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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

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IN RE: ATRIUM MEDICAL CORP.
C-QUR MESH PRODUCTS LIABILITY
LITIGATION
* * * * *

* 1:16-md-02753-LM
* September 25, 2017
* 3:03 p.m.
*

TRANSCRIPT OF STATUS CONFERENCE
BEFORE THE HONORABLE LANDYA B. McCAFFERTY

Appearances
Via Telephone:

For the Plaintiffs:

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Fleming, Nolen, Jez, LLP

Lauren Godshall, Esq.
Morris Bart, LLC

Appearances Continued:

For the Defendants:

Enjoliqué D. Aytch, Esq.
Hugh J. Turner, Esq.
Akerman, LLP

Pierre A. Chabot, Esq.
John E. Friberg, Esq.
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1 P R O C E E D I N G S

2 THE COURT: Good afternoon, counsel. This is
3 Judge McCafferty.

4 MR. ORENT: Good afternoon, Judge.

5 THE COURT: Let me just -- we have a
6 stenographer here, a court reporter, and I'm just going
7 to announce the name of the case and then let you
8 introduce yourselves for the record.

9 In Re: Atrium, MDL docket 16-md-02753-LM.

10 This is our status conference, and typically
11 it is a monthly status conference, and we have -- I have
12 the joint agenda, document number 182, which we will
13 follow today.

14 Let me do this for the record. Let me ask
15 everybody on the phone to identify themselves and spell
16 their last names for the court reporter.

17 And then let me just remind attorneys when you
18 speak, before you speak, if you would just identify who
19 you are for our court reporter so she does not have to
20 guess.

21 All right. Let me hear from plaintiffs'
22 counsel first and then we'll move to defendants.

23 Go ahead.

24 MR. HILLIARD: This is Russ Hilliard,
25 H-i-l-l-i-a-r-d, liaison counsel for the plaintiffs.

1 MR. ORENT: Good afternoon, your Honor.
2 Jonathan Orent, O-r-e-n-t, lead counsel for the
3 plaintiffs, and I'm joined here with -- with me is
4 Katie Menard, also from Motley Rice.

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

7 MS. SCHIVONE: Anne Schivone, S-c-h-i-v, as in
8 Victor, o-n-e, executive committee member for
9 plaintiffs, and I also have in my office Brandon Corl,
10 C-o-r-l, who is with Holman Schivone as well.

11 MR. EVANS: Adam Evans, E-v-a-n-s, from the
12 Hollis Law Firm for the plaintiffs.

13 MS. STOKES: Kelsey Stokes, S-t-o-k-e-s, from
14 Fleming, Nolen & Jez for the plaintiffs.

15 MS. GODSHALL: Lauren Godshall,
16 G-o-d-s-h-a-l-l, from Morris Bart for the plaintiffs.

17 THE COURT: And defense counsel?

18 MR. TURNER: Hugh Turner, T-u-r-n-e-r, on
19 behalf of Atrium, your Honor.

20 MS. AYTCH: Enjoliqué Aytch, A-y-t-c-h, on
21 behalf of defendants.

22 MR. FRIBERG: Jack Friberg, F-r-i-b-e-r-g, on
23 behalf of defendants.

24 MR. CHABOT: And Pierre Chabot, C-h-a-b-o-t,
25 on behalf of the defendants.

1 THE COURT: All right. Go ahead.

2 MR. ORENT: Good afternoon, your Honor.

3 Jonathan Orent for the plaintiffs.

4 The first item on the agenda today is the lift
5 of the discovery stay. We had --

6 THE COURT: Okay. Just one -- one moment,
7 Mr. Orent. I just think that we may have had some
8 additional plaintiffs' counsel join the call. I just
9 want to have them introduce themselves and state their
10 last name -- spell their last name for the court
11 reporter.

12 MS. LOWRY: Yes, thank you. I apologize.
13 This is Susan Lowry. It's L-o-w-r-y.

14 THE COURT: All right. Let me ask those
15 plaintiffs' counsel who are not part of the leadership
16 team, if you would, just mute your phones for purposes
17 of the status conference. And -- and again I remind
18 those who are lead counsel today to identify themselves
19 for the court reporter.

20 Go ahead, Attorney Orent.

21 MR. ORENT: Thank you, your Honor.

22 We have filed a joint motion to lift the
23 discovery stay that your Honor entered at the inception
24 of this MDL. We have jointly completed all of the tasks
25 that your Honor has set forth in the initial case

1 management orders and we are at a point where we believe
2 that general phase discovery should begin and specific
3 phase discovery with regard to plaintiffs' profile forms
4 and the like should begin as well. And so we'd ask your
5 Honor to sign that order and grant that motion that was
6 filed earlier this -- last week.

7 THE COURT: Okay. I believe I did actually go
8 ahead and issue that via an endorsed order on Friday.

9 MR. HILLIARD: Yes, your Honor, Russ Hilliard,
10 you did.

11 MR. ORENT: I must confess, your Honor, I was
12 off Thursday and Friday for the Jewish holiday, so I did
13 not -- I did not see that come in.

14 THE COURT: That's --

15 MR. ORENT: I prepared my binder in advance of
16 that, so I apologize on that.

17 THE COURT: That's quite all right. We can
18 basically put a check mark by number 1 and move on to
19 number 2.

20 And I think you were just informing me in
21 paragraph 2 of the status of your productions with
22 respect to ESI, but anybody want to add anything to
23 paragraph 2?

24 MR. ORENT: Your Honor, if I could -- again,
25 Jonathan Orent for the plaintiffs.

1 Over the last couple of weeks there has been a
2 little bit of movement in terms of additional
3 documentation that the defendants have agreed to grant
4 plaintiff in the state court litigation. It's my
5 understanding that we will be receiving that
6 supplemental production of about 125,000 documents in or
7 about the same time as the state court litigation. And
8 there is a provision in the ESI protocol that foresaw
9 something like this happening and so we will be
10 following that protocol as -- as we previously agreed to
11 with defendants. So that will increase the number of
12 currently produced documents to about 200,000 and we are
13 expecting the bulk of the ESI production to go forward
14 this fall, making up the large supplementation that was
15 contemplated by the ESI protocol.

