

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

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

* * * * *
*
IN RE: ATRIUM MEDICAL CORP. *
C-QUR MESH PRODUCTS LIABILITY * No. 16-md-02753-LM
LITIGATION * September 11, 2019
* 1:08 p.m.
*
* * * * *

REDACTED TRANSCRIPT OF DAY THREE OF MOTION HEARING
AFTERNOON SESSION

BEFORE THE HONORABLE LANDYA B. MCCAFFERTY

APPEARANCES:

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

Brian A. Glasser, Esq.
Katherine E. Charonko, Esq.
Bailey & Glasser LLP

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

D. Todd Matthews, Esq.
The Gori Law Firm

For the Defendants: Katherine Armstrong, Esq.
Mark Cheffo, Esq.
Katherine Unger Davis, Esq.
Lincoln Wilson, Esq.
Dechert LLP

Pierre A. Chabot, Esq.
Wadleigh Starr & Peters PLLC

Court Reporter: Brenda K. Hancock, RMR, CRR
Official Court Reporter
United States District Court
55 Pleasant Street
Concord, NH 03301
(603) 225-1454

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

(Lunch recess taken)

THE CLERK: All rise for the Honorable Court.

THE COURT: Go ahead.

ALEX FERNANDEZ, having been previously duly sworn, was further examined and testified as follows:

CONTINUING DIRECT EXAMINATION BY MR. CHEFFO:

Q. All right, Mr. Fernandez, we're back at it. We ended, just to orient you, in slide 15, I'm sorry, slide 14, so we're going to move on to the next slide. This is just a demonstrative with respect to -- could you just explain for the Court what current assets and what current liabilities are?

A. Yeah. Current assets are basically assets that one may be able to convert into cash within the next 12 months.

Q. And what about liabilities?

A. Those are obligations that are likely or will mature and will be payable within the next 12 months.

Q. Okay. Now, this is -- her Honor has seen this in various forms throughout the last few days, you've certainly looked at it, but let's just take a minute and talk about what this is. Would you just describe what 2560 is.

A. It's labeled "Short-Term Financial Liabilities Group Internal."

THE COURT: Are you looking at something? My screen is not on. Everybody else is able to see it.

1 (Discussion held off the record)

2 THE COURT: Actually, I can see this. Go ahead.

3 MR. CHEFFO: Thank you, your Honor.

4 Q. Mr. Fernandez, so this is listed on the internal balance
5 sheet, line 2560, as a "Short-Term Financial Liability Group
6 Internal," correct?

7 A. That's correct.

8 Q. Now, did you form a view as to whether this is, in fact, a
9 short-term current liability?

10 A. Yes, I did. When I was doing my initial review, one of
11 the things that pops out is that the balance remains relatively
12 stagnant during the period, so I inquired with the CFO,
13 Mr. Sufat, regarding the nature of that account and why it
14 hasn't changed or moved in the last three years. He actually
15 explained that the account was related to the actual initial
16 acquisition of the company, and that it had been on the books
17 since then, and I asked him whether there was a document that
18 showed the terms of this amount due to the parent company, and
19 he told me that there was none and whether -- I further asked
20 him whether there was any intent to collect that or to call
21 that debt within the next 12 months, and he said that -- easy
22 for him to, say the 12 months pretty much had expired. He
23 said, "No, it's been there on the books, there's no intent to
24 call that, so, therefore, it is really not a liability that is
25 expected to be paid within the next 12 months." Of course, now

1 we're in 2019. We know that it remains on the books and it has
2 not been called, so it verifies or validates his statements to
3 me.

4 Q. Did you form a view as to how this would be treated if
5 GAAP were applied?

6 A. Again, short of a contractual obligation or the intent to
7 call the debt, then I think it would be classified as other
8 than current or long-term liability.

9 Q. You heard some, if not testimony, certainly questions and
10 answers about the concept of substance versus form. Do you
11 recall that?

12 A. I do.

13 Q. And part of that entailed understanding kind of the
14 day-to-day practical impact of how businesses operate?

15 A. Correct.

16 Q. Is that what you did in trying to understand this entry
17 and how it was treated in its implications for GAAP?

18 A. Certainly. I mean, management of Atrium clearly knows
19 what it is, is not overly concerned about it, and once they
20 identify the fact that there is an obligation, there isn't an
21 intent, then it was easy for me to conclude that that should
22 not be considered a current liability but something other than
23 that.

24 Q. In addition to just the factors I think you indicated, it
25 wasn't just the word of Mr. Sufat, correct?

1 A. Well, one of the best indicators of any predictive test is
2 what actually happened, and it has not been called, so we have
3 the benefit of hindsight.

4 Q. And have you seen anything even after this one way or the
5 other indicating any effort, intention, ability to call this?

6 A. I have not.

7 Q. And what would the impact of your solvency analysis be if,
8 in fact, this was characterized from a GAAP perspective as a
9 short-term liability?

10 A. If one was to consider it a current liability, then it
11 would give you a negative result of the working capital test,
12 which would cause you to look further then into if, in fact,
13 they have excess current liabilities over current assets what
14 other methods would they have available to meet those
15 obligations. Are there other assets that could be converted
16 into current assets through the sale of property, plant,
17 equipment, patents, whatever, or their ability to renegotiate
18 debt or their ability to raise capital would have to be
19 addressed. But in this particular case it was obvious that it
20 was not a short-term liability.

21 Q. Okay. And even if it was, you would require additional
22 steps that you just talked about to determine whether it
23 rendered it insolvent?

24 A. The whole purpose of doing a comparison of current assets
25 to current liability is to be able to use it as an indicator

1 whether the company is going to have the ability to meet its
2 obligation over the next 12 months. It is nothing more than an
3 indicator. It is not a determinative test. It's not a test
4 that would conclude or cause you to draw a conclusion on
5 solvency, but it would cause you to further address how well
6 they'd be able to meet those current needs if they have a
7 shortfall in current assets.

8 THE COURT: Could I ask a question?

9 MR. CHEFFO: Please.

10 THE COURT: This, obviously, took some time with
11 Mr. Messina yesterday, this number, these three numbers. Why
12 would a company have a number on the books that is essentially
13 meaningless? It's a number and it's a big number, and it would
14 cause someone to look at just the statements and say, okay,
15 that's a liability, that's in the negative column. Why would
16 that stay there if it really is never going to be called?

17 THE WITNESS: Well, it is a liability, so I don't
18 assume that it will never be called. At some point they do
19 have the legal right to call that debt, if they chose to. But
20 this is -- my understanding of it is this is part of the
21 initial structuring of the purchase. So, this ended up being
22 kind of like a leveraged buyout, so you're basically leveraging
23 the assets that you have and putting more liability or more
24 debt in your balance sheet in order to buy the company and be
25 out less cash. So, the company could have considered it a

1 capital contribution, and at some point in the future may
2 decide to formalize the agreement, but it does exist as a
3 liability. For me is it a current liability? Is it going to
4 be due and payable in 12 months or not? But I consider it to
5 be a fully payable liability on behalf of the company.

6 THE COURT: And it could be called at any time?

7 THE WITNESS: Well, yes, absent an agreement, and I'm
8 not sure what the terms would be when you don't have a formal
9 agreement, a formal debt instrument, a formal note payable.
10 But, yes, theoretically, you know, the parent company, I guess,
11 could call it at any time but has not expressed the intent to
12 do so, and it has not done so.

13 THE COURT: Okay. But they could theoretically call
14 it at any moment in time and require that to be paid?

15 THE WITNESS: Yes, yes. Obviously, any time we look
16 at any kind of debt that is an important factor. The fact that
17 they have the ability to call it is a critical factor. The
18 next factor would be do they have an intent, and can you have
19 an intent that you can validate, that you can substantiate that
20 they, in fact, will not call it within the next 12 months? So,
21 in this case we have, you know, the benefit of hindsight. They
22 did not call it. It may not always be a current liability, but
23 as of 12/31/2017 it was -- or it may not always be a long-term
24 liability, but as of that date and as of today it still has not
25 been called.

1 THE COURT: Okay.

2 THE WITNESS: And we're doing the test as of a
3 specific point in time, so our test, our date of measurement is
4 12/31/2017. We're really not looking beyond the next 12
5 months. It becomes way too subjective to be able to predict
6 solvency two years, three years from now. There's too many
7 things that can happen.

8 THE COURT: I know from Mr. Messina, as I recall
9 yesterday, he was really concerned at least, I'm sure you aware
10 this is his criticism, that there's a number in the books that
11 isn't substantiated by a document or contract or a record, as
12 you just said.

13 THE WITNESS: And possibly not correctly labeled as
14 well.

15 THE COURT: And it's substantiated only by word of
16 mouth of a CFO, and he had a problem with that in terms of just
17 specific accounting standards and how one would go about taking
18 this number into account, and, as I recall, that was one of his
19 major critiques of your analysis.

20 THE WITNESS: Right. And it's not ideal. Ideally,
21 you would have a written document, but we are allowed to
22 consider the intent of the company and what actually happened
23 in order to properly classify it. As far as the company is
24 concerned, they know exactly what it is. It's been on the
25 books, you know, for an extended period of time. So, they

1 know. They can control between parent and a subsidiary the
2 terms of that at will. They could draw an agreement tomorrow
3 that said it may not be called for 10 years, or they could draw
4 a different one. But, yes, it's not the ideal situation, but
5 the intent is a critical factor in that determination.

6 THE COURT: Okay. Thank you. Go ahead, Attorney
7 Cheffo.

8 MR. CHEFFO: Thank you, your Honor, for the
9 clarification.

10 BY MR. CHEFFO:

11 Q. Before we move on, because I think her Honor asked a few
12 questions that I probably should have followed up on as well,
13 your task, your assignment, our request of you was to look at
14 the solvency of the company up to and including December 31st,
15 2017, correct?

16 A. Correct.

17 Q. And that was based on looking at when the cases were filed
18 and when the Motions to Dismiss were filed in this case. At
19 least, that's your understanding, right?

