABLE LANDYA B. McCAFFERTY

Appearances
Via Telephone:

For the Plaintiffs:

- Jonathan D. Orent, Esq.
Motley Rice LLC
- D. Todd Mathews, Esq.
Gori, Julian & Associates PC
- Russel F. Hilliard, Esq.
Susan A. Lowry, Esq.
Upton & Hatfield LLP
- Adam M. Evans, Esq.
Hollis Law Firm PA
- Anne W. Schiavone, Esq.
Holman Schiavone LLC

For the Defendants:

- Enjoliqué D. Aytch, Esq.
Elan S. Hersh, Esq.
Akerman LLP
- Pierre A. Chabot, Esq.
John E. Friberg, Esq.
Wadleigh, Starr & Peters PLLC

Court Reporter:

Liza W. Dubois, RMR, CRR
Official Court Reporter
U.S. District Court
55 Pleasant Street
Concord, New Hampshire 03301
(603) 225-1442

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

2 THE COURT: Good afternoon, Counsel. This is
3 Judge McCafferty. I'm here with a court reporter and
4 I'm here with my law clerk.

5 Let me just for the record identify the case
6 name, In Re: Atrium Medical Corp., C-Qur Mesh Products
7 Liability Litigation, MDL docket number 2753. I should
8 say 16-md-02753-LM for the full docket number.

9 All right. Let's do this. Let's start as we
10 always do by having everyone just state their name,
11 spell their last name, and if you speak, just please
12 quickly identify yourself. You can just say
13 "Attorney Orent here" and then start speaking; Attorney
14 Aytch here," then start speaking, just to help our court
15 reporter identify who is actually speaking.

16 Those who have speaking roles, obviously,
17 don't put your phone on mute. Those who are not having
18 speaking roles, please keep your phones on mute. Do not
19 put them on hold.

20 Okay. Let's start with names of attorneys who
21 are appearing for the plaintiffs. Go ahead.

22 MR. HILLIARD: Russ Hilliard, your Honor.
23 Good afternoon.

24 THE COURT: Good afternoon.

25 MS. LOWRY: Susan Lowry, your Honor.

1 MR. ORENT: Good afternoon, your Honor;
2 Jonathan Orent.

3 MR. MATHEWS: Good afternoon, your Honor; Todd
4 Mathews with one T.

5 MS. SCHIAVONE: Anne Schivone, your Honor,
6 S-c-h-i-a, V as in Victor, o-n-e.

7 MR. EVANS: Good afternoon, your Honor; Adam
8 Evans, E-v-a-n-s, for the plaintiffs.

9 THE COURT: So that's good afternoon to all
10 plaintiffs' counsel.

11 Now for defendants.

12 MS. AYTCH: Good afternoon. Enjoliqué Aytch,
13 A-y, T like Tom, C, H like Harry.

14 MR. CHABOT: Good afternoon, your Honor;
15 Pierre Chabot and Jack Friberg here in New Hampshire.

16 MR. HERSH: Good afternoon. This is Elan
17 Hersh, H-e-r-s-h, also appearing on behalf of the
18 defendants.

19 THE COURT: All right. And it may be helpful
20 if you're not actually speaking just to mute the phone
21 until you do speak because there's a lot of background
22 noise. And the person who is speaking, obviously,
23 can -- should take their phone off mute.

24 Okay. Now, let me just start by saying I've
25 read the agenda, the short agenda, and my conclusion

1 from the agenda was that there might be a very brief
2 status conference today and that you would update me on
3 your progress with respect to some of these depositions
4 that have been delayed because of some technological
5 issues and -- but it appears that there are some other
6 disputes and I have received letters laying out some of
7 these disputes. And they seem to be, I must say, out of
8 order in terms of how we are supposed to proceed by way
9 of informally resolving issues.

10 So to the extent that an issue is brought to
11 my attention, I would like the parties to abide by the
12 informal resolution procedure that is laid out in the
13 case management order. So I'll say that to start.

14 And so I think the description in what is
15 docketed at document 680, which is a letter to the Court
16 from Attorney Turner, I am sympathetic to the argument
17 that is made in that letter; however, I would also say
18 that I am sympathetic to the position of Attorney Orent.
19 At least on the merits, his position in his most recent
20 letter states simply the meet-and-confer process should
21 be appropriate in all phases of the informal dispute
22 resolution process. And I -- and I certainly agree with
23 that.