16 THE COURT: All right. Anyone -- anyone else
17 want to add to those comments with respect to paragraph
18 2?

19 MS. AYTCH: Nothing to add, your Honor. This
20 is Enjoliqué Aytch on behalf of the defendant.

21 THE COURT: All right. Does that mean then we
22 can move to paragraph 3?

23 MR. ORENT: It does, your Honor.

24 All right. Okay. And I did not see any sort
25 of letter brief, so I'm guessing that the parties have

1 jointly agreed to revisit the preservation issues and
2 submit something new to me?

3 MS. AYTCH: This is Enjoliqué Aytch, your
4 Honor, on behalf of the defendants.

5 The parties have spoken again even just this
6 morning and we are still negotiating whether or not
7 we're going to revisit this protocol. We believe that
8 we can, but we want to tie down agreeable language
9 initially before we move the Court for anything further.

10 THE COURT: Okay. All right. And so I will
11 just put that in the To Be Updated pile. It sounds as
12 though it's something that you may be able to work out.
13 And if you --

14 MR. ORENT: That's correct. I'm sorry.

15 THE COURT: No, go ahead.

16 MR. ORENT: That's correct, your Honor.

17 The -- the issue is actually something that
18 has arisen through my work in another hernia mesh matter
19 where we -- we really began to really understand that
20 dividing the mesh might be more destructive to the
21 information-gathering process than anything.

22 I raised this concern with defense counsel
23 that perhaps we should not divide any of the samples,
24 keep them intact, let our experts jointly look at them,
25 and then if there's going to be any sectioning of the

1 pieces for purposes of making slides or something like
2 that to do it in a method where both parties have
3 experts present and can be viewing the mesh so that
4 any -- anything -- any information that is to be gained
5 from looking at the mesh in its gross form can be
6 captured.

7 I think defendants are receptive to that
8 and -- but they are -- have raised concerns with us
9 relative to it being a joint undertaking and not just
10 allowing the plaintiffs to do whatever they want with
11 the pathology prior to defendants being brought into the
12 process.

13 And so we're -- we think that we are, at least
14 in theory, in agreement and can come to terms in terms
15 of language, and I do owe my colleague on the other side
16 of the aisle some language to that effect.

17 THE COURT: All right. Okay. We will move on
18 then to paragraph 4, which is an issue with respect to
19 short form complaints that are not yet filed and -- all
20 right.

21 Let me just handle some really minor matters
22 with respect to short form complaints, if I may, and
23 just make sure to weigh in to the extent you need
24 clarification or you disagree.

25 First of all, in this paragraph, the date

1 cited for the due date for short form complaints for all
2 individual plaintiffs who previously filed complaints,
3 those were actually due on August 11th. And I can -- I
4 can tell you that that date is included in document
5 number 82.

6 So just to be clear, that date has passed, but
7 the date was not June 13th; it actually is August 11th.

8 And just so you are clear on that, I think
9 there was a little confusion about approval -- my
10 approval, my formal approval, of the master complaint
11 and we discussed that in one of our previous status
12 conferences and I included an approval date in my orders
13 because I wanted that date to be the date by which we
14 would measure the filing of short form complaints. And
15 that may have passed you both by because it -- it was
16 not something that I think we talked about at length.

17 But, in any event, August 11th is the due date
18 for those and the question becomes now what do we do
19 with -- I think there are maybe as many as a dozen,
20 maybe just under that, short form complaints that are
21 due but have not been filed. And the defendants
22 apparently propose that if after seven days of the entry
23 of an order to show cause short form complaints have not
24 been filed, those plaintiffs' cases be dismissed with
25 prejudice.

1 And, plaintiffs, are you in agreement with
2 that proposal?

3 MR. ORENT: No, we're not, your Honor. We
4 think that the dismissal with prejudice is Draconian in
5 light of several factors.

6 First of all, as your Honor indicated, there
7 may very well have been some confusion over -- over
8 exactly when the due date was.

9 Second, and perhaps more importantly, these
10 are individuals that actually did go about and file a
11 long form complaint and so the defendants have full
12 notice and knowledge as to the facts underlying each of
13 their claims and so there is no prejudice to the
14 defendants by it -- by the plaintiffs' failure. And so,
15 really, the issue is the -- the administrative failure
16 of -- for a variety of reasons or whatever reason to
17 supplement the record by filing a short form complaint.

18 We would suggest, your Honor, that the
19 plaintiffs be given some amount of time, no less than
20 two or three weeks, to update and amend their cases.
21 And at that point, your Honor, to the extent that there
22 are any delinquent cases that remain, what we would
23 request is that the plaintiffs' counsel involved be
24 ordered to appear at the next status conference by phone
25 and offer an explanation, at which point the Court can

1 impose what it sees as a proper remedy based on the
2 individual plaintiff and plaintiff's firm that's
3 involved as opposed to simply just ordering a remedy for
4 something that's not a large problem and it doesn't pose
5 any prejudice to the defendants.

6 THE COURT: Okay. Let me just ask some
7 questions before I hear from defense counsel.

8 Number one, you're saying give them time to
9 amend -- essentially amend their long form complaint
10 that they filed originally?

11 MR. ORENT: I'm sorry, your Honor. You're
12 right; I misspoke. I meant file a short form.

13 THE COURT: Okay. All right. And let me say,
14 before I hear from defense counsel, that I'm not -- I'm
15 amenable to a longer period of time.

16 And let me hear from defense counsel about the
17 question of requiring plaintiffs' counsel to appear at
18 our next monthly status conference with an explanation
19 rather than a dismissal with prejudice.

20 MS. AYTCH: Your Honor, we don't have an
21 objection to that. Our main concern here is just that
22 we have some mechanism by which we're not including
23 cases in this MDL that are just languishing and not
24 otherwise complying with the order because down the line
25 we do believe that it will cause prejudice to defendants

1 as we start to determine bellwethers and start to do
2 anything with regard to bringing these cases to a
3 resolution.