20 A. There's also the information that was available at the
21 time that I was engaged. So, the most current information
22 available when I was engaged was 12/31/17, and, therefore,
23 that, by default, ended up being my final date of measurement.

24 Q. And we know, as you said, we have the benefit here of
25 hindsight, a few things, right? We know the company has never

1 declared bankruptcy, right?

2 A. Correct. And there is a distinction between reclassifying
3 it for purposes of a solvency analysis and reclassifying it for
4 purposes of reporting to shareholders and investors. I'm not
5 suggesting anything other than for purposes of making a
6 solvency determination, just that it was not called, there was
7 no intention to call it, and it continues to be so today.

8 Q. All right. So, at least as I understand your opinion,
9 your view is we know it was on the books and it hasn't been
10 called, so to basically suggest this liability rendered a
11 company insolvent, when we know it wasn't called and there's no
12 intention, that wasn't the appropriate way under GAAP to look
13 at this?

14 A. And not in a solvency analysis. I mean, it's important to
15 make sure that we understand why we're doing this. We're doing
16 this to measure the company's ability to meet its current
17 obligations. So, if, in fact, that is not a current
18 obligation, if, in fact, we know that it is not going to be
19 called within that 12-month period in a solvency analysis, it
20 is appropriate to do it that way.

21 If I was doing an audit of the financial statements in
22 accordance with International Financial Standards I would
23 probably hold a higher standard, because it's simply not an
24 analytical tool that you're applying then; it's a
25 representation that you're making to users outside the company.

1 Q. And I think, based on your many years of experience,
2 you'll be able to field this, but tell me if we're getting
3 outside your area of expertise. I don't think we are. But,
4 just for a minute, to the extent that there was -- her Honor
5 asked about whether it was called today. If something like
6 this was called and it rendered a company insolvent, there are
7 remedies for that, right, in terms of bankruptcy, fraudulent
8 conveyances? So, in other words, if you're looking at the
9 implication if the company was to call it, there are other ways
10 that creditors can be protected, correct?

11 A. Certainly. And there are other tools that the company can
12 utilize to try to meet that obligation if it was called. In
13 other words, they could try to sell assets. They could try to
14 sell, you know, patents or intellectual property or product
15 lines. They could try to borrow money to pay it off. They
16 could try to raise additional capital. So, the test in and of
17 itself is not determinative, but it is important for a solvency
18 analysis to understand whether the company is going to have the
19 ability to pay its obligations that will become due over the
20 next 12 months, and this was not an obligation that became due
21 or was intended to become due as of December 31, 2017.

22 THE COURT: And who is the company that can call this?
23 Is it Getinge or is it Datascope?

24 MR. CHEFFO: That's a good question, your Honor. If
25 you'll indulge me, we'll look at the actual -- unless you know

1 off --

2 THE WITNESS: Well, I know that it was originally
3 labeled as an amount payable to parent company. Now, whether
4 parent company to them would be the next -- the one step up
5 above parent or whether they're talking about the global parent
6 I couldn't tell you.

7 MR. CHEFFO: My understanding is it's Datascope, but
8 if you'll indulge us on that, we'll try and find out.

9 THE COURT: Okay. Is it Gary Sufat? Is he also going
10 to testify?

11 MR. CHEFFO: He is not. He's not, at least live.

12 BY MR. CHEFFO:

13 Q. So, and the last thing before we move on to the next
14 slide, have you seen any information that Atrium, anything big
15 or small, has not been able to meet any of its financial
16 obligations, bills, payroll of its 500 employees, taxes,
17 anything of that regard?

18 A. No, I have not.

19 Q. So, this is Atrium's internal balance sheet from 2017.
20 It's Plaintiffs' Exhibit 31. What items are included as
21 Atrium's current assets?

22 A. Again, inventory, because it is expected to be converted
23 into a cash sale within 12 months; accounts receivable, which,
24 again, are all expected to churn or convert within 12 months;
25 other current receivables, which a lot of that are

1 transfer-pricing amounts due to the company; and, of course,
2 cash or cash equivalent, which, in essence, is, in fact,
3 already liquid.

4 Q. And we did the math for you, Mr. Fernandez. So, when you
5 add those up it comes to about 56 --

6 A. Right. We have [REDACTED] available in current assets to
7 meet operating needs over the next 12 months.

8 Q. And what does this represent?

9 A. Well, these are the liabilities that we know are expected
10 to be paid within the next 12 months that includes the accounts
11 payable of the company and the total other current liabilities,
12 which, again, primarily are intercompany transfer-pricing type
13 transactions.

14 Q. And your opinion assesses Atrium's solvency and
15 capitalization through December 31st, 2017, correct?

16 A. Correct.

17 Q. When you add up its current liabilities based on its
18 balance sheet you have this [REDACTED] number, correct?

19 A. That's correct.

20 Q. And, again, this is just basic math, right?

21 A. Yes. We have [REDACTED] of excess convertible current
22 assets to repay the amounts that are expected to be paid within
23 the next 12 months.

24 Q. So, what this shows is, looking at its balance sheet, its
25 internal records, that it has assets of [REDACTED]-and-some-odd

1 dollars, liabilities of ■. How did the ■, how does
2 that play into your solvency analysis?

3 A. It offers a cushion of the company's ability to meet its
4 current obligation, and I should say it's just an indicator,
5 because this is a measurement at one point in time, and,
6 obviously, companies are fluid and are transactional on a daily
7 basis. But it indicates excess current assets over
8 liabilities, so an ability to meet its operating needs.

9 Q. Was this part of your looking at kind of the substance in
10 the operational -- in the operations of the company in order to
11 really understand its assets, liabilities, whether it was able
12 to meet its needs, whether it was solvent?

13 A. One of many factors that had to be considered.

14 Q. You've heard and there's been some testimonies about
15 something called a "quick ratio"?

16 A. Correct. But we're showing a current ratio. There's a
17 difference between the two.

18 Q. Yeah, okay. And so, why don't you explain what the
19 current ratio is.

20 A. Well, the current ratio -- or the primary difference is
21 the quick ratio would exclude inventory, while the current
22 ratio will include inventory if it's expected to be convertible
23 into sales within that 12-month period of time. So, a ratio
24 above 1 means that there are excess assets, current assets over
25 current liability. So, in theory, you can check that box off

1 and go to your next analysis.

2 Q. And I believe, I'm not sure if it was in his testimony,
3 but I think in his report Mr. Messina indicated that there was
4 some confusion that you had with respect to quick ratio versus
5 current ratio. Would you just address that.

6 A. Well, when we first took a look at it, we quickly realized
7 that a quick ratio is not appropriate for a manufacturing
8 company. A manufacturing company does have significant
9 inventory, but that inventory is expected to be converted into
10 sale. You kind of discard the quick ratio. We did not -- I
11 did not utilize the quick ratio, and it did not become part of
12 my opinions or part of my opinion as stated in the report.

13 Q. And is the current ratio something that's required for a
14 solvency analysis?

15 A. No. It's just one more indicator that could be used as
16 part of your comprehensive analysis.

17 Q. But when you did do the current-ratio analysis, it showed
18 solvency; is that right?

19 A. Well, it shows excess current assets over excess current
20 liabilities. That in and of itself, just like a negative
21 indicator, would not mean insolvency. A positive indicator
22 also does not necessarily mean solvency. It is one factor to
23 be considered.

24 Q. You've, I think, corrected me, but this is not just a one
25 size fits all; you've looked at a number of different factors,

1 and that all goes into your solvency analysis?

2 A. Certainly. You're required to -- even with a negative
3 current ratio, with a shortage of current assets over current
4 liabilities, there are a lot of other tools available to manage
5 the company that are available to the company to aid it in
6 meeting its current obligation. Using current assets, it's
7 only one possible tool that they have.

8 Q. Now, let's look at -- this is a slide that Mr. Messina, I
9 think it's from his report, and I think he also talked about it
10 yesterday. Would you explain how Mr. Messina arrived at these
11 two different numbers for his ratios?

12 A. Well, I think, if I remember correctly, in excluding the
13 group account he not only excludes the payable that's been on
14 the books indefinitely, and there's no intent and there's no
15 intent to call it within the 12-month period look-forward, but
16 he also excluded all the other intercompany assets. So, right
17 now you have intercompany receivables that result from the sale
18 and the transfer price reimbursement that goes to Atrium after
19 the sale is finalized.

20 Q. Is that what we talked about over here, the transfer of
21 the transfer price funding?

22 A. Correct. So, the receivables that result from the
23 finalization of a sale are -- when you exclude the group
24 accounts you're excluding that account. On the liability side
25 you're excluding shared services that are being billed to the

1 company. So, I think that it's not an include everything or
2 exclude everything. There are valid transactions that should
3 be included, and there are others or there's one specific other
4 ones that could be excluded.

5 Q. And, at least as I recall his testimony, he said, "Well, I
6 did run an analysis taking the [REDACTED] amount out, and
7 that's how I got to the .76 number, and that still shows
8 insolvency.

9 A. He also excluded the intercompany receivables that are
10 current receivables which are the transfer pricing monies due
11 to Atrium from the sales organization.

12 Q. In your view was that a proper way consistent with GAAP?

13 A. At the end of every month they go through a settlement
14 process, and that amount is, in fact, remitted back to Atrium.
15 It should be considered as a current receivable.

16 Q. Let's turn to cash flow statements. Mr. Messina took the
17 view, as I understand it, that a cash flow analysis is a
18 necessary part of a solvency analysis. Do you agree?

19 A. Yes, I do.

20 Q. And did you do a cash flow analysis?

21 A. Certainly. When we do an analysis of the income statement
22 and we try to identify whether they, in fact, are using or
23 providing capital to the company, we're exactly doing that.
24 We're trying to measure the cash that's being generated by the
25 company or being used by the company and compare that to what

1 resources they have available. So, yes, we did consider that.

2 Q. And do you need actual cash flow statements to do that
3 analysis?

4 A. No, you don't.

5 Q. And, in fact, you did it without them, correct?

6 A. That information is derived from the income statement and
7 the balance sheet. The cash flow statement is derived from the
8 income statement and the balance sheet. So, we had all the
9 core data necessary.