24 But to the extent today the parties want me to
25 resolve some sort of dispute, then I believe Attorney

1 Turner is correct that the informal process has not been
2 really completed.

3 And even with respect to the -- the process
4 that the parties proposed and that I approved with
5 respect to rejecting depositions in their entirety, even
6 that process does lay out a letter-writing, an exchange
7 of letters between the parties. And I don't think that
8 means that you can't discuss things, you can't continue
9 to meet and confer and discuss and try to resolve short
10 of a letter, but ultimately if this issue's going to
11 make it up my way, then ultimately it has to be done in
12 accordance with the procedure.

13 Otherwise, what happens is I get presented
14 issues in a way that's not at all clear and I'm asked to
15 resolve them by the parties. And I am not going to
16 resolve issues that aren't brought to me in a manner
17 that makes it fairly clear to me what the dispute is,
18 what the nature of the dispute, the scope of the
19 dispute, and what is the basic -- what's the basic legal
20 principle at issue.

21 And I would say right now I don't have
22 anything in front of me that would enable me to resolve
23 any sort of dispute.

24 So I preface this status conference with that
25 and I'll let Attorney Orent go ahead and tell me what

1 you envision for this status conference.

2 MR. ORENT: Well, your Honor, there are two
3 items that have come up since the filing of the agenda
4 that we wish to discuss, neither one of which requires
5 action from the Court. One I had thought would require
6 clarification as to when it was appropriate to meet and
7 confer, and I'll follow up in a moment on that; and then
8 there's another glitch with the bellwether order that I
9 recently recognized, wanting to discuss it with my
10 colleagues across the aisle. I'm not prepared to argue
11 anything. I don't know where plaintiffs stand in terms
12 of a position. But I thought it was something that the
13 Court needs to be aware of and so that quirk I will
14 outline.

15 But, really, the meat and potatoes today is of
16 this document issue. I have prepared most of my time
17 and your Honor is aware I had originally requested that
18 this hearing be in person and that was because of the
19 technological nature of these events, which I don't
20 believe are disputed, and a little bit of explanation
21 about the timeline of where things had been going and
22 when things had been going.

23 And I thought given the technical complexities
24 of this issue, an in-person presentation might be
25 beneficial. However, I learned that my sister across

1 the aisle was not available or could not readily be
2 available to come to the court and so that is the basis
3 for me withdrawing my request for the in-person and I
4 will try and make my presentation today related to the
5 agenda item as simple and straightforward as possible,
6 but if your Honor does feel the need to intervene and
7 ask questions, I would certainly invite that.

8 But those are the three things and I think
9 you've already made clear with regard to the second
10 item, which is we have felt that the meet-and-confer
11 process should be involved prior to filing informal or
12 serving upon each other informal dispute resolution
13 papers and that it should continue from that time
14 until -- until such time as -- as the parties aren't
15 able to agree and actually need to litigate it.

16 But it seems like it is a waste of resources
17 to not engage in any dialogue or to refuse to schedule
18 meet-and-confer calls until an item is fully briefed, at
19 which neither party has motivation to really move beyond
20 their positions.

21 And so I just wanted to get clarification
22 because it does not explicitly say, though I am -- I
23 read into the Rules of Civil Procedure the requirement
24 to meet and confer into all of your informal processes
25 and I wanted that clarification because defendants had

1 used your orders as justification to not meet and
2 confer. And so I wanted that clarification.

3 THE COURT: Okay. Let me just get some
4 clarity here.

5 So the procedure that you recommended, the
6 parties agreed to, and that I approved is where one
7 party rejects a deposition notice in its entirety, the
8 parties agree that the objecting party shall notify the
9 noticing party.

10 So, here, defendants notify plaintiffs of the
11 objections and provide a position paper under the
12 informal resolution process within one week of the
13 initial request. Then there is this response that's
14 envisioned by this process. And at no point, at no
15 point, is meet-and-confer barred.

16 So if you receive the position paper and you
17 see a reasonable position or you see some sort of
18 reasonable compromise, it only makes sense that you
19 would pick up the phone and call the other side and say,
20 well, wait a minute, let's see if we can't work this out
21 so I don't have to respond in writing. But it does only
22 give you one week in terms of the procedure that you --
23 you agreed to.