4 Prior correspondence has been sent to
5 plaintiffs' executive -- well, I guess plaintiffs' lead
6 and liaison counsel about at least at that time the
7 plaintiffs who had not yet filed short form complaints.
8 I think that was done at the beginning of this month,
9 September 6th.

10 So the time period, we're definitely amenable
11 if the Court would like to give more. With the prior
12 notice, we thought that, you know, at least given the
13 prior due date that a couple of months would be
14 sufficient --

15 THE COURT: All right.

16 MS. AYTCH: -- but I -- and having counsel
17 appear at the next status conference in order to get an
18 explanation or at least a plan with regard to their
19 cases is also fine with the defendants. Moreover, it
20 was just to bring, you know, this concern to the Court
21 and have some mechanism by which to handle it.

22 THE COURT: All right. Excellent. All right.

23 Well, I can -- I can fashion a procedure then
24 in a procedural order that addresses this and it will be
25 along the lines of what plaintiffs requested and what

1 apparently defense counsel doesn't really have any
2 objection to.

3 Anything else on paragraph 4?

4 MR. ORENT: Not from the plaintiffs, your
5 Honor.

6 THE COURT: Okay.

7 MS. AYTCH: Nothing from the defendants, your
8 Honor.

9 THE COURT: Okay. And just -- just so we're
10 clear, I think at times in written orders of mine I have
11 described your response, defense counsel -- defendants'
12 response to short form complaints as notice and entry of
13 appearance when, in fact, what you have been doing from
14 the beginning is really a waiver of service, which I
15 think was part of one of my very earliest orders in the
16 case.

17 And so I just want to make clear on the record
18 that the waiver of service operates identically to what
19 I referred to in I think at least two orders as an entry
20 of appearance. So to the extent there's any confusion
21 about that, I want to be clear that the waiver of
22 service operates in the same exact manner.

23 And also I just want to raise the issue of
24 amendments to short form complaints. There have been
25 some filed in the case and my thinking on that is that

1 the waiver of service or entry of appearance, as I've
2 described it at times, operates in the same manner for
3 any amendments, subsequent amendments, to short form
4 complaints.

5 In other words, I don't want to require
6 defense counsel to have to file anything subsequent to
7 an amendment to the short form complaint to operate as a
8 further denial. I -- I am inclined to just allow the
9 waiver of service with respect to the short form
10 complaint to operate as a -- you know, as a denial with
11 respect to any subsequent amendment as well.

12 Does anybody have any thoughts on that, any
13 objections to that process?

14 Okay. So there are no objections to allowing
15 that and I'm -- I'm just going to guess that all of you
16 assumed that the waiver of service would operate in that
17 manner.

18 MS. AYTCH: That's correct on the part of the
19 defendants, your Honor. If -- if anything further is
20 required, like an actual notice of appearance, we're
21 happy to do so, but as we've returned and looked at the
22 language of I believe it was CM-02 and CM-03 --

23 THE COURT: You are -- you are correct. I
24 think it's orders subsequent to that where I have used
25 the phrase entry of appearance.

1 So I just want to be clear for the record that
2 the waiver of appear -- the waiver of service operates
3 in the same manner and that with respect to any
4 subsequently filed amendments to short form complaints
5 that your original waiver of service will operate as the
6 denial for any subsequent amendments.

7 Okay. Let me ask one general question and, in
8 a sense, I'm kind of backing up a little bit to
9 paragraph 1.

10 I envisioned at some point receiving from
11 counsel a detailed and specific discovery schedule for
12 general phase discovery. And I may have received that.
13 If I have, you can tell me what the docket -- docket
14 number is. I know that you have filed a coordination
15 agreement that coordinates this MDL with the state court
16 discovery, but I'm just talking about basic details such
17 as when does general phase discovery -- when is it
18 complete, when do you anticipate it being completed, do
19 you have agreements on interrogatories, admissions,
20 depositions, dates to disclose experts, reports,
21 challenges, and amendments and any -- any sort of
22 dispositive motion deadlines.

23 Is -- have you filed such --

24 Whose phone is that that's playing the music?

25 MR. HILLIARD: I hope it's not mine, your

1 Honor, but I don't think it is. I've never heard that
2 before.

3 THE COURT: Would the person who is playing
4 the music mute their phone for me, please.

5 MS. AYTCH: Your Honor, this is
6 Enjoliqué Aytch --

7 THE COURT: Okay. Can you hear me over the
8 background music?

9 MS. AYTCH: I can, your Honor.

10 MR. ORENT: I can as well, your Honor.

11 THE COURT: Okay. Let me -- would counsel,
12 either Attorney Orent or Attorney Aytch, just clarify
13 for me and explain where I would find those kinds of
14 specific timetables. And if they haven't been filed
15 yet, you must have some sort of informal agreement with
16 respect to these timetables?

17 MS. AYTCH: Yes --

18 THE COURT: Go ahead.

19 MS. AYTCH: Yes, your Honor. This is Attorney
20 Aytch speaking.

21 So as we were backing up, if I can just refer
22 you to paragraph 2 of the agenda and that joint motion
23 for relief from Case Management Order Number 3 that's
24 mentioned there, document 132.

25 In that document, we -- the parties

1 acknowledge that we owe you a general phase discovery
2 schedule, but as --

3 MS. AYTCH: I'm sorry, your Honor. Can you --

4 THE COURT: I can hear you okay.

5 MS. AYTCH: Okay. So we decided that because
6 so many of those dates are dependent upon --

7 THE COURT: Okay. I -- I'm not able to hear
8 you. We're going have to figure out who the culprit is
9 on this Muzak problem.

10 So what we're going to do is I'm going to
11 have -- we're going to start from scratch and I'm going
12 to make it very clear whoever has a phone that they've
13 put on hold and they're not even aware their phone is
14 playing this Muzak is not permitted to use that line in
15 the future.

16 So what we'll do is we'll start from scratch.
17 We're almost -- I think we're coming close to simply
18 finalizing Science Day. So we don't have much more, but
19 I -- unfortunately, you were -- what you were saying,
20 Attorney Aytch, was breaking up, so I couldn't hear it.