10 Q. So, your analysis -- am I correct did your analysis take
11 into account Atrium's cash flow?

12 A. Certainly. I think we walked through that process whether
13 they are contributing or using capital from operations. That,
14 in essence, is by cash flow analysis.

15 Q. Now, we've colloquially I think referred to -- I'm moving,
16 changing gears again to this October 2018 provision regarding
17 the mesh litigation. Can you generally tell us what your
18 understanding of that provision is.

19 A. I was provided a copy of the press release. I have an
20 understanding of -- of course, I have a thorough understanding
21 of International Financial Reporting Standards and how it is
22 that a provision gets recorded into the books of a company and
23 when it should be recorded into the books of a company. I had
24 a follow-up conversation with the CFO, with Gary Sufat again,
25 because my concern was that the recording of this provision,

1 that this result from either information that was available
2 during the prior periods and simply misused, was it from the
3 misapplication of Generally Accepted Standards or International
4 Standards, or was it simply -- so, therefore, if it was those
5 two things it would be considered a correction of an error and
6 would result in the restatement of Atrium's income statement
7 and balance sheet.

8 Q. Let me stop you there. So, when you saw this you talked
9 to Mr. Sufat, and you asked him a number of questions?

10 A. I did.

11 Q. And I think you identified two things you were
12 particularly concerned about, whether it was erroneous or
13 whether it was based on prior information?

14 A. If it is a correction of an error, then it would require
15 the company to restate, so they would have to go back and
16 adjust the financial statements as of when the provision should
17 properly have been recorded. So, the company has to go through
18 an analysis and determine whether, in fact, there was any --
19 whether they misinterpreted the data that was available at the
20 time and, therefore, reached the wrong conclusion or whether
21 they simply, you know, made a misapplication of the applicable
22 standards. So, I went through that with Gary. "He says, Yeah,
23 we, in fact, went through that analysis. We are not required
24 to restate, because this is not a result of those two
25 situations."

1 Q. So, if Mr. Sufat and the professionals and the outside
2 advisers had determined there was some information that was
3 available or somehow this shouldn't have been declared or
4 issued in October of 2018 but should have been issued a year or
5 two before, that would have been something -- the remedy for
6 that would have been a restatement?

7 A. It could be. I mean, you'd have to go further than that,
8 because at the end of the day, especially for a solvency
9 analysis, you want to look at the net effect of that provision,
10 what is the net amount that the company is likely to pay out as
11 a result of this litigation. So, you have to consider other
12 variables such as recoverability through insurance, the
13 allocation of liability among other affiliates.

14 So, there's more to it than simply, you know, we have
15 a provision, we're going to record it as of '14 or '15 or '16.
16 It's a call that has to be made regarding what is the net
17 likely payout or the net more likely than not payout resulting
18 from these asserted and unasserted claims.

19 Q. Okay. Now, does this provision demonstrate that
20 Getinge AB funds will be used to satisfy liabilities related,
21 to the extent there are any, to any of the litigation before
22 her Honor?

23 A. No, I don't believe it does.

24 Q. Is this a pledge by Getinge to essentially ensure any
25 liabilities of Atrium?

1 A. There's a very specific road map that has to be followed
2 when you include a provision and when you don't include a
3 provision, and it is required based on International Financial
4 Reporting Standards. It doesn't go beyond that. No obligation
5 is created or not to my knowledge.

6 Q. And does the recording of this provision at all mean that
7 this amount will ever be paid or need to be recovered?

8 A. No. The final outcome is still -- could still be, you
9 know, a long period off. It could be, I don't know, months,
10 years. But, more importantly, you still have to go through the
11 process of making the determination on recoverability through
12 insurance, allocation or apportionment of liability, all these
13 different issues that could and should be properly considered
14 as an offset if they are likely to play out as part of the
15 entire litigation process.

16 Q. And one of the plaintiffs' positions is, hey, this should
17 have been considered as part of Atrium's solvency analysis.
18 How would you respond to that?

19 A. I don't see how he could make that conclusion. I mean
20 clearly -- well, first of all, it's not a financial conclusion;
21 it's really a determination that's made by the attorneys
22 handling the litigation. They're the ones that are asked to
23 opine what the likelihood is of a negative outcome and what the
24 likely payout is if that likelihood exceeds a certain level.
25 It is not a decision made, obviously, by a non -- by an

1 accountant, by a CPA, by an economist or by a CEO. It is made
2 by the people that can actually properly analyze the exposure,
3 the likely results and the net recoverabilities.

4 Q. And was this also outside the time frame that you were
5 asked to look at?

6 A. It was.

7 Q. Now, and as kind of a hindsight, do Atrium's financials
8 need to be restated as a result of this for 2015 through '17?

9 A. Per my discussions with Mr. Sufat, the analysis has been
10 done and there was a conclusion that this was not the result of
11 an error, misapplication of standards, information that was
12 available and misuse. This is based on information that became
13 available and that the determination was made during this time
14 period, the October time period.

15 Q. So, Mr. Fernandez, is this a summary of your ultimate
16 opinion in this case?

17 A. Yes, it is.

18 Q. And we do have a little bit, as we said earlier, benefit
19 of hindsight, correct?

20 A. That is correct.

21 Q. And how does that help us validate your view?

22 A. Well, the first and simplest proof of insolvency is
23 usually bankruptcy, but also you also have creditors that are
24 calling upon debt and it's not being paid; there are debt
25 obligations that are not being served based on a contractual

1 basis. So, we have the benefit of hindsight. We know none of
2 that has occurred. We know the company did, in fact, meet its
3 operating requirements and its obligations in 2015, '16 and
4 '17, and my understanding is that that is true through today.

5 Q. And that's true for the 500 men and women who work here in
6 New Hampshire who receive a paycheck every two weeks and have
7 for the last number of years that they've worked at the
8 company, right?

9 A. Hopefully, if they are not receiving their paychecks
10 everyone would know about it.

11 Q. Now, do you hold the opinions that you've given here today
12 to a reasonable degree of financial certainty?

13 A. Yes, I do.

14 MR. CHEFFO: Your Honor, I have no further questions.

15 THE COURT: All right. Attorney Glasser.

16 CROSS-EXAMINATION

17 BY MR. GLASSER:

18 Q. Hello, Mr. Fernandez.

19 A. Good afternoon.

20 Q. You offered a solvency opinion at your deposition as to
21 December 31, 2017 only; isn't that true?

22 A. I believe that that is my final measurement date, and,
23 obviously, we know that obligations, operating needs were, in
24 fact, met, and excess capital was reflected in those prior
25 years. But my final measurement date was December 31, 2017.

1 Q. So, the slide that you sat down on said solvent through
2 December 31, 2017, and I asked you very specifically at your
3 deposition, "Are you offering an opinion for any date, any
4 period prior to December 31, 2017?" And your answer was, "No,"
5 wasn't it?

6 A. Well, my opinion is as of December 31, 2017. I don't
7 recall the exact -- I do recall the conversation. I don't
8 recall the exact wording, but it would have been virtually or
9 impossible for me to have an insolvency opinion in 2016 and
10 then have a solvency opinion in 2017, when there were no
11 structural or operational changes or circumstances that had
12 occurred. I think it is implied that the three years the
13 company was, in fact, solvent, as hindsight has demonstrated.

14 Q. So, I'm asking you --

15 A. I did state that it was as of December 31, 2017.

16 Q. So, I'm going to show you a clip, and I want you to tell
17 the Court whether you gave -- I asked these questions and you
18 gave the answers on the clip.

19 MR. GLASSER: Clip number one, please.

20 (Video deposition clip played)

21 Q. Did I ask you those questions, and did you give those
22 answers?

23 A. I did.

24 Q. Do you stand by your sworn testimony at your deposition?

25 A. Well, clearly, my opinion and my reports are as of

1 December 31, 2017. I think that it is understood that you
2 can't get to that without having looked at those three years.
3 But my opinion was as of December 31, 2017.

4 Q. And so, you stand today by this proposition you are
5 offering no opinion as to solvency on any other prior period;
6 isn't that true?

7 A. Again, it is such an obvious fact that you cannot reach an
8 opinion as of one date and not have analyzed the prior dates.
9 But if I misspoke I apologize, but, yeah, as of December 31,
10 2017, but it covered the three years prior to that.

11 Q. You've testified as an expert hundreds of times, right?

12 A. I have.

13 Q. Divorce cases, right?

14 A. No, I do not do divorce cases.

15 Q. Well, hundreds of different types of tort cases, mainly on
16 damages, right?

17 A. That's correct.

18 Q. All right. And you're aware that we take depositions for
19 purposes of discovery, right?

20 A. Certainly.

21 Q. So that we can know exactly what we're going to be talking
22 about when we get to trial, right?

23 A. That's correct.

24 Q. And so, when you tell me you're not offering opinion about
25 something, do you believe I'm entitled to rely on that?

1 A. I do.

2 Q. Okay. Now let's talk about the [REDACTED] and follow up
3 on some of the questions the Court asked you. I just want to
4 focus in on -- I want to focus back in on that [REDACTED], the
5 undocumented [REDACTED] that you characterized as demand
6 obligation. Do you remember those questions and answers with
7 the Court?

8 A. I do. Yes, sir.

9 Q. All right. Now, the company I want to focus in on whose
10 solvency is at issue is Atrium, correct?

11 A. That's correct.

12 Q. Not the company that holds the demand note, correct?

13 A. That's correct.

14 Q. Atrium has no right to delay payment of that if it is
15 called; isn't that true?

16 A. I believe that would be true.

17 Q. Okay. So, the company whose solvency is at issue has no
18 rights. The company whose intent you were checking with is
19 some other company, right?

20 A. Well, the intent is obvious because of what actually
21 happened, but, yes, and they are related companies, so there is
22 a relationship there that goes beyond simply two separate
23 companies. One has the right to call the debt, the other one
24 has no recourse.

25 Q. No rights at all?

1 A. No rights at all.

2 Q. Okay. So, the company whose solvency is being analyzed
3 has no rights at all to stop the payment of the [REDACTED], so
4 far as you know?