24 So you only have one week before you're
25 supposed to respond in writing and this was a -- a

1 process that both parties agreed to and proposed.

2 In no way, in no way, would I have approved
3 some sort of process that would bar the parties from
4 talking on the phone or meeting and conferring at any
5 point. So let me make that clear.

6 To the extent if, in fact, you know, you're
7 saying, Attorney Orent, that the defendants are saying
8 respond in writing or we're not talking to you, that --
9 that's -- that's -- that's not something that is part of
10 this procedure, as I understand it and as I approved of
11 it. Meet-and-confer is always ongoing.

12 So, however, to the extent you have something
13 you want to present to me today and it's complicated and
14 you want to be here in person and there are documents,
15 what -- what is it that you need me to decide today?
16 Why would I be hearing all of this if you don't want me
17 to decide something, I guess is a better question. Why
18 would you --

19 MR. ORENT: Well --

20 THE COURT: -- want to present all kinds of
21 things to me in person with all kinds of documents or
22 PowerPoints, but yet not really be asking me to decide
23 something? That I don't understand.

24 MR. ORENT: Well, your Honor, with regard to
25 these technical issues, there's a lot to it and they are

1 the subject of future motion practice. And I felt like
2 while we were at a point where we were moving
3 depositions and we were delaying the proceedings and
4 causing some delay that we owed it to you to give you a
5 full explanation as to what is going on and all of the
6 technical details.

7 And so I felt that it would pave the way for
8 that in a neutral way, just like Science Day did; that
9 you would have an ability to understand what technical
10 issues were in play so that to the extent that we did
11 have motion practice over discovery, which is in the
12 process of being informally briefed at this time, or we
13 had other issues come up, your Honor would have a
14 familiarity with the technical terms, technical details,
15 and the travel of -- of these items.

16 THE COURT: Where would I get --

17 And so, for that reason --

18 THE COURT: Mr. Orent, where would I get that
19 from the agenda? Where would I get the understanding --

20 MR. ORENT: Well, your Honor --

21 THE COURT: -- to predict what the status
22 conference is going to be like? I read the agenda. And
23 there's no dispute presented to me. I'm reading about,
24 you know, issues that you're having, but I'm reading
25 and understanding you're working them out and that

1 parties -- you, as lead counsel for plaintiffs, Attorney
2 Aytch, Attorney Turner, all defense counsel, are -- look
3 to be working some of these complicated issues out
4 between you and this agenda tends to give me the
5 impression that, frankly, there really isn't much to do
6 other than potentially extend jurisdictional discovery.
7 And it looks like the parties agreed with respect to
8 that. And when you agree on things, I tend to try to
9 get you an approval or an order as fast as I can so that
10 you can continue to work together and move forward.

11 But nothing in this agenda would suggest that
12 the parties are going to come in here and detail some
13 sort of technical e-discovery dispute for the Court.

14 And so to the extent --

15 MR. ORENT: But I --

16 THE COURT: Mr. Orent, to the extent that you
17 interpreted this agenda as including some sort of
18 lengthy hearing on technical issues where you would be
19 educating the Court so that the Court could understand
20 disputes that may come up in the future or may not come
21 up in the future, it would be good to include that in
22 the agenda so that the Court is aware that this is going
23 to happen. And, also, so defendants are aware that
24 that's your understanding of this.

25 Because I read this agenda and think, okay,

1 I'm going to hear from the parties, things are going
2 well, they've got some disputes, but they're working
3 them out.

4 So I do not -- I'm -- I do not think also, let
5 me just say, that I need to hear all the technical
6 issues related to discovery disputes that don't exist
7 yet. I would like to be educated when necessary, but I
8 don't think I need to be educated about, you know, the
9 specific issues. And, frankly, the expertise that you
10 and Attorney Hersh have with respect to TAR and with
11 respect to e-discovery, I don't want to spend two hours
12 listening to a lecture on that unless I really need to
13 resolve a dispute for the parties.

14 I'm totally in favor of a Science Day with
15 respect to understanding what this case is about, but
16 I -- I am not in favor of a -- you know, a lengthy
17 hearing that's really not necessary yet.