21 So we will start from scratch. Hang tight.

22 (Off-the-record discussion.)

23 THE COURT: Good afternoon, counsel. I
24 understand we have everybody back on the line. Let me
25 just reiterate that, number one, anybody who is not lead

1 counsel, please -- please mute your phone. And I would
2 ask counsel, all counsel, not to put this call on hold
3 in the middle of the call because I think that may be
4 what occurred here and the person who put the phone on
5 hold I don't think had muted their phone, so that's why
6 we were all treated to that lovely Muzak.

7 All right. Attorney Aytch, you were just
8 pointing out to me document number 132, which I had time
9 to review and look at, which completely explains and
10 clarifies for me the question that I was asking.

11 So I understand you're still working on that
12 and there is certain info that you need and that you
13 should have that to me fairly soon. So thank you for
14 that.

15 Before we get to the Science Day, let me just
16 clarify that with respect to your participation in these
17 status conferences, it would be helpful for my case
18 manager to know, you know, not later than five business
19 days before our status conference whether you intend to
20 be present in person or via telephone. Obviously I like
21 the idea of telephone conferences and appearing via
22 telephone because it saves money for everybody,
23 especially the litigants.

24 So to the extent, however, for some reason you
25 feel as though you want to be here in person, please

1 notify my case manager of that fact not later than the
2 same deadline that I gave you to file the agenda, the
3 joint agenda.

4 Okay. Is everybody ready then to move on to
5 Science Day, paragraph 5?

6 MR. ORENT: Yes, your Honor.

7 THE COURT: Okay.

8 MS. AYTCH: Yes, your Honor.

9 THE COURT: All right. Before we get into
10 some of the -- I think one major dispute with respect to
11 Science Day, give me a sense of the science that I am
12 going to be learning, that Judge Temple and I will be
13 exposed to on Science Day.

14 I'm looking at the questions. It's hard for
15 me to imagine that you have differing positions on what
16 is a hernia, the types of hernias, some of the things
17 listed in document number 136 was -- which is the agenda
18 for the status conference that ultimately I think I
19 canceled.

20 So I'm looking at document 136 and I'm looking
21 at your joint summary of Science Day and I'm
22 specifically looking at paragraph 2g, which lists the
23 topics. And I'm just curious on, you know, why -- why
24 is it that, for instance, I'm not -- there won't be any
25 citation to or call-outs from any journal, expert,

1 scientist, organization, agency, or study.

2 So give me a sense of how you both view this
3 Science Day, because that may be the genesis of this
4 major dispute between you with respect to the
5 confidentiality of defendants' corporate
6 representatives.

7 So why don't you start, Mr. Orent, and give me
8 a sense of your understanding of the agreement you've
9 reached with defense counsel on Science Day. It sounds
10 a little bit more basic than what I had envisioned.

11 MR. ORENT: Your Honor, I think that you're
12 right to some degree, that it is a very basic overview
13 and it's intended to be a very basic overview of things
14 like what hernias are, what the various treatment
15 modalities are, what the science of that mesh is; that
16 is, what these meshes -- what these devices are intended
17 to do, the process, the regulatory process by which they
18 make their way through the FDA and onto -- onto the
19 market, specific design elements, and what is known and
20 available related to these products and some of the
21 types of complications that can occur.

22 I think with regard to your specific question
23 about the -- the agreement to not cite literature, I
24 think that there are going to be very different views
25 about the safety and efficacy of hernia meshes,

1 particularly the C-Qur devices, the different types of
2 C-Qur devices, and what we intended was to remove the
3 cherry-picking of articles and flashing quotations that
4 might sway your Honor one way or another --

5 THE COURT: Say that again. What's -- what --
6 Mr. Orent --

7 MR. ORENT: -- and focus on what we thought --

8 THE COURT: Mr. Orent, I'm sorry to interrupt
9 you. I think I missed what you said and I don't want to
10 mishear you.

11 What is -- what is it that is the topic that
12 could cause some dispute?

13 MR. ORENT: Well, your Honor, we think that a
14 lot of these areas, particularly with use of
15 literature, can be susceptible to cherry-picking of
16 literature and -- and ideas, and what we wanted to do
17 was to try and present this as while we think that this
18 is what the science says, this is our perspective, this
19 is certainly the plaintiffs' perspective on the science
20 versus trying to cherry-pick quotations from various
21 articles that might support our case and the defendants
22 doing the same and trying to have a -- a battle over the
23 truth of what our positions are.

24 I think that your Honor's going to see that
25 there is quite an area of overlap between the two sides,

1 but there's going to be some -- some wide differences in
2 terms of how we see the science, in terms of how we see
3 what the state of knowledge is and has been over the
4 last 10 to 20 years, and overlook what's known about the
5 complications, complication rates, and the alternative
6 treatments that -- that were available.

7 So we believe that -- and reached agreement
8 with the defendants on this -- that to present this as
9 what we think the literature shows is a cleaner way of
10 doing it and to avoid the issue of us pulling one
11 article and then having to respond to the defendants'
12 citation of the same article and getting into the weeds
13 as to what a particular article says when what we really
14 want to do is educate your Honor as to what we think the
15 body of literature says, what we think that these cases
16 are about, and what we -- what we think we intend to
17 prove at the end of the day and why it is that we're
18 seeking certain types of things in discovery, to provide
19 your Honor with that context.

20 So we wanted to get out of the weeds of what
21 an individual article might say and really focus on the
22 big ideas, so to speak.

23 THE COURT: Attorney Aytch?

24 MS. AYTCH: With regard to your question, your
25 Honor, the defendants see it pretty much the same. We

1 feel that the purpose of Science Day is to educate the
2 Court as to the science, terminology, and concepts so
3 that as the Court deals with, you know, discovery issues
4 or any issues that come to it, the Court has a better
5 concept.

6 What Science Day is not supposed to be is a
7 litigation of the liability or a proceeding dealing with
8 the liability. And it was the parties' -- pretty much
9 agreed already with what Attorney Orent said; it was
10 pretty much the parties' position that, you know,
11 getting into the weeds on the science and actually
12 culling out, you know, certain citations, it almost
13 comes down to a battle of the experts and a battle of
14 science, which is the liability, and we were trying to
15 stay above the fray with regard to that.