5 A. Again, it was not done, and that is very relevant, but, as
6 far as I know, there is no document that would prevent them
7 from doing so.

8 Q. All right. So, when you showed the Court your summary
9 analysis saying that the company had a \$6 million cushion in
10 the current period you were not counting that [REDACTED],
11 correct?

12 A. That's correct. I was not counting it.

13 Q. All right. And had you counted the [REDACTED] under the
14 orthodox cash flow test the company would be insolvent, you
15 concede, correct?

16 A. Absolutely not. You're talking about one indicator, and
17 if a company does not have current assets it does not mean it
18 doesn't have other assets that are convertible into a current
19 asset within the 12-month period of time.

20 Q. All right. You said two things --

21 A. If I may finish.

22 THE COURT: Go ahead. Let him finish.

23 A. And when you talk about the classification of debt for
24 purposes of Generally Accepted Accounting Principles I would
25 agree 100 percent that the fact that the company, the parent

1 company has the ability to call that debt is a significant
2 factor.

3 That's not what we're doing here. What we're doing
4 here is what is the likely capital needs of the company over
5 the next 12 months? That is a slightly different proposition,
6 because there it is not what is under any circumstances totally
7 out of your control what becomes due. If I was issuing another
8 opinion I would have taken issue with that, but for purposes of
9 a solvency analysis you're really looking at what is the likely
10 amount of debt that is going to have to be repaid within the
11 next 12 period of months, and the fact that it wasn't repaid is
12 relevant, and the fact that there was no intent is relevant.
13 Not GAAP, but relevant.

14 Q. You said a lot of things, and I'm going to take them apart
15 one little piece at a time, okay? So, just stick with me. The
16 question I asked you is the orthodox cash flow test happens as
17 of one day, correct?

18 A. Well, no. A cash flow test is over a period of time. If
19 you're talking about the measurement of current assets to
20 current liabilities, that is as of one day.

21 Q. All right. And under the orthodox test this company would
22 be negative something like 46- or \$47 million of current assets
23 over current liabilities if you treated the short-term
24 [REDACTED] as it's characterized on the balance sheet, not as
25 you recharacterized it, correct?

1 A. That is correct.

2 Q. All right. Then you said to me, but if you fail that test
3 you can go look at whether you can get money from insurance or
4 you can maybe sell assets. That's what I heard you say to
5 Mr. Cheffo.

6 A. I think insurance we were talking about specifically the
7 asserted claims against the company and whether they're covered
8 by insurance. The tools available to the company in that
9 situation is, in other words, a situation where there's a
10 shortage of current assets, it's to convert other assets into
11 current assets or to convert -- raise additional debt or raise
12 additional capital.

13 Q. Okay. You have been sitting in the courtroom, and you
14 have seen that Getinge AB is the senior secured lender that has
15 as collateral all the property, plant, equipment, intangibles,
16 patents, everything at Atrium. You are aware of that; isn't
17 that true?

18 A. I am.

19 Q. So, if Atrium wants to go sell an asset in the face of a
20 debt being called by a company above them that has the absolute
21 right to do that, isn't it true that they cannot possibly do it
22 without release of those liens?

23 A. I'm not sure if I follow your question at all.

24 Q. When you sell your house and -- have you ever sold a
25 house?

1 A. Certainly.

2 Q. And when you go to the closing table does the buyer
3 require that the liens from the prior lender be released?

4 A. Yes, or disclosed and funded in reserves.

5 Q. So, if you don't have the money to get the release or the
6 lender is not cooperating you can't sell that asset, can you?

7 A. I still don't understand your question or hypothetical, if
8 it has to do with liening properties or if it has to do with the
9 financials.

10 Q. So, Atrium does not have a free ability to convert any of
11 its assets to cash on a quick basis without the consent and
12 cooperation of its lienholder; isn't that true?

13 A. There is no doubt that Atrium does not have the ability to
14 make significant decisions regarding its balance sheet without
15 the consent of its shareholder, okay? So, the shareholder
16 would be part and parcel with that process.

17 Q. So, the idea that if this short-term liability is called
18 that Atrium can go out and sell its property, plant, equipment
19 away from these loans is just hypothetical, it's not true in
20 real life, right?

21 A. No. It has the ability to do so, but it would need the
22 consent -- it would likely need the consent -- I couldn't tell
23 you that with absolute certainty, but it would likely need the
24 consent from the parent company. The point, though, that you
25 may be missing is that you expect the company and the

1 shareholders of the company to be acting in concert with the
2 same goal, which is to maximize the value of that investment.
3 So, therefore, you would assume that the parent company would
4 cooperate to the extent necessary to give Atrium the ability to
5 continue as a going concern --

6 Q. Okay. Now, the third thing --

7 A. -- an assumption that is underlying in any work that you
8 would do.

9 Q. The third thing you said to me when I asked you about -- I
10 guess you were talking to Mr. Cheffo about the \$200 million
11 provision in 2018. You said you would have to look and see if
12 there's available insurance, right, to cover those \$200
13 million?

14 A. Well, that's one thing you would want to see.

15 Q. All right. And you looked -- [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED] What I can tell you is that

24 you would need an analysis of the insurance policies at the

25 various levels, the likelihood of collecting under the

1 insurance policies, and the apportionment of liability.

2 Can I sit here today and conclude for you that the
3 company is uninsured or lacks insurance? There's just no way I
4 can make that assessment.

5 Q. [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 A. And the relevance of that with the multiple levels of
14 insurance that may be available I could not even begin to
15 address.

16 Q. Okay. Were you present in the courtroom when Mr. Chad
17 Carlton was examined about this [REDACTED] aggregate coverage?

18 A. I was.

19 Q. All right. In your review of everything in this case
20 isn't it true that you've seen no other coverage?

21 A. First of all, I did no review of insurance coverage, so I
22 can't tell you whether there are 10 or 15 more layers of
23 policies or whether that's the only one. I couldn't even
24 venture to guess on that.

25 Q. So, to your knowledge, there is no other source of

1 insurance?

2 A. No, that is not true. To my knowledge, I don't know what
3 the coverage is, I don't know how many policies may exist or at
4 what level.

5 Q. Right.

6 A. I cannot conclude or have an inference that, to my
7 knowledge, there is no coverage. That would be inappropriate.

8 Q. No, no. I'm saying you don't have any positive knowledge
9 of any coverage?

10 A. Or negative knowledge that they don't exist.

11 Q. All right. But in answer to Mr. Cheffo's question about
12 whether a person analyzing the solvency of the company in 2018
13 should take account of the \$200 million provision you said --
14 well, I took you to be saying you should, unless there is some
15 other reason why you shouldn't count it, like insurance
16 coverage.

17 A. No. I said there's a lot more to it. I mean, the
18 standards that require a company to record a provision are
19 very, very clear. There's actually a significant mismatch in
20 the regulations between when you record an insurance -- I'm
21 sorry -- a provision and when you realize or recognize the
22 benefit of coverage, of insurance coverage. One of the
23 standards is more likely than not. So, you record it if it is
24 measurable, if you can establish a range, and if it is more
25 likely than not interpreted as 50 point -- 50 plus 1 percent.

1 On insurance coverage you can only use it as an offset
2 for financial statement purposes if it is virtually certain --
3 that is the words from the International Reporting Standards --
4 if it is virtually certain that the insurance coverage will be
5 there at the end of the process. I did not make an analysis
6 along those lines, nor could I, and I don't think anybody else
7 could at this point without all that information.

8 Q. Okay. So, looking at your presentation and your Exhibit A
9 with Mr. Cheffo, I heard you criticize Mr. Messina for not
10 taking account of centrally approved items and group
11 contribution in the way you did.

12 A. Right, that he did not take into account the
13 transfer-pricing portion of the sale.

14 Q. All right. I'm showing you Messina demonstrative Exhibit
15 No. 3 that he testified about. And do you agree that
16 demonstrative Exhibit No. 3, covering years 2015, 2016 and
17 2017, presents the data the exact same way you did in
18 Exhibit A?

19 A. If I may, he clearly extracted that information from my
20 statement, because those are the three years that I did
21 address. 2018 and 2014 he ignored the contributions. That
22 doesn't mean that they didn't exist.

23 So, I actually believe that this is quite misleading.
24 It would cause you to think that in 2018 sales dropped by
25 \$70 million, and that in 2014 sales were only \$86 million.

1 Neither one of those numbers are correct.

2 Q. Now, hang on. Mr. Messina testified that the company
3 itself presented the 2018 this way. Is he wrong about that?

4 A. But he's comparing apples and oranges. He uses my
5 adjustments for the three years that I did adjust, and then he
6 ignores that same adjustment for the years that I didn't look
7 at.

8 Q. I haven't even asked you a question yet, right? Look,
9 these numbers right here are the exact same numbers for
10 operating losses as your numbers right here --

11 A. Yes, they are.

12 Q. -- right here, aren't they? Your numbers, your numbers
13 right here, 10.1, 1.9, 5.5, are the exact same numbers that
14 Mr. Messina uses, right?

15 A. That's correct.

16 Q. All right. Your analysis, because you started in 2015,
17 does not include this negative [REDACTED], correct?

18 A. First of all, that number would allow you or would cause
19 you to think that there were no transfer-price adjustments in
20 2014 or 2018. I take exception to that. I think that's simply
21 not the case.

22 Q. All right. But at the end of the day --

23 A. If I may finish, though, so the gross profit number for
24 2014 is miscalculated if, in fact, you've excluded the
25 transfer-pricing adjustments for that year.

1 Q. All right. And he highlighted these things so he could
2 talk about it with the Court and in his opinion, didn't he?
3 That's why it's yellow highlighted, correct?

4 A. Why he -- I mean that's --

5 THE COURT: How would he know that?

6 A. Yeah.

7 Q. Well, you were here when he talked about it.

8 A. Sure, but I have no idea of why he did or didn't highlight
9 certain items.

10 Q. I thought he testified to that. Okay. And because your
11 analysis doesn't include 2018 you don't include the losses
12 associated with the provision?