18 So I'm not -- I'm not prepared today to listen
19 to a lengthy presentation on TAR and e-discovery and to
20 the extent that's something that you want the Court to
21 do, I think that needs to be laid out in the agenda and
22 the parties need to understand the scope of it and the
23 parties need to agree on it. And then present it to me
24 and I'll -- I'll -- if both parties want to do that,
25 I'll take two hours and put it aside.

1 If you both agree that it is utterly necessary
2 for me to be educated on that, I will probably just
3 agree to do it. But at this point there's nothing in
4 this agenda that would suggest to me that I'm going to
5 have a lengthy hearing.

6 So I -- I am prepared, per the agenda, to
7 essentially hear the updates and I'm happy to hear the
8 updates with respect to the disputes between counsel,
9 but I'm not resolving those disputes because they're not
10 properly before me.

11 So that's what I would say. We can go forward
12 on this agenda and I'm happy to hear what you think the
13 glitch is with the bellwether order and see if we can
14 fix that, if counsel agrees, but we're not going to have
15 a lengthy hearing today on electronic discovery, just to
16 be clear.

17 Go ahead, Attorney Orent.

18 MR. ORENT: And, your Honor, just to be clear,
19 I didn't intend on making it lengthy, but I thought that
20 some timelines and definitions would be helpful, but
21 that -- that -- to give a status update but I am hearing
22 what you are saying and I will be as brief as possible.

23 The issue that was brought as part of the
24 scheduling order and the joint agenda is very simple.
25 Defendants' production of electronic data, or ESI, has

1 been fraught with technical errors since day one and, to
2 put it bluntly, the productions have been a disaster.

3 We as plaintiffs have had to postpone now all
4 of our depositions because of this and as a result of
5 the -- what was originally a finding of about 78,000
6 documents, defendants ultimately found another
7 200,000-plus documents that should have been produced to
8 us. And then in digging up that issue, it was
9 discovered that two other technological problems exist:
10 Something known as bodiless emails and something known
11 as Mimosa stubbed emails.

12 Both of those are referenced in the -- in the
13 agenda, but by short what a bodiless email is where the
14 caption of the email, the to, from, and the -- some of
15 the other information metadata is produced, but the
16 contents of the email are not.

17 A Mimosa stubbed email relates to the Mimosa
18 archives system that defendants used up until --
19 actively up until 2012, but maintained in service long
20 after that where they would produce documents to us that
21 were supposed to have an attachment and did not, in
22 fact, have the attachment.

23 My concerns are that some of these issues have
24 been ongoing for some period of time and the first that
25 we were alerted to them, the Mimosa issue particularly

1 that's being made, searching for Mimosa was particularly
2 concerning in that on -- as the Court may recall back in
3 January and February, we had learned that -- about a
4 month earlier, we had learned that the original TAR
5 production was going to be delayed, and part of it was
6 because of the bodiless email situation.

7 We were under the belief that that issue had
8 resolved in the same way that the bodiless email issue
9 that was first addressed in April of 2017, this hearing
10 with our court, we were discussing the state court
11 production, had been resolved. We then received
12 supplemental data and thought that that was the end of
13 the situation with regards to these bodiless Mimosa type
14 emails.

15 It turns out that part of the reason that
16 the -- the discovery was delayed, the production was
17 delayed from the initial timeline set out in the
18 September case management order and you'll see in the
19 November, December case management orders the time
20 frames change and ultimately production occurred in
21 January, February of this year.

22 We weren't told that there were problems other
23 than -- other than that they were technological delays.
24 But it turns out that the defendants, in December, had
25 to fully recreate the Mimosa archives and in doing so,

1 advised some us on 5/31 that they had done this in
2 December and that there were some emails which they
3 believed were permanently lost.

4 After learning this information, we had a
5 telephone -- telephone call on June 1st, wherein I
6 advised defendants -- we discussed the issues. I
7 advised defendants that we would serve some discovery on
8 them to verify some of the facts, but that we would like
9 to continue working with them. And I sent them ten
10 questions in a letter.

11 That letter went unanswered until after the
12 filing of the agenda in this case, which explains why we
13 didn't learn of some disputes as of the filing of this
14 agenda, and, in short, we were told that, well, maybe,
15 kind of, sort of, we might have a solution.