16 THE COURT: Well, let me ask you this, what --
17 a physician who starts out trying to educate herself
18 about -- about the science here, are there treatises or
19 articles or journals that that physician might consult
20 to try to educate herself?

21 MR. ORENT: Your Honor, speaking for the
22 plaintiffs, I would say that there -- there certainly
23 are treatises and texts, but as we start getting into
24 the issues related to the mesh -- so I think that there
25 are going to be -- there's going to be a universe of

1 issues related to what a hernia is and -- and what the
2 different treatment modalities are, but I think that as
3 soon as we start talking about what -- what failure
4 rates are, before we even get into complication rates,
5 how do you consider the failure rate of one modality
6 versus another very quickly become topics of discussion
7 and debate as opposed to pure material that is -- that
8 is objective. Because I think that things like
9 recurrence rates, things like -- even complication rates
10 are different based on whichever study you choose and
11 that there's a -- there is a whole education component
12 to understanding what the different levels of evidence
13 are and getting into the strengths and weaknesses of
14 different studies.

15 And so it may not be -- this may be more of an
16 answer to your last quest question, which is why were we
17 not citing various articles, and that would be to avoid
18 that further discussion.

19 But, you know, to answer your instant
20 question, I think that for some material there is, but
21 particularly once you start getting into the way in
22 which meshes are supposed to work, what their safety and
23 efficacy is supposed to be and some of the more
24 complicated issues, I think that the realization of what
25 is fact and what is opinion of a particular author might

1 get murky pretty quickly.

2 MS. AYTCH: Your Honor, this is Attorney
3 Aytch.

4 Again, I -- there's no real dispute about what
5 Attorney Orent is saying at -- with regard to that.

6 Are there, you know, some basic treatises and,
7 you know, medical literature that medical students are
8 required to read on the -- in terms of it, it is at
9 least defendants' position that hernia repair is kind of
10 in a general surgical field.

11 So if we get into some of the initial topics
12 that you noted, what is a hernia, types of hernias,
13 various treatment modalities, there will be a lot of
14 overlap and I don't think that citation to a particular
15 source will advance the Court's knowledge because most
16 sources, at least on those topics, will -- it's
17 pretty -- it's pretty common knowledge and there will
18 probably be overlap.

19 It is a concern when you get into the issues
20 that will have an effect on liability -- so failure
21 rates, things like that -- that the parties thought that
22 there may be an issue in terms of citing sources and,
23 you know, getting into a debate about the strength of
24 one source and any discrepancies in our sources.

25 But for -- just in terms of just like a

1 straight treatise hornbook on the subject, there are
2 those out there and I doubt that they will vary too much
3 with regard to what either of the parties are going to
4 say on those topics.

5 THE COURT: Okay. And can you tell me, how --
6 how are you putting this evidence before me and Judge
7 Temple? What -- is it by way of lawyers? And I'll
8 start with plaintiffs.

9 MR. ORENT: Your Honor, the state court
10 liaison counsel, Mr. Matthews, and myself intend to
11 split the presentation for the plaintiffs and largely
12 using PowerPoint and other graphics to teach the Court
13 what we think are the central concepts involved in the
14 case.

15 THE COURT: All right. And Attorney Aytch?

16 MS. AYTCH: Similar, your Honor. We intend
17 to, again, use the PowerPoint with a lot of these
18 concepts and then just, you know -- but it won't be
19 anything beyond the PowerPoint and then whether or not
20 we have a corporate representative and then us just
21 speaking.

22 THE COURT: Okay. So the issue of the
23 corporate representative, you haven't decided whether or
24 not you would actually use that person at Science Day?

25 MS. AYTCH: Correct. We haven't -- we haven't

1 made a complete decision, partly, you know, waiting on
2 this particular ruling. But I don't want to -- I don't
3 want to confirm one way or the other.

4 What we did agree, because we did not want to
5 blindside the Court or plaintiffs -- this was not
6 supposed to be a gotcha. So I believe it is in that
7 same agenda, that document 136, where we agreed, I
8 believe, two weeks prior to the scheduled Science Day to
9 disclose people who will be presented and --

10 THE COURT: Okay. All right. Now, let me
11 just back up a little to Attorney Orent and ask you --
12 well, maybe I can just ask a more general question.

13 If, indeed, this is going to be essentially
14 PowerPoint production and lawyers presenting the
15 science, the very basic concepts to the judges, why does
16 it have to be confidential? Why isn't it something that
17 could be made available via a transcript for people who
18 are not able to attend the hearing?

19 MR. ORENT: Your Honor, speaking for the
20 plaintiffs, I think when we said confidential, perhaps
21 maybe there's a disagreement with the defendants as to
22 what that means.

23 What I simply meant by that is that these
24 positions aren't binding on any plaintiff or any
25 plaintiff's firm; that this is our interpretation of it,

1 that these are lawyer comments, and that the evidentiary
2 value is -- is not there because this is lawyers'
3 attempts to educate the Court. That's simply what we
4 meant by an off-the-record or however term that it was
5 intended to be.

6 This is -- we have no objection as plaintiffs
7 to sharing the transcript or -- in fact, to anyone in
8 the world that wants to be a recipient of the
9 transcripts, but I don't want to bind my clients or the
10 clients of the entire MDL to what is lawyer -- I don't
11 want to say argument, but my interpretations and the
12 interpretations of the MDL leadership. And so that's
13 why we, as far as plaintiffs are concerned, have held
14 that belief.

15 But by that same token, just as we are all
16 sworn officers of the bar, a fact witness is a very
17 different story and that's why we -- we oppose the -- a
18 fact witness coming and having that be as if it didn't
19 happen.

20 So I have a good faith belief and trust
21 in everything that I'm going to tell this Court.
22 Mr. Matthews and I are going to be spending many, many
23 hours working on the presentation to make sure that it
24 is as accurate as we can possibly make it and it will be
25 as consistent as possible with the views of the entire

1 plaintiffs' bar as is possible, but I can't guarantee
2 that every plaintiff is going to agree with every point
3 that I'm going to make.