13 A. Well, yes, I did not analyze 2018. If I may point out, in
14 2018 he does have the centrally approved items; he just simply
15 doesn't include it in the gross profit calculation. So he's
16 consistently, he's comparing apples and oranges in '15, '16 and
17 '17 and then '14 and '18. I think it's quite misleading.

18 Q. Now, you rendered your opinion in September of '18, right?

19 A. That's correct.

20 Q. And so, you must have had this conversation with the CFO,
21 Mr. Sufat, near in time to rendering that opinion, right?
22 Sometime in August or July?

23 A. I had several conversations with Mr. Sufat throughout the
24 process. I had a final conversation after the press release.

25 Q. Oh, in October. So, before your deposition?

1 A. Before my deposition, yes.

2 Q. When was the conversation where he told you that the
3 [REDACTED], it would be okay not to count it as a short-term
4 liability because the parent didn't intend to call it?

5 A. It's more than the parent didn't intend. The parent did
6 not. So, if I'm trying to identify what are the liabilities
7 that are going to be required to be paid within the 12
8 preceding months, and we know they have not been paid, you
9 know, that is an important variable. But I think at every
10 conversation I would ask him, "Has anything changed with the
11 status of this one account?"

12 Q. All right. When was the last conversation?

13 A. The last conversation would have been probably November.

14 Q. Okay. Before you rendered your opinion in September when
15 was the closest-in-time conversation?

16 A. It would have probably been -- I think I had three prior
17 to that. That would have probably been early September.

18 Q. All right. So, early September the CFO at least
19 reiterates his position on what should happen in respect of
20 these financial statements. Fair?

21 A. I'm not sure if I would characterize it that way, but we
22 discussed various accounts, and he either confirmed or didn't
23 confirm.

24 Q. All right. And so, you had approximately five
25 conversations with the CFO, right?

1 A. I couldn't tell, but at least three.

2 Q. All right. Three conversations. And you agree that the
3 last one was on or about September of 2018?

4 A. No. I believe the last one was after the press release,
5 which was sometime in October.

6 Q. All right. Do you agree with me that Getinge had to
7 report its year-end results for 2017 by at least the first
8 quarter, the end of the first quarter of 2018?

9 A. I couldn't tell you. I don't recall when they released
10 their statements or when their financial statements were
11 published.

12 Q. Isn't it normal for a public company to not -- well, would
13 it be normal for a public company to release year-end 2017
14 financial statements as late as September 2018?

15 A. No, no. I would say usually most of them will have
16 reported by --

17 Q. March or April?

18 A. -- by end of April.

19 Q. Okay. So, Getinge would have reported -- you understand
20 that the statements that we're looking at, Mr. Hjalmarson also
21 testified about them. He was head of Treasury. Do you
22 remember that deposition testimony?

23 A. I only sat in on part of that, but I do remember what he
24 said when I was present.

25 Q. All right. He said, "These are from the Kronos system.

1 These are our internal financial statements," right?

2 A. Again, I don't recall specifically that terminology or
3 verbiage, but I sat for the first two hours, maybe three hours.

4 Q. All right. And so, they are what we would call
5 "consolidating financial statements," in that they roll up to
6 the consolidated statement of the parent, correct?

7 A. I understand the process of consolidation, of course.

8 Q. So, Atrium's statement would be a consolidating statement,
9 whereas Getinge's would be the consolidated statement. Am I
10 correct?

11 A. I don't disagree with the way you're defining it. There's
12 a very specific accounting definition for those two terms.

13 "Consolidating" means all the separate companies are actually
14 reflected within a statement, and then the final consolidated
15 statement is at the bottom. So, there are companies that will
16 issue consolidating statements, which will include all the
17 major subsidiaries and the parent, and there are companies that
18 simply issue consolidated, which only reflect the parent.

19 Q. Whether you issue it or not, the subsidiary statement is,
20 in fact, consolidating because the subsidiary statements roll
21 up to make that consolidated, right?

22 A. It's required to be consolidated in, yes.

23 Q. All right. So, you have the call with the CFO based on
24 financial statements, the exact same ones the treasurer of the
25 company testified about in this case, you're after the

1 reporting period is closed, and he tells you these are not the
2 drawers you're looking for, you do not have to count this
3 [REDACTED] as current?

4 A. He said, "We do not have any contractual agreement with
5 the parent company on this amount. The amount has been on the
6 balance sheet since 2011. There is no intent by the parent to
7 call the debt, as far as I am aware, and it has not been
8 called."

9 Q. But you made a distinction in that you would not
10 recharacterize it for purposes of financial reporting, though?
11 That would be completely improper, correct?

12 A. If I was doing an audit of the company and I was issuing
13 an audit opinion on the company would I consider that
14 classification as current or long-term on the [REDACTED], if
15 they wanted to classify it as long-term I would ask them to
16 follow it up with an agreement between parent and subsidiary
17 that showed their intent, that documented their intent. That's
18 a certified audit opinion.

19 Now, for solvency analysis I need to make a
20 determination of what is the most likely -- what is the likely
21 capital needs of the company over the next 12 months. The
22 standards are different, and they're different because there's
23 different purposes in the two analyses.

24 Q. And I asked you, I said, "Did you take any notes from
25 these conversations with the CFO so that I can see exactly what

1 he said and examine you on it?" And you said, "No."

2 A. Also under the assumption that you have the ability to
3 depose them and get it directly from his mouth. You don't need
4 anything from me as to what he said or didn't say.

5 Q. In fact, you didn't only say, "No," you said you
6 intentionally didn't take notes, didn't you?

7 A. I do not typically take notes, period. What I do is I get
8 all the statements that are made that are relevant to my
9 opinion and incorporate them in my opinion. I have one report,
10 one opinion, and not, you know, ten different variations or ten
11 different analyses.

12 Q. So, you agree with me that, knowing this would be an
13 important issue in this case, and having had three
14 conversations about it, you intentionally took no notes on what
15 he said and what you asked?

16 A. I never take notes in any engagement, in any litigation
17 engagement. The process typically would be that, if I say this
18 was a representation made to me by a client, then you have the
19 ability and I would argue the responsibility to validate that:
20 "Did you say that to Mr. Fernandez?" I can accept what the CFO
21 tells me and utilize what he tells me, and that's sufficient
22 for me.

23 Q. But as part of your process of being an expert it is your
24 practice, it is your intent -- you intended me not to be able
25 to examine you on these notes?

1 A. You're easiest way to examine it is to talk to the person
2 that originated the comments. I do not, as a practice, take
3 notes in engagements. I never have.

4 Q. So, if the Court wanted to see the notes on what Mr. Sufat
5 actually told you and what you actually asked him, it's
6 impossible?

7 A. Unless Mr. Sufat took notes, and then I'm sure you would
8 have access to those notes. But, again, you also have access
9 to him and have the ability to compare statements.

10 MR. GLASSER: No further questions, your Honor.

11 THE COURT: All right.

12 MR. CHEFFO: So, I don't think I have any questions,
13 but I just wanted to try to answer your question because in
14 case -- I don't know that it will impact Mr. Fernandez, but
15 we'll confirm this, but what I've been just handed, as your
16 Honor saw, is that Datascope actually holds the debt, which is
17 not the Getinge AB. It's the Datascope and the two other
18 entities and then Getinge AB. So, that's where that debt
19 instrument would lie, and we'll confirm that with the actual
20 document.

21 THE COURT: Okay. So, there is some sort of document
22 that details this?

23 MS. ARMSTRONG: I don't know if there is a document.
24 If you would like us to supplement Mr. Sufat's affidavit to
25 address this point, we can do that.

1 MR. CHEFFO: That's fair. And I said "document." Our
2 understanding is that Datascope actually holds the debt, and I
3 think what we've heard is that there isn't a document, so I
4 don't know.

5 THE WITNESS: And, if I may, the debt is eliminated in
6 consolidations, because you have one affiliate that is owed
7 money, one affiliate that owes the money, and the two net out
8 to zero, and when you report that consolidation of the
9 financial statements it actually gets eliminated. So, it's not
10 a big deal for the companies to formalize these agreements,
11 because at the end they get eliminated.

12 MS. ARMSTRONG: We are happy to do what will assist
13 the Court.

14 THE COURT: All right.

15 MR. GLASS: I would like to ask the witness a
16 follow-up question on that one point.

17 THE COURT: Okay.

18 CONTINUED EXAMINATION BY MR. GLASSER:

19 Q. Mr. Fernandez, isn't it true that if the parent forgave
20 the note at Atrium they would owe tax?

21 A. First of all, you have to look at -- you're asking a tax
22 question. My point was consolidated statements eliminate
23 intercompany accounts, because, if not, you would be
24 overstating assets and overstating liabilities. So, they are
25 netted out. That's part of the process.

1 For tax purposes you have to look at the jurisdiction
2 of the companies. I would probably have to know more, but the
3 forgiveness of debt can be a taxable event.

4 Q. All right. So, assume the following facts: Atrium is a
5 United States company. Atrium owes [REDACTED]. Somebody
6 forgives that debt. Atrium owes corporate tax on that debt?

7 A. It would be highly unlikely that that's the way -- the way
8 the transaction would expect it to play out is they simply
9 would contribute that money and reclassify it as equity as
10 opposed to debt, so that would not be a taxable transaction.
11 To forgive debt from an intercompany account is unheard of. I
12 mean, it just doesn't happen.

13 Q. Because it puts tax on the forgivee?

14 A. And because you don't necessarily reach the goal that
15 you're trying to reach, which is to augment the capital of the
16 company, if that's what you're trying to do. You're not trying
17 to show that the company made money on forgiveness of debt.
18 That doesn't help anybody. So, it would be a capital
19 contribution in all likelihood.

20 Q. So, until it's either reclassified as a capital
21 contribution or forgiven it's real debt?

22 A. That is correct. It is real debt.

23 MR. GLASSER: I have no further questions, your Honor.

24 MR. CHEFFO: I have nothing further, your Honor.

25 THE COURT: I have just one little, simple question.

1 These companies set up -- both you and Mr. Messina testified
2 you transfer --

3 THE WITNESS: Transfer pricing.

4 THE COURT: Yes, transactions, and will send product
5 to other companies. What's the advantage to that? Why are
6 companies setting a system up like this that is on the white
7 board?