16 We tried to engage the defendants in a
17 meet-and-confer. Not only were we told we could not
18 meet and confer, they would not schedule a
19 meet-and-confer until after the papers that are due --
20 the opposition papers are due this Friday -- and until
21 after we served those. So we are going to go ahead and
22 serve those.

23 Then on the 11th, just a couple days ago, we
24 received another letter from defendants, claiming that
25 this was now a nonissue, solving the issue, and

1 essentially downplaying the entire production of almost
2 300,000 new documents months late and delaying this
3 whole process.

4 So to make a long story short, we're concerned
5 that we're going to be put in a position where if we
6 take depositions where we may have to come back and seek
7 to redepose people if we keep getting new documents.

8 And we also have some concerns about how the
9 documents were preserved. These are issues that have
10 been raised early on in the litigation, back I think in
11 April of 2017, particularly around the time of the
12 merger and the move from one facility to the other.

13 But in a nutshell, really, what we're looking
14 to do for plaintiffs -- and we're not necessarily
15 looking for any kind of order from the Court -- is a
16 recognition that we would move to redepose people if new
17 documents become available and that separately it is our
18 hope that defendants will engage in meaningful
19 meet-and-confer and provide meaningful responses to our
20 questions on issues so that we can understand these
21 issues as they are coming up in real time.

22 And that, your Honor, by and large, is that
23 issue.

24 THE COURT: Okay. And there is nothing before
25 me to resolve, but I'm happy to hear whatever it is the

1 defendants want to say.

2 MS. AYTCH: Thank you, your Honor. This is
3 Attorney Aytch. I'm going to go first and then if there
4 are any follow-up that Mr. Hersh would like to give in
5 terms of the technical aspect, I would like him to do
6 so.

7 But I want to first, if I can, your Honor,
8 return to the meet-and-confer issue because I don't want
9 to leave the Court with the impression that defendants
10 are being unreasonable without the full context of the
11 circumstances. If the Court later comes to that
12 decision, I understand, but I do feel that context is
13 being left out here.

14 So as your Honor may recall, shortly after the
15 emergency hearing that was called before -- the
16 defendants to tell him about issues in real time as
17 opposed to when we have run -- in an effort to --

18 THE COURT: We're having trouble -- hold on a
19 second, Attorney Aytch. We're having trouble. We can
20 hear your voice, but some of your words are very
21 muffled.

22 So do you think you could start with the
23 emergency hearing discussion? That's when we started to
24 lose you.

25 MS. AYTCH: I am so sorry.

1 THE COURT: That's all right.

2 MS. AYTCH: Following the call of the
3 emergency hearing -- and I apologize, I'm not exactly
4 sure when that was, I believe in April -- the parties
5 got together and decided that we would try to give each
6 other information in real time. So as we are learning
7 of glitches and anything troubling, we are letting them
8 know, as opposed to fully running this to ground. And I
9 appreciate Attorney Orent for acknowledging that at the
10 last status conference.

11 So in this vein, we sent the May 31st letter
12 and immediately let -- and I also immediately let
13 Attorney Orent know of any issues prior to even reducing
14 them to writing.

15 We had a June 1st meet-and-confer or at least
16 a talk about that letter and where things stand. At
17 that time, we were told that discovery would be
18 forthcoming in the form of these depositions as well as
19 a letter to run things to ground. We said that we
20 believed that those depositions --

21 THE COURT: Sorry. Say that again. Say that
22 again.

23 MS. AYTCH: I'm sorry?

24 THE COURT: Can you just repeat that?

25 MS. AYTCH: We were told at the time that

1 discovery would be forthcoming in the form of the
2 deposition notices as well as the letter asking us to
3 finish running these issues to ground, which we said
4 that we would consider and do so because at the time we
5 informed them that we are still learning of this issue
6 as it is developing. We have not completed running it
7 to ground. But we alerted them then that we believed
8 that those deposition notices will be premature.

9 We received the deposition notices and because
10 of an outstanding -- a currently in place order that
11 requires us to respond to those deposition notices in
12 writing if we are objecting to them in their entirety
13 within a week, we had to do that. So we did that by the
14 deadline of June 8th.