4 On that -- by that same token, a defendant
5 employee who's a corporate employee should be subject
6 to cross-examination on every statement that that
7 individual makes relative to hernia mesh. If ultimately
8 that individual comes before your Honor as part of
9 Science Day and says in open court that the failure rate
10 of the Atrium devices are X or that Y complications
11 can't happen or that the device performs in some other
12 way and we later find documents that are directly
13 contradictory to that, I believe that we are entitled to
14 cross-examine that individual and to be able to
15 demonstrate that that individual was not being candid
16 and that subjects that person to questions by the jury
17 as to the validity of whatever else that they're going
18 to be testifying to.

19 So it's very pertinent to a -- to a fact
20 witness and, your Honor, to be quite frank, it would be
21 the first thing that I would ever ask a corporate
22 representative when I get to depose that individual,
23 what positions that they spoke of, and really get into
24 the -- the truth of each of those statements and the
25 basis for those statements, because a corporate

1 individual has a different role and different
2 responsibilities to the truth than do lawyers. Lawyers
3 can be advocates as well as officers of the court;
4 obviously, they're bound -- we are bound by our ethical
5 obligations to candor to the tribunal, but that does not
6 hold for an unsworn layperson.

7 THE COURT: Go ahead, Attorney Aytch.

8 MS. AYTCH: Well, your Honor, what I would get
9 at here is -- is the purpose of Science Day, and the
10 Science Day is still to educate the Court. It's not to
11 try the case. And any use of a corporate
12 representative, again, would not be going to liability.
13 It would still be going to these issues of educating the
14 Court.

15 Nothing that the attorney says or anyone says
16 in a Science Day proceeding -- that's the whole point of
17 stipulating to it being off the record -- is evidence.
18 It can't be used and it shouldn't be used in any
19 furtherance of the liability phase of the case. It's
20 simply to educate the Court.

21 Moreover, judges who have conducted Science
22 Day have noticed the benefit of having it off the record
23 because it liberates the parties to speak freely. It
24 liberates the Court to ask whatever questions that they
25 want to make candidly and get answers to those because

1 you're not being held on the record to any statement and
2 set up for cross-examination. The preparation would be
3 different, the delivery would be different, and then the
4 information that the Court can inquire to may be
5 different.

6 So this -- it just kind of disrupts the entire
7 purpose of Science Day to have any person held, you
8 know, to a cross-examination standard.

9 THE COURT: Okay.

10 MR. ORENT: Your Honor, if I might just
11 respond to that very briefly, and that is this is not
12 about holding someone to a cross-examination standard or
13 a different standard. This is about whether or not
14 someone is going to get up there, someone who is
15 involved with the company, and speak the truth. Any
16 time any one of us gets in front of the Court, we are
17 held to a --

18 The way that fact witnesses conduct
19 themselves, whether in court or on the Internet or in
20 any manner of the activities that they do is direct
21 evidence of that character -- that individual's both
22 character, which is the propensity to tell the truth, as
23 well as the subject matter.

24 And if the defendant is going to put forward a
25 corporate representative, that individual can be

1 cross-examined on anything that has happened from that
2 person's birth to the time that they arrive, and it is
3 that deposition that is relevant and related to the
4 facts at issue in this lawsuit. And if that individual
5 is going to get up and talk about things that are
6 directly contradictory to information that is contained
7 within that individual's e-mails, we -- that fact is
8 something that a jury should know. That jury has a
9 right to know that that individual said one thing in
10 deposition and something else in e-mail and something
11 else in open court. That goes to the credibility of the
12 witness and that's not an issue of Science Day --
13 whether or not something is helpful to the Court or not.

14 It goes to that individual's propensity to
15 tell the truth and what the truth is and that's very
16 different than a lawyer looking at and putting forward
17 what they believe to be the science and the evidence,
18 which -- as your Honor's well aware, we appear before
19 you. We have our credibility on the line every time
20 that that we say something. So if we say something that
21 is not going to be accurate and it's untruthful, there's
22 a consequence to that action. And just like that, the
23 fact witness -- the way that fact witnesses can be held
24 accountable for their actions is by cross-examination.

25 And so these are people with firsthand

1 knowledge of the facts and circumstances of these cases.
2 They're already witnesses in this case. They're already
3 going to have information subject to deposition. And so
4 putting them in a position to come before a court and
5 speak, the defendants should recognize that they are
6 putting their clients at potential risk if that person
7 doesn't speak consistently with what that person already
8 knows and documented.

9 MS. AYTCH: Your Honor, this is Attorney
10 Aytch.

11 And just to respond to that, I mean, our duty
12 as officers of the court doesn't cease just because
13 we're not speaking. I mean, we're still bound to not
14 allow -- and I won't say a witness because, again, this
15 would not be evidence nor opinion, nothing at Science
16 Day is evidence -- but that to speak any untruth, I
17 mean, the standard that -- of what the Court would hold
18 us to as officers of the court remains. If there is
19 something that is said that is untruthful, it's
20 incumbent upon us to correct that truth and that would
21 be the remedy in this -- in this manner.

22 I mean, this would -- the fact that this would
23 be off the record is no different than proceedings that
24 happen in settlement conferences. It's understood that
25 the purpose for that proceeding is something different

1 than to get into liability. And so to further that
2 purpose, statements off the record -- I mean, whether or
3 not a witness says something different in his e-mail and
4 he says it again on the stand at, you know -- or at a
5 deposition or on the stand at trial, yes, counsel of
6 course would have the right to cross-examine him on that
7 because that's an evidentiary part of it.

8 So there's nothing different that's being
9 requested here than happens at settlement negotiations
10 or any other proceedings in which trying the liability
11 is not at issue.

12 MR. ORENT: Your Honor, if I might just raise
13 one additional concern, which is this is -- as of right
14 now is a joint state court effort. And while I know
15 Mr. Matthews is on here and can speak to the state
16 court's position, I'm sure that Mr. Matthews would --
17 would oppose this before the state court judge as well.