8 THE WITNESS: The first one would be economies of
9 scales. To the extent that you have a large group, a
10 consolidated group, and you can centralize functions such as
11 procurement or distribution or sales, you're eliminating a lot
12 of the redundancies at the individual company's level, so you
13 hope that there is a significant cost savings and access to
14 perhaps additional customers that you would not otherwise have.

15 But there are very specific tax rules that prohibit
16 the manipulation of earnings from company to company using this
17 pricing, and they have to begin at fair value, and if they're
18 not they're violating the tax laws either in the U.S. or in the
19 EU. I mean, this is a point of contention for every
20 multinational company, and it has to be addressed every single
21 year. But the requirement is any transfer should be at or
22 approximate fair value.

23 THE COURT: All right. Mr. Fernandez, thank you very
24 much.

25 You may call your next witness.

1 (Witness stepped down)

2 MR. CHEFFO: What's your Honor's thinking in terms of
3 when you would like to take a break?

4 THE COURT: Let's see. We came back out close to 1:00
5 or 1:05. Is that right?

6 THE CLERK: We started about 1:10.

7 THE COURT: I would say 2:30.

8 MR. CHEFFO: Okay, great.

9 THE COURT: And everybody can take a break then.
10 2:30, 2:45.

11 MR. CHEFFO: I'll just go until your Honor thinks it
12 makes sense.

13 THE COURT: And if somebody signals me they need a
14 break, I'll take a break. But 2:30-ish.

15 **JOHN ORCUTT**, having been duly sworn by the Clerk, was
16 examined and testified as follows:

17 THE CLERK: Please state your full name and spell your
18 last name for the record.

19 THE WITNESS: John Orcutt, O-r-c-u-t-t.

20 THE CLERK: Thank you very much. Please be seated.

21 DIRECT EXAMINATION

22 BY MR. CHEFFO:

23 Q. Good afternoon, Professor Orcutt. How are you today?

24 A. I'm doing fine. Thank you.

25 Q. Good. You've just been introduced to the Court. Would

1 you just please tell her Honor what you were asked to do in
2 this case.

3 A. I was asked to examine the relationship between Getinge AB
4 and Atrium and give an opinion as to whether their relationship
5 was normal.

6 Q. And would you just summarize, if you could, your opinion
7 and your ultimate conclusions here.

8 A. My ultimate conclusion was that the relationship between
9 Getinge AB and Atrium is the type of relationship that I would
10 expect to see in a large multinational corporation between a
11 parent and one of its subsidiaries.

12 Q. Great. Thank you. And did you also work with us to try
13 to create some slides to help facilitate and move along your
14 testimony here today?

15 A. Yes, I did.

16 Q. So, in the spirit of that, this is a brief summary of your
17 experience and education; is that right?

18 A. That's correct.

19 Q. Would you please just walk us through your experience and
20 education and maybe touch upon some of the issues that are
21 particularly relevant for your assignment here in this case?

22 A. So, I graduated from both college and law school at UC
23 Berkeley. After I left UC Berkeley, I went to work for
24 Shearman and Sterling as a corporate finance associate. I
25 worked for two years in our New York office, and then I spent

1 two years in Paris, France working in our Paris, France office.

2 During my time in Paris I specialized in dual-listed
3 offerings, so those would be offerings by European companies
4 where they were doing securities offering both in their home
5 country, on their home stock exchange, and then as well in the
6 United States on either the New York Stock Exchange or NASDAQ.
7 At that time I worked a lot with multinational corporations
8 that were based in Europe. I did deals in France, Ireland, the
9 Netherlands, Italy, a few other places.

10 And then after that I left and went to work for
11 Robertson Stephens. That's actually one of the original
12 Silicon Valley investment banks. During my time at Robertson
13 we were the investment banking subsidiary of Bank America, Bank
14 Boston and then Nations Bank, and while I was there I served as
15 Deputy General Counsel, and for most of that time I was the
16 number two attorney for my investment bank just below the
17 General Counsel. I also served as Chief Administrative Officer
18 for our Mergers and Acquisitions Group, and then I was an
19 investment banker running my own franchise, which was the
20 competitive telecom services franchise.

21 And then after that, in 2001, I came to what at the
22 time was the Franklin Pierce Law Center. It is now the
23 University of New Hampshire Franklin Pierce School of Law, and
24 I've been a professor there for the last 18 years.

25 Q. Have you ever testified as an expert witness before?

1 A. I have not. This is my first time.

2 Q. Your first time?

3 A. Yes.

4 Q. Have you had occasion or opportunities to have -- have
5 people asked you to testify before?

6 A. I've been asked on occasion, and I turned down each of
7 those opportunities.

8 Q. Was there something particular about the subject matter or
9 the issues here that allowed you to say, "Yes"?

10 A. Yeah. So, I have a day job, I have a really good day job
11 that I enjoy doing, so it's not one that I'm looking for
12 additional employment. So, I've set two conditions to whenever
13 I would serve as an expert witness. It needed to be an area
14 where I felt that I had a substantial amount of expertise to
15 bring to the table, and it had to be an issue that I thought
16 was important. And this is the first time that both conditions
17 have been satisfied.

18 Q. We didn't put it on here, but with respect to your
19 academic career, I understand you've been recognized or
20 received some recognition; is that right?

21 A. Yes. I've been selected Teacher of the Year six times.

22 Q. And you are being compensated for the time that you've
23 worked with us in this case?

24 A. Yes, that's correct.

25 Q. And what is your hourly rate?

1 A. \$300.

2 Q. And prior to accepting this engagement did you have any
3 involvement, financial or otherwise, with any of the Atrium or
4 Getinge family of corporations?

5 A. No.

6 Q. Now, were you asked or do you intend to provide the Court
7 with a legal opinion or provide any guidance on how her Honor
8 should apply the law here today?

9 A. No. I'm confident that she can do that herself.

10 Q. Now, and how do you distinguish the scope of your
11 testimony from someone who might provide legal testimony?

12 A. I'm really providing -- I'm providing factual testimony.
13 I'm providing information about relationships between
14 Getinge AB and Atrium and Atrium and some of the other entities
15 in the larger Getinge Group. I'm not providing any legal
16 conclusions.

17 Q. Now, would you describe your methodology for how you went
18 about conducting your assessment and forming your opinions in
19 this case.

20 A. So, I was given sort of the general scope of the
21 assignment to examine the relationship between Atrium and
22 Getinge AB. I then started with a few boxes full of documents.
23 I reviewed those documents. Some things were clear and I could
24 understand what was happening very quickly. A lot of things
25 were not clear, in which case I asked for more documents and

1 reviewed more documents. Other things were still not clear, so
2 I asked to interview a number of individuals with Atrium or one
3 of the other Getinge entities. And then I reviewed more
4 documents and asked for more interviews.

5 And at the conclusion of all of this I was able to
6 apply my experience both as -- as a lawyer, as an investment
7 banker and as an academic who teaches in the area of business
8 associations, mergers and acquisitions, securities regulation
9 and valuation, and then was able to apply that -- to apply my
10 experience to all this information that I reviewed and was able
11 to reach my opinions.

12 Q. Is it fair to say that at least a part of your opinion is
13 to provide the Court with testimony about how corporations
14 operate, what's customary, what's ordinary with respect to
15 transactions that may not be within the common knowledge of
16 folks who don't have the experience of your expertise?

17 A. That's correct. A lot of the facts here are really
18 understanding transactions and interactions that, for somebody
19 who has not spent their lifetime working in this area, may
20 appear to be very complicated, when, in reality, many of these
21 situations are very understandable.

22 Q. And approximately how many boxes of documents did you look
23 at?

24 A. Seven standard banker boxes and then one extra large
25 banker's box full of documents.

1 Q. You mentioned that you interviewed several individuals
2 working at Atrium; is that right?

3 A. Atrium and other entities.

4 Q. And who were those?

5 A. I interviewed Chad Carlton, I interviewed Gary Sufat, and
6 I interviewed Erica Gallagher.

7 Q. And did you also have an opportunity to review some
8 testimony, deposition testimony in the case?

9 A. Yes. I reviewed the deposition testimony of
10 Mr. Hjalmarson and, as well, the deposition testimony of
11 Mr. Messina, although actually that was after my opinion.

12 Q. And you also sat through most, if not all, of the last few
13 days?

14 A. I sat through all of the last few days.

15 Q. In addition, you were asked to prepare two affidavits; is
16 that right?

17 A. That is correct.

18 Q. Why did you prepare a supplemental affidavit?

19 A. After I issued my initial report, I thought there were
20 some significant events that took place. There was the
21 provision that took place in October as well as the attempt to
22 sell the mesh business, Project Star, which was announced on
23 the same day as the provision. I thought those were very
24 significant events, and I thought it was worthwhile for me to
25 update my report to explain how those events did not affect any

1 of the opinions in my original report.

2 Q. That's what I was going to ask you. So, having looked at
3 that issue, your supplemental affidavit, you did not alter your
4 ultimate opinions?

5 A. No, not at all.

6 Q. Now, there was some -- let me ask you this: How would you
7 respond to the claim that your testimony conflicts with
8 Mr. Hjalmarson's and perhaps other Atrium employees' -- or
9 Atrium employees'? He's not an Atrium employee.

10 A. So, during Mr. Hjalmarson's deposition, at one point he
11 stated that Getinge was a single economic unit, and there was
12 some concern that maybe that means that Getinge is now assuming
13 all of the liabilities of Atrium, or that it is treating Atrium
14 as some sort of a mere play thing, and that is not at all what
15 Mr. Hjalmarson was saying, and so part of what I included in my
16 report was an explanation of what Mr. Hjalmarson was saying.

17 Q. And what does it mean to operate as a single economic
18 unit, and how do these IFRS standards impact your analysis?