15 That evening we received a response from
16 Attorney Orent that says: Thank you for the attachment
17 letter. We would like to complete the meet-and-confer
18 and get this issue before the Court as soon as possible.
19 Therefore, we request a call on Sunday or Monday, we
20 will have our motion to compel filed by Monday afternoon
21 and would appreciate your response by late Wednesday so
22 that this can be argued on an expedited basis this
23 Thursday. Please advise what times work for you this
24 weekend or on Monday.

25 We did not respond until Monday morning and

1 it -- at this point is when we took the position that in
2 light of this email, that this is going to be tried to
3 be brought to the Court on an expedited basis this
4 Thursday, and this meet-and-confer seems to be
5 perfunctory at best, we would appreciate the benefit of
6 their position in writing. Otherwise, we could have
7 picked up the phone and just said, hey, we object in its
8 entirety because we think they are premature, which is
9 what we already said on June 1st.

10 But the benefit of having the parties'
11 arguments well reasoned with case law in writing is so
12 that we can have a meaningful meet-and-confer.
13 Otherwise, the meet-and-confer, from the defendants'
14 perspective at that time, would not have been
15 substantive, but perfunctory, in order to get this
16 motion to compel by Monday afternoon to say, hey, we
17 tried. So we wanted to know the benefit of what the
18 plaintiffs' positions are to our objection before we had
19 the meet-and-confer.

20 So that is why we resorted to the order that
21 is in place that says, hey, we should have your response
22 in writing before we're able to meet and confer. We
23 never said that we wouldn't; we never said that we
24 otherwise were not -- I believe Attorney Orent and I
25 speak informally often about when issues arise, but this

1 is the reason that we wanted it in writing this time. I
2 don't want it to seem that the defendants are just being
3 obstinate in any way.

4 So with that background is how this issue came
5 from one where the defendants based upon that Friday
6 night email thought that this would be something before
7 the Court and wanting to adhere to that protocol as
8 opposed to just not wanting to meet and confer.

9 And I will now turn it over to Attorney Hersh
10 if he has anything to add with regard to the status
11 update on the actual technical issues.

12 MR. HERSH: Thank you.

13 All I would say is that we brought these
14 issues to plaintiffs' attention as soon as we became
15 aware of them and -- and -- and did so in the spirit of
16 cooperation and transparency with which the parties had
17 been getting along since that emergency hearing. Prior
18 to that, it was aggressive and antagonistic and now it
19 seemed to have returned to that aggressive and
20 antagonistic posture by the -- by the plaintiffs.

21 We brought this issue to their attention
22 because we wanted them to be aware that there would be a
23 forthcoming document production. By the time of that
24 production, we had produced roughly 1.5 million
25 documents, somewhere thereabouts, and we've now produced

1 over 1.7 million documents.

2 This is the first time I've ever heard the
3 word disaster labeled -- ascribed to the document
4 production. I take issue with that. And we have made a
5 very fulsome and thorough document production to -- to
6 plaintiffs.

7 There have been technical issues and we have
8 brought those issues to the attention of plaintiffs as
9 we became aware of them. We -- we identified that there
10 would be supplemental document production because of
11 those issues and we made a supplemental production on
12 June 4th and we're going to make a supplemental
13 production as it relates to the Mimosa attachments.

14 We've also explained in detail, both in the
15 May 31st and in the June 11th letter, that's the -- from
16 Tuesday evening, why the bodiless email issue exists and
17 what can or cannot be done about it. We -- we make
18 clear in, especially in that latter letter, that nothing
19 that Atrium has done caused those letters -- those
20 emails to have bodies missing. In fact, once an email
21 goes into this archive -- this quote, unquote, Mimosa
22 archive -- it becomes read only and not deletable by --
23 by the user.

24 So, in short, these -- these messages were
25 corrupt because of the archiving of this -- based on a

1 problem with the Mimosa system itself, nothing --
2 nothing that we've done, and we brought that to the
3 attention of the plaintiffs in very clear terms earlier
4 this week.

5 But we've just been met with -- you know, I
6 think they -- my impression was they saw this as an
7 opportunity to exploit, you know, a late document
8 production and, you know, I think it's rather un --
9 unfair. We've been -- we've been fully compliant with
10 all of our discovery obligations.

11 And that's all I would say right now.

12 THE COURT: Okay. I think I've heard enough
13 about the document issue and I think I've clarified with
14 respect to meet-and-confer and I agree that the
15 meet-and-confer process should happen at all times.