18 And so there may be other cases out there
19 where -- in other state courts, though -- where these
20 same people might become witnesses and we can't
21 guarantee with any degree of consistency that that
22 person's not going to be subject to testifying later on
23 about the same issues that -- if your Honor were to
24 allow that individual to testify and it to be centrally
25 sealed -- there may be another court. And so the

1 defendant still has that same risk.

2 And, you know, I -- I think that it's a very
3 dangerous prospect to have fact witnesses being able to
4 appear before a court, a tribunal, without -- without
5 being under oath and on the record and not being held
6 directly to account for the statements that they make.

7 MR. TURNER: Judge, this is Hugh Turner. If I
8 could just add a comment. I've been quiet so far.

9 THE COURT: Go right ahead.

10 MR. TURNER: I must say that the idea of
11 having a former corporate rep, actually, not a present
12 employee, as someone who might educate and help the
13 Court understand came to me a while back and I thought
14 it would be of benefit if I were in your shoes. Because
15 if you have somebody who is a cofounder of the company
16 who could speak to some of these issues without looking
17 over his or her shoulder, I think that would be of
18 benefit.

19 I think that whether it is me or Enjoliqué
20 Aytch or a former corporate rep who stands before you, I
21 assume they're going to try to tell the truth and
22 they're going to be subject to if there's -- an issue
23 comes down the road later that there's some testimony
24 given because the -- the lawyers who are going to be
25 present at Science Day are going to hear what this

1 person has to say and take notes anyway. So they're
2 going to know what's said and they're going to ask
3 questions at a deposition anyway.

4 And if it really turned out that there was
5 some egregious misstatement before the Court, I'm sure
6 they could bring it to the Court's attention, the Court
7 will have a transcript of the proceedings on Science
8 Day, and then the Court would deal with it individually.

9 But I think it would be ill-served, the
10 purpose of educating the Court, to have this person
11 someone who has to not be off the record when everybody
12 else is.

13 THE COURT: All right. I have heard enough, I
14 think, to make a decision on this.

15 Does anybody else want to be heard, however,
16 before I make my decision here?

17 All right. Let me just say that I do think
18 there is -- there is some -- something to plaintiffs'
19 argument here, and let me also just say I'm deciding
20 this in the context of what you both have summarized for
21 me as a very basic -- what I would call basic Science
22 Day, where attorneys are essentially going to translate
23 for me and for Judge Temple the broad principles in the
24 science, just terminology and providing context. And it
25 seems to me that Attorney Aytch and Attorney Turner

1 could do the same with respect to summarizing whatever
2 it is your former corporate representative would tell
3 me. I'm not sure necessarily why I would need to hear
4 from a live witness on certain facts at issue.

5 Obviously those kinds of decisions are better
6 left to counsel, but where this dispute is brought
7 before me, frankly, I'll tell you, I -- I can see the
8 benefit of a free-flowing Q&A where there's no
9 transcript and witnesses aren't sworn and -- I can see
10 the benefit of that if I had a bunch of scientists or
11 professor types in front of me and -- and I was going to
12 be free to ask whatever questions I had and those
13 individual witnesses would be explaining concepts to me.

14 But here this is already somewhat staged, if
15 you will, with counsel filtering all of the information
16 for me. And so that's what counsel has really proposed
17 to me and I'm not inclined to tweak that. You both seem
18 to agree that that's how you're going to do this.

19 So in light of the way that you have
20 structured and proposed Science Day to me, I think
21 introducing a potential fact witness in the case is
22 messy and ultimately I balance the value to all
23 plaintiffs' counsel who are unable to come to this
24 Science Day to have access to a transcript of what is
25 said and to the exhibits, which would be your

1 PowerPoints.

2 So -- so from my perspective, I think it would
3 be very beneficial to the public to have access to this
4 and ultimately I'd like to see it on our website so that
5 any plaintiff who is interested in what happened at
6 Science Day could review a transcript.

7 So my -- my thought is that it just is much
8 simpler if we keep the -- the general structure that's
9 proposed and not introduce the possibility of a fact
10 witness or one of the employees or former cofounders of
11 the company.

12 So that's where I come down on that.

13 Any other issues with respect to Science Day?
14 I can tell you that the date that works for Judge
15 Temple, works best for him, is October 27th. My
16 understanding is that that works for plaintiffs and
17 defense counsel and so October 27th is looking to be the
18 date for Science Day.

19 Anybody else have anything they want to talk
20 about with respect to Science Day?

21 MR. TURNER: Judge, Hugh Turner again. I have
22 one clarification.

23 The -- you're indicating that there may be a
24 transcript. Now, normally I don't think there are
25 transcripts, but if you are having a transcript -- is it

1 still the Court's intention that this be off the record
2 and confidential?

3 THE COURT: Well, it will be off the record.
4 It will be counsel presenting it to me, but it won't be
5 sealed.

6 MR. TURNER: Whatever is said would be
7 accessible to the general public?

8 THE COURT: Yes.

9 MR. TURNER: All right, your Honor. Thank
10 you.

11 MR. HILLIARD: Your Honor, Russ Hilliard.
12 We've been assuming this will be a half-day in the
13 morning. Is that a correct assumption?

14 THE COURT: Well, I, frankly, am guided by
15 what you have proposed to me, which I think was no more
16 than an hour and a half per side.

17 MR. HILLIARD: Right.

18 THE COURT: So I envision that it would take
19 no more than half a day.

20 MR. HILLIARD: Okay.

21 THE COURT: So, now, to get back to the
22 question of -- I'm not intending to seal the transcript.
23 I was intending to make that be available. My
24 understanding is as you're describing it to me, lawyers
25 are going to be telling me and summarizing for me

1 this -- this science, summarizing for myself and Judge
2 Temple. So I'm not seeing any reason why that should be
3 sealed.

4 I can see why it might be nonbinding and the
5 parties can agree on that and we can place that on the
6 record, the things that you say at this -- at this
7 hearing, the way in which you might answer my questions
8 would not bind any party later, but I'm not seeing a
9 reason why I would -- it would be confidential or
10 sealed.