19 A. So, to provide some context, Mr. Hjalmarson obviously is
20 not a native English speaker, and he is Swedish and based in
21 Sweden. If you work in Europe and you talk about the concept
22 of consolidated financial statements and the like, you would be
23 subject to IFRS, and under IFRS standards, and I think I have
24 right up here "IFRS 10" is on the board, and see that the
25 specific language under IFRS 10, when you are talking about a

1 consolidated set of companies the consolidated set, so the
2 parent company that would be reporting out to the public
3 shareholders is presented as a single economic entity to the
4 shareholders.

5 Q. Do you believe in reading and evaluating -- reading the
6 deposition testimony and seeing it and evaluating this that
7 Mr. Hjalmarson intended to say that essentially this was one
8 company with no corporate distinctions?

9 A. No, that is not what he was saying at all.

10 Q. And let me ask you this: Did you find any evidence that
11 all of the various parents and subsidiary relationships were
12 something to be disregarded and were not valid?

13 A. No. I haven't looked at it for all of the companies. I
14 only looked at it for purposes of Atrium, and I saw no reason
15 to do that.

16 Q. And does treating something as a single economic entity
17 for purposes of IFRS reporting standards, does that somehow
18 alter the corporate relationship or the corporate form?

19 A. No, not at all.

20 Q. And does it mean that the parent, in this case Getinge AB,
21 is exerting undue or inappropriate control over its
22 subsidiaries?

23 A. No. And to provide more context, all that was happening
24 was Mr. Hjalmarson was explaining the relationship that
25 Getinge AB has with its shareholders. If you are a publicly

1 traded company, you have public shareholders. I believe this
2 is factually accurate, that every single publicly traded
3 company in the United States or on any major stock exchange in
4 Europe, none of them are a single entity. Every single one of
5 them will be a parent company that has multiple subsidiaries
6 underneath it. Those shareholders have a relationship with the
7 parent company, and when they look at that parent company and
8 they have that relationship with the parent company, they are
9 thinking about it as a consolidated group of entities, and so
10 that's when you start talking about something as a single
11 economic entity.

12 From a shareholder standpoint, the shareholder is not
13 thinking about, "Well, there's all these different entities
14 underneath there." They're thinking about, "I am buying a set
15 of consolidated cash flows from the parent company."

16 Q. Now, do you know when Getinge AB acquired Atrium?

17 A. Yes. It was in the Fall of 2011.

18 Q. And what does this chain represent?

19 A. So, this is the ownership chain of Atrium and its parents
20 all the way up to Getinge. So, Atrium was acquired in a
21 reverse triangular merger by Datascope. Datascope is itself
22 owned by Getinge USA Holding II, which is owned by Getinge USA
23 Holding, Inc., and then finally Getinge AB sits on top of that.

24 Q. And having had the benefit of reading all the briefs and
25 materials that you have and sitting through, there's been some

1 discussion, right, of Atrium Medical today and the last two
2 days?

3 A. Correct.

4 Q. Some of Datascope, right, and Getinge?

5 A. Getinge AB.

6 Q. Getinge AB. Have you seen any discussion about corporate
7 form or separateness or issues of fraud or injustice with
8 respect to Getinge USA Holdings, Inc. or Getinge USA Holding
9 II, Inc.?

10 A. No, I have not.

11 Q. Now, I'm going to move to the Board of Directors
12 discussion. There was some discussion about Board proceedings.
13 You recall that, right?

14 A. Yes, I do.

15 Q. Now, how would you address a claim that, following the
16 merger or the acquisition of Atrium, Atrium no longer had a
17 Board of Directors because it operated by consents rather than
18 meetings? How would you respond to that?

19 A. That's incorrect. They had a Board of Directors. A Board
20 of Directors is required under Delaware law, and there was a
21 Board of Directors at all times. From the records that I
22 reviewed there was a Board of Directors at all times after the
23 merger.

24 Q. And what about the claim that there wasn't actual Board
25 meetings of the subsidiary, so perhaps there was something

1 extraordinary, unusual or inappropriate about that? How would
2 you respond to that?

3 A. That's the norm in these types of relationships. The
4 Board serves a slightly different function for a subsidiary of
5 a large multinational corporation than they would for a parent
6 corporation. The parent corporation has a lot of shareholders,
7 and they are different shareholders and they change every day,
8 potentially every minute, as new shareholders buy and sell
9 stock in the company. And so, those directors operate in the
10 most transparent and, hopefully, in the best manner possible.
11 You have more meetings, you do more things in a more formal
12 way, because you're answering to a wide variety of potential
13 stakeholders.

14 When you are a subsidiary in a large multinational
15 corporation you have one shareholder, and that one shareholder
16 doesn't change over time. And so, the need for kind of the
17 extra level of formality and bureaucracy that is actually very
18 healthy at the parent company level is just, you know, it's
19 inefficient, and it's not one where it's inefficient and I'm
20 making a choice. It's just wasteful to spend too much time on
21 those kinds of formalities.

22 Q. And you recall there was a fair amount of video
23 proceedings and testimonies where, one by one, there was listed
24 a unanimous consent, unanimous consent. Remember that?

25 A. Yes.

1 Q. Is there anything unusual or improper about unanimous
2 consents by a Board for a wholly owned subsidiary?

3 A. Unanimous consents are absolutely permitted under Delaware
4 law, and that is the norm as to how subsidiary boards meet for
5 large multinational corporations.

6 Q. Now, you also recall there was some testimony where
7 Mr. Hjalmarson was asked about certain information that was
8 presented to Getinge AB's Board of Directors concerning certain
9 significant events happening at Atrium. Do you recall that?

10 A. Yes.

11 Q. How would you characterize the review or evaluation by
12 Getinge AB's Board of certain of these significant
13 Atrium-related events?

14 A. Well, they were all significant events, and they are the
15 types of events that you would expect that a parent
16 corporation's Board of Directors would be both concerned about
17 and give its opinion on so that the subsidiary understands how
18 the parent Board feels.

19 When we talk about this -- here we're talking about
20 piercing the corporate veil, so we're really looking at the
21 concept of, you know, does the parent exercise, you know, so
22 much control over the subsidiary that it's now a play thing.
23 But whenever we're typically talking about the concept of
24 subsidiary governance there's two sides to it. It's, on the
25 one side, you expect that the subsidiary has its own

1 independence. On the other side, the parent corporation,
2 though, does have fiduciary duties to its shareholders, and it
3 needs to exercise a certain level of control and oversight over
4 its subsidiaries in order to satisfy its fiduciary duties to
5 the public shareholders, and that's actually something that, as
6 a public policy matter, we want to encourage.

7 MR. CHEFFO: Your Honor --

8 THE COURT: Good time to break? All right. Ten
9 minutes or so.

10 THE CLERK: All rise.

11 (Recess taken from 2:30 p.m. to 2:48 p.m.)

12 THE CLERK: All rise for the Honorable Court.

13 THE COURT: Go ahead.

14 MR. CHEFFO: Thank you.

15 CONTINUING DIRECT EXAMINATION BY MR. CHEFFO:

16 Q. We're back, Professor. Now, there came a time when Atrium
17 did have a formal Board meeting to discuss the potential sale
18 of the mesh business. You're aware of that, correct?

19 A. Yes, I am.

20 Q. And you had a chance to review the minutes of that
21 meeting?

22 A. I did.

23 Q. Do you have a view as to whether it was appropriate for
24 Atrium to conduct those and the scope and extent of its
25 minutes?

1 A. They were the typical minutes that I would expect to see
2 from that type of Board meeting. The Board meeting is
3 appropriate and proper, and these are the types of minutes I
4 would expect to see.

5 Q. And to the extent that there was any claim that this sale
6 was also discussed or covered in Getinge AB's minutes, Board
7 minutes, is that evidence of Getinge's efforts to strip value
8 out of Atrium?

9 A. No, not at all. This is a significant transaction, and
10 it's the type of significant transaction that I would expect
11 that the parent Board would want to weigh in on.

12 Q. It's the type of thing we would expect to see really --

13 A. Absolutely.

14 Q. -- in any international company or even national company?

15 A. Any international company. And here you're talking about
16 selling an asset that has substantial contingent liabilities
17 that are associated with it. This is the sort of thing that
18 you would expect that the parent's Board would weigh in on.

19 Q. And is there anything in the transaction that you saw that
20 speaks to the issue about whether Atrium intended to avoid its
21 own potential contingent liabilities?

22 A. Yes. I reviewed the asset sale agreement in this
23 particular case, and the agreement was very clear as to what's
24 happening with the liabilities and to who has them. The
25 liabilities are -- assuming the sale had gone through -- and

1 the sale did not go through. It turned out that there were
2 regulatory issues. The Chinese purchaser was not able to get
3 the regulatory approval it needed to complete the deal.

4 But the way the deal was structured was Atrium -- and
5 it was Atrium. It wasn't Getinge, it wasn't Getinge AB, it
6 wasn't some other entity. It was Atrium that was to retain any
7 of the liabilities associated with the mesh litigation up to
8 the point of the closing of the sale; and then post-closing of
9 the sale the buyer would take on any liabilities that occurred
10 afterwards. And when we're talking about liabilities that
11 occurred afterward, it would be any product sold after the
12 closing. The products liability that could potentially flow
13 from those post-closing sales would be for the buyer.

14 Q. So, any potential liabilities resulting from the
15 litigation in this MDL would be retained by Atrium, if the sale
16 had gone through?

17 A. Correct. And when you do an asset sale, that is a choice.
18 You have the ability to decide whether you're going to transfer
19 the liabilities as part of the transaction or keep the
20 liabilities as part of the transaction, and this deal was
21 structured in a way that Atrium decided that it was going to
22 keep the liabilities.

23 Q. Is it standard practice with respect to subsidiaries to
24 have overlapping Board members? And maybe you can just explain
25 to us what --

1 A. It's very standard.

2 Q. What is that? What is "overlapping Board members"?

3 A. So, the idea -- if you are a publicly traded company with
4 lots of subsidiaries, you might have a hundred subsidiaries,
5 you might have 500 subsidiaries, you might have 1,000
6 subsidiaries, you need to come up with directors for each of
7 those subsidiaries, and it is not uncommon for officers and
8 directors and other important personnel within the overall
9 corporate family to serve as directors on some of the
10 subsidiaries within the group.