16 However, in light of the time frame, it seems
17 reasonable to me for Attorney Aytch to have demanded
18 something in writing because I think her mindset was
19 this is the process, this is how we get it before the
20 Court, the status conference is coming, you know, put it
21 in writing so that we can actually see if we can
22 meaningfully resolve the issue in the spirit of, I
23 think, that order that the parties agreed on and,
24 frankly, in the spirit of trying to resolve things in
25 good faith.

1 So I think I've heard enough about the
2 document issue. To the extent the parties want to put a
3 formal -- an informal dispute in front of me or a formal
4 dispute, that can be done, obviously.

5 There was a --

6 MR. ORENT: Your Honor, I --

7 THE COURT: -- mention -- Attorney Orent,
8 there was a mention of a glitch with the bellwether
9 order. Is that something that you think you could
10 resolve with Attorney Aytch?

11 MR. ORENT: I'm not sure. I don't even know
12 what the resolution would be, your Honor.

13 I do just feel obligated to correct the record
14 because I feel like a statement was made to the Court
15 that may not be fully accurate and I wish to just
16 respond very -- very, very briefly.

17 And that is the letter of June 8th, which came
18 a week after I had sent my letter with -- after we had
19 drafted the agenda and had spoken on the phone and
20 discussed the agenda -- was a complete reversal of the
21 approach that we had discussed on June 1st and, quite
22 frankly, was aggressive and a -- it was a complete
23 posture change.

24 And so I think to say that -- that my email
25 response was what made a meet-and-confer impossible

1 is -- is unfair to the plaintiffs. In fact, I had done
2 several things. I called defendants -- I intended to
3 call them and schedule something and I actually shot
4 Enjoliqué, Ms. Aytch, an email, a very low-key email,
5 trying to get her on the line so that we could have a
6 more meaningful discussion.

7 So I think to just -- the way things were
8 categorized I think is -- was a little unfair to me,
9 personally, and I just want to set that record straight,
10 your Honor.

11 With regard to the -- the issue on the
12 bellwether order, again, I don't know if there's a
13 problem, if this is something that was foreseen, but it
14 is something that has come into the minds of plaintiffs
15 as we've been looking at this.

16 And this all stems from the Court's -- from
17 the paragraph giving the Court preliminary jurisdiction.
18 And, really, the long and short of it is I'm not quite
19 sure what that means, because if you look at the short
20 form -- short form complaint, paragraph 7 says:
21 District court and division in which venue would be
22 proper absent direct filing.

23 And I think what has happened is instead of
24 plaintiffs filing this, covering their bases and seeking
25 to suggest that they would put down their preferred

1 remand jurisdiction, that is, the district in which they
2 would have filed, this is -- it says in which venue
3 would be proper.

4 So I think a lot of plaintiffs went forward,
5 didn't put New Hampshire and another jurisdiction, and
6 the concern is that if we look at just the pool of cases
7 that -- that answered that number 7 to be New Hampshire,
8 we are left in a situation where there's maybe only 50
9 to 60 cases, 30 of which belong to two law firms
10 available for deposition -- excuse me -- available
11 for -- for this.

12 So, you know, what I -- what I wanted to avoid
13 is a scenario where individuals plaintiffs, you know,
14 that might want to be picked as they -- the bellwethers
15 request permission to leave -- for leave to file an
16 amended complaint if number 7 is going to be the guiding
17 point at which point I wouldn't want to be accused of
18 sort of gaming the system, if you will. But,
19 alternatively, I didn't know if filing a direct -- a
20 short form complaint in and of itself would be
21 considered the requisite to confer jurisdiction.

22 So, really, just the mechanics of that, I
23 don't know what the solution is. I haven't thought of a
24 solution. But I do know that we do have a bellwether
25 selection process that has less than a month to go and

1 that this is our hearing, really, to discuss this. I
2 don't know if there is a solution needed, but I did feel
3 obligated because if we stick with it like this, I
4 foresee people on a case-by-case basis asking to amend
5 their complaints and, you know, I wouldn't want to be
6 essentially gaming the system by putting too many
7 plaintiff good cases in that would unbalance the pool.
8 You know, this is sort of not a representative sample.