11 Everybody okay with that? Any --

12 MR. TURNER: I'm just thinking out loud. Hugh
13 Turner, your Honor, again. I'm just thinking out loud.

14 I'm not sure; the other people on the
15 telephone could speak for themselves on this. But I'm
16 not familiar with Science Days that are -- that are
17 public in the sense that what's said is on the record
18 and nonconfidential and a transcript can be obtained by
19 anybody afterwards. I'm just not familiar with that.

20 THE COURT: Well, what would be confidential?
21 What would have to be sealed? What would you
22 envision -- what would be the basis for sealing
23 something like this?

24 MR. TURNER: I think that the concept is that
25 it's off the record so that whatever is said by --

1 amongst the -- at the -- at the conference is off the
2 record. It's not something that would be considered to
3 be -- it would be confidential in the sense that it
4 would be said in confidence to the Court. It wouldn't
5 be something of public record. As the entirety of it,
6 not individual pieces of it, if that was your question.

7 THE COURT: Well, if something came up that
8 was worthy of being sealed, I certainly would be open to
9 that, some sort of partial seal, but as -- as you're
10 describing Science Day to me, I'm not seeing the need to
11 make this -- this hearing completely off the record
12 without any transcript and I'm not seeing any reason why
13 other plaintiffs' counsel couldn't have access to it.

14 I could certainly hear argument on some sort
15 of limited confidentiality, but the benefits to -- I
16 think to the plaintiffs' counsel nationally are
17 fairly -- fairly high here and I'm not seeing any
18 countervailing reason to -- to seal any portion of this.
19 I understand the off-the-record rationale, but I -- I
20 think that what you're describing to me is fairly
21 limited in its scope and it's just lawyers presenting
22 information to me. I think -- my understanding of
23 Science Days in general, what I have heard about and
24 read about in other cases, is different than what you
25 are proposing to me.

1 So I think this is very filtered material and
2 I don't think that you're going to be in any way
3 inhibited just because there's a transcript that would
4 be made public after Science Day. But, you know, I'm
5 open to an argument; I'm just not -- I'm just not
6 hearing one.

7 I did speak with -- briefly with my colleague
8 on the court, Judge Barbadoro, who is very, very
9 experienced with MDL hearings about Science Day and all
10 of his Science Days have been transcripts and have been
11 public. And I understand, though, that there is -- also
12 there's a large number of Science Days that are off the
13 record and are -- and are no transcript and ultimately
14 confidential, if you will.

15 But I'm not seeing a reason why this
16 particular Science Day needs to be so closed and I don't
17 see any reason why it would need to be sealed.

18 So, you know, I'm open to hearing arguments to
19 that effect, but simply because this is the way it's
20 always been done, I would not be persuaded by that
21 argument. But if you can persuade me there's some true
22 need for confidentiality, then I'm open -- I'm all ears.

23 MR. TURNER: No, we're -- that's all the
24 comment we have, your Honor.

25 THE COURT: Okay.

1 MR. TURNER: This is Hugh Turner.

2 THE COURT: All right. Anything else from
3 plaintiffs about Science Day?

4 MR. ORENT: No, your Honor.

5 THE COURT: Okay. And let me just say to
6 counsel, if counsel can agree on a -- some sort of
7 publication or article or treatise, even if you would
8 agree on two and you wanted to submit those even in
9 advance of Science Day, I would happily read them before
10 I take the bench on that day. I'll provide, obviously,
11 copies to Judge Temple. But I'm very open to reading
12 any -- anything you might submit along those lines, you
13 know, obviously if both of you agree on the submissions.

14 So keep that in mind and we will schedule
15 Science Day for what will -- we now -- we anticipate it
16 taking half a day, but I know that we're reserving the
17 court for the whole day to the extent it needs to go
18 past or beyond lunch.

19 Any --

20 MR. ORENT: If I might just ask one quick
21 question. Does the Court intend to have the regularly
22 scheduled status conference the second week in October
23 or doing sort of all at once on this date, the 27th?

24 THE COURT: I intend to keep October -- I
25 think it's October 12th -- scheduled, but I would be

1 very open to you filing something that indicates to me
2 you don't feel we need to have it. I want to leave it
3 there in case there are any other disputes around
4 Science Day in particular or any other matters that can
5 be resolved by me at the status conference.

6 So let's keep it on and if you both -- if
7 counsel for both sides agrees that you don't need it,
8 you can just notify my case manager.

9 MR. ORENT: Thank you, your Honor.

10 THE COURT: All right.

11 MR. TURNER: All right. Thank you, Judge.

12 THE COURT: Yes.

13 MR. HILLIARD: Thank you.

14 THE COURT: You're very welcome.

15 It looks as though we've gone through the
16 agenda. Anything else anybody would like to bring up
17 before I close the court?

18 MR. ORENT: Just -- I had just one question,
19 your Honor, and I certainly don't mean to rush the Court
20 in any way.

21 Just in terms of our discovery planning now
22 that we are beginning the general phase discovery, I'm
23 just curious when the Court -- if it knows when it might
24 have a decision on the motions to dismiss that are
25 pending before it so that we can plan whether or not

1 we're going to be doing, you know, certain types of
2 discovery. And if your Honor doesn't know, I certainly
3 don't want to pressure the Court. That was not my
4 intention.

5 THE COURT: The Court cannot give you a
6 definitive answer to that question.

7 MR. ORENT: Okay. Thank you, your Honor.

8 THE COURT: All right. Anything else?
9 All right.

10 MS. AYTCH: Not from the defense, your Honor.

11 THE COURT: Okay. Thank you, counsel, and
12 I'll talk to you on October 12th unless I hear otherwise
13 from you.

14 MR. HILLIARD: Thank you, Judge.

15 MS. AYTCH: Thank you.

16 MR. ORENT: Thank you, your Honor.

17 THE COURT: Thank you.

18 MR. HILLIARD: Goodbye.

19 (Proceedings concluded at 4:17 p.m.)
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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: 9/27/17

Liza W. Dubois
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