9 And so, anyway, that's the concern I wanted to
10 apprise the Court of, apprise the defendants of.

11 Candidly, we haven't had an opportunity to speak about
12 it and, really, I just wanted the Court to be aware of
13 this issue so that we could all collectively perhaps
14 come up with a solution and I'm certainly willing to
15 talk with the defendants on whatever they think is just
16 and equitable to reach the ends of -- of the Court's
17 purpose.

18 THE COURT: Okay. Well, that's an issue that
19 you haven't conferred about. I'll let you confer with
20 counsel and I'll see if the two of you can come up with
21 some sort of solution to propose. If you can't or you
22 can't agree, you can lay them out, your respective
23 positions. If you need some sort of expedited decision
24 on it, certainly request that.

25 But right now, where that issue is not before

1 the Court and is not referenced, I don't believe, in the
2 agenda, I'm happy to hear you describe it and Attorney
3 Aytch can get back to you and the two of you can meet
4 and confer and we can go from there on that issue.

5 Do you need to say anything with respect to
6 that issue, Attorney Aytch?

7 MS. AYTCH: No, your Honor. Attorney Orent
8 lays it out perfectly. He did bring this issue to my
9 attention yesterday. I was traveling and so I did not
10 get back to him until this morning. And so if we do
11 need to bring this issue to the Court, which I believe
12 we would be because at least from my cursory
13 understanding of it, it sounds like a substantive change
14 to a -- an operative order.

15 But we have spoken offline and said that we
16 would meet and confer on it and see what we can do.

17 THE COURT: Okay.

18 MS. AYTCH: And if not, if we can't resolve
19 it, I do imagine we would come to the Court on an
20 expedited basis because, as Attorney Orent mentioned, we
21 do have a July 20 deadline.

22 THE COURT: Okay. All right. And the only
23 issue that's still outstanding with respect to the
24 agenda now is just the need to further extend
25 jurisdictional discovery.

1 Is that something you want to do by way of a
2 joint proposed scheduling order?

3 MS. AYTCH: Your Honor, I would say yes. I
4 imagine that part of the jurisdictional discovery -- I'm
5 sorry -- this is Attorney Aytch -- that part of the
6 jurisdictional discovery is still a forthcoming Atrium
7 30(b)(6) deposition notice.

8 While we've given proposed dates, August 30th
9 and 31st, for who we think that that person would be on
10 the financial side, since we don't have a notice yet,
11 we're not sure who else we may need to name and what
12 those dates are.

13 So I would prefer, if Attorney Orent is
14 amenable to that, to doing the joint motion once we have
15 a better understanding of what dates look like in terms
16 of depositions and we have the notice in hand.

17 THE COURT: Okay. And do you agree with that,
18 Attorney Orent?

19 MR. ORENT: I do, your Honor.

20 THE COURT: Okay. All right.

21 Then as far as I read the agenda, I think
22 we've handled the issues therein. And I've listened to
23 various disputes that have erupted, frankly, since I
24 guess the filing of this agenda, but to the extent those
25 disputes become ripe and you want to bring them before

1 me for decision, obviously let me know and you can
2 obviously do that via the informal discovery process or,
3 if need be, the formal discovery process, if that fails.

4 So -- and, again, if there's some reason there
5 needs to be an expedited scheduling, I think you know I
6 would be amenable to helping you do that and it would
7 just require the counsel to propose something to my case
8 manager and get it on the court's schedule and then the
9 parties just properly present and brief, whether it's
10 letter briefs or full briefs, but on an expedited
11 schedule it would be letter briefing, just get that to
12 me in a way that will help me understand what the issues
13 are and give you a -- you know, give you an expedited
14 decision that is, you know, thoughtful and well
15 researched. And the only way I can do that is -- is if
16 I understand what the dispute -- the nature of the
17 dispute is before it's put in front of me for decision.

18 So I think that's it for today. Is there
19 anything else?

20 MR. ORENT: Not from the plaintiffs, your
21 Honor.

22 MR. HERSH: Thank you, your Honor.

23 MS. AYTCH: Not from the defendants, your
24 Honor.

25 THE COURT: All right. Thanks to everyone.

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

Court is adjourned.

(Proceedings concluded at 2:47 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: 6/25/18

Liza W. Dubois
Liza Dubois, RMR, CRR
Licensed Court Reporter No. 104
State of New Hampshire