11 Q. And we saw that with Mr. Messina, right, when he was at
12 Steinway?

13 A. Mr. Messina served as a director of some of his
14 subsidiaries. That's correct.

15 Q. Does that evidence an intention or an effort by the parent
16 who may also employ that officer or director to exert undue
17 influence or control over the subsidiary?

18 A. No. And just to be clear, what I'm saying is it's the
19 norm. It really is -- it is the norm. It would be surprising
20 if you were to see lots of external directors. Now, you might
21 have -- on occasion you might have some subsidiary where
22 there's a benefit to having an external director, so somebody
23 from outside of the corporate family, and that can be
24 beneficial to bring in additional information, and each company
25 will make their own choice on that. But the norm is all of

1 your directors for your subsidiaries are internal people. What
2 happens is, when you go to the Board meeting serving as the
3 director, that individual would put on their director hat for
4 that Board meeting, even though they serve some other function
5 within the overall corporate family.

6 Q. There's been some testimony and questioning with respect
7 to the concept of indemnifications and at least questions
8 raised as to why would it be that a parent company would offer
9 an indemnification agreement to a senior executive at a
10 subsidiary. Do you recall that?

11 A. Yes, I do.

12 Q. Have you had experience with respect to such
13 indemnification agreements in terms of commenting are they
14 unusual, are they inappropriate, or is it something that
15 happens with frequency?

16 A. They're not unusual. I couldn't say -- you know, I
17 haven't done enough work that I would be able to tell you that
18 they are the norm. So, like, I can say with confidence that
19 Boards of Directors acting through unanimous consent for a
20 subsidiary is the norm. When it comes to having
21 indemnification where the parent company gives indemnification
22 for the officers or directors of its subsidiaries, that does
23 happen. It is not a rare exception. I think Mr. Messina said
24 yesterday that's something that he's never seen. Well, that
25 just may be because he's not a corporate lawyer so that's not

1 the kind of detail that he would see on a regular occasion. I
2 can tell you that they do occur, and they occur with some level
3 of frequency.

4 Q. And do they occur for reasons other than the individual
5 thinking that his company is insolvent or not going to pay him?
6 Are there other --

7 A. It could even be as simple as litigation management. It
8 gives the parent company an easier ability to deal with D&O
9 insurance. So, instead of having to have each one of your
10 companies go out and buy their own D&O insurance, you do it
11 centrally. So, just like we've talked about eliminating
12 redundancies in other areas when you have a multinational
13 corporation, one area may be that you can get D&O insurance at
14 the parent company level and then just do the indemnification
15 from there.

16 Q. So, let me just move to this email, because I think we've
17 covered the last slide. I want to talk to the cash pool issue.
18 This is an email between Gary Sufat and Peter Hjalmarson,
19 correct?

20 A. Yes.

21 Q. And this is with respect to the -- this is Exhibit 59 --
22 the [REDACTED] payment to Getinge AB in 2011, and there's at
23 least been a claim that this is an effort to syphon funds from
24 the subsidiary to the parent. Do you recall that?

25 A. Yes, I do.

1 Q. How would you respond to that?

2 A. This was the equivalent of putting a [REDACTED] deposit
3 in the bank.

4 Q. Can you elaborate on that a little bit more?

5 A. So, what was occurring here was this was after the closing
6 and Atrium had [REDACTED] of cash available that they didn't
7 have any immediate needs for. They could put the money in
8 their own bank account, or they could put the money in -- what
9 they would do today is they would put that money in the cash
10 pool agreement, and I can explain a cash pool agreement now or
11 if that's a follow up question --

12 Q. Please. Go ahead.

13 A. So, with large multinational corporations and, in
14 particular, those in Europe, cash pool arrangements are very
15 common, and they serve a number of functions. And I just want
16 to be really clear, they're not commingling of funds, as was
17 described yesterday by Mr. Messina. In fact, they are the
18 exact opposite of commingling of funds. They exhibit good
19 corporate governance and allow for really good recordkeeping so
20 we can see exactly where every company's dollars are, and it
21 allows you to track cash in a way that you otherwise wouldn't
22 be able to track. So, actually it is a better system.

23 Each of the subsidiaries could set up their own local
24 bank account, and, okay, you could that, and each subsidiary,
25 because individually they will be much smaller, will be able to

1 get the terms that you would be able to get from setting up
2 your own bank account. So, you would get a lower interest rate
3 on your deposits. And then every company needs to have the
4 ability to draw cash for short-term purposes on a very regular
5 basis. So, like every time you pay payroll you don't -- you
6 don't want to keep that money in the bank, right? You want to
7 be able to put that money out, or at least you don't want it in
8 a short-term deposit account that you can withdraw easily. So,
9 what you would typically do is go get a line of credit. And
10 so, every two weeks, when it's time to pay payroll, you would
11 borrow the money from the bank and you would pay interest on
12 that.

13 Doing this through a cash pool arrangement, instead of
14 each company having to individually go set all of this up on
15 their own, you do this centrally through the cash pool
16 agreement, where if you have excess cash, instead of depositing
17 it in your local bank account, you deposit it in the cash pool
18 agreement. To the extent that you need to borrow money for
19 your short-term capital needs, you would be able to withdraw
20 that money from the cash pool account. All the money gets
21 collected. From a physical standpoint, all the money is
22 collected and usually kept in like one master account, and then
23 that makes it easiest for the bank. And then the bank will
24 keep separate information accounts for each of the
25 subsidiaries.

1 From a standpoint of recordkeeping as to where the
2 actual dollars are, each of the information accounts is
3 actually zero, but from an information point you would be able
4 to say, yes, it's zero, but that account is entitled to, let's
5 say in this case [REDACTED], and it's entitled to whatever
6 interest it would have earned while it was in the account. So,
7 all of the information is there, although you've got a master
8 account where all the money is actually located.

9 Q. If we were to adopt Mr. Messina's view of commingling,
10 essentially any time you or I or the Court were to go and make
11 a deposit to Citibank or Bank of America, that would be
12 commingling, right, because they don't put my money in a
13 separate little box?

14 A. That's correct.

15 Q. They put it all together in some aggregate financial
16 instrument, but they keep track, right, of our money? Right?

17 A. Right. It's the equivalent of a bank. So, like I believe
18 I get paid on Friday, and my account will be direct deposited
19 into my account at Bank America, and Bank America will hold my
20 money, along with lots of other people's money, and
21 collectively all that money will get used. Some of it will get
22 used to lend somebody money to buy a house or do whatever, but
23 there's track. It's not like my dollars that came into my
24 account on Friday are exactly my dollars. I'll get some
25 dollars back, and those dollars will match however many dollars

1 I put in there, but it all gets mixed together.

2 Q. This is a very common type of thing, right?

3 A. Correct.

4 Q. Many companies do this?

5 A. Absolutely. And there's all kinds of benefits. Cash pool
6 agreements are a beneficial thing. So, just from the parent
7 company's standpoint -- now, the first benefit is not one that
8 applies here, because this cash pool arrangement -- or at least
9 it applies less, because this cash pool arrangement was for the
10 U.S. subsidiaries. Oftentimes in Europe you'll have companies
11 that are doing transactions all over the world. So, the first
12 thing it allows you to do is it allows you to manage your
13 currency risk, because now all of my money is in one place, and
14 to the extent I need to take strategies to manage that currency
15 risk I can do it in one spot instead of having each of my
16 subsidiaries have to do that. And it's actually quite
17 expensive to manage your currency risk. It's a very
18 sophisticated strategy.

19 The other thing, though, it does, is it allows you
20 scale, so that each of your subsidiaries should get a better
21 interest rate than they would get on their own, and then
22 they'll also get a lower cost of capital, so a lower interest
23 rate when they borrow money.

24 And then, finally, it gives the parent company -- and,
25 remember, the parent company has its own fiduciary duties to

1 its shareholders, and while Getinge AB is a Swedish company, so
2 it's not subject to Sarbanes-Oxley, they have similar
3 Sarbanes-Oxley type of regulations where, as a parent company,
4 you need to be able to keep track of your assets. Some of your
5 most important assets are cash, and they are important both
6 because cash is a good thing to have if you're a company, and
7 it's also an easy thing to lose if you are a company. This
8 allows the company to keep a better view as to what's going on
9 with its cash.

10 Q. Let's move on. I'm going to touch this briefly. One of
11 the issues that was raised was whether there was some inability
12 or lack of ability to collect interest by Atrium. You've seen
13 this document before?

14 A. Yes, I have.

15 Q. And does this basically show that Mr. Messina's view was
16 incorrect? In other words, there is an interest payment that
17 was made to Atrium from the cash pool?

18 A. Yes. He made an incorrect assumption in his report.

19 Q. Now, we've also heard, and this gets a little bit
20 complicated, but I think Mr. Carlton and Ms. Armstrong did a
21 pretty good job of taking a complicated issue and trying to
22 break it down, but there's been some discussion that the
23 restructuring of Atrium and its sales force activity was at
24 least somehow not beneficial to the company or unusual. How
25 would you respond to that?

1 A. The first thing I would like to say is, actually, I don't
2 think this is very complicated, and this is one of those areas,
3 this is one of the reasons why I took on this assignment. This
4 is the kind of transaction where you're not used to this, you
5 see some arrows and things seem complicated. This is actually
6 a very straightforward transaction; it's not very complicated
7 at all.

8 Atrium sells to the warehouse company. At that point
9 the warehouse company pays the standard cost. The warehouse
10 company then transfers it out, it sells it to a subsidiary that
11 does the actual selling. When the sale actually occurs money
12 comes back. The standard cost will then be reimbursed to the
13 warehouse company. So, they're now basically at a zero. And
14 then the profit that was generated gets split in two. Part of
15 the profit will be a retail profit that's kept by U.S. Sales,
16 and then part of the profit will flow all the way back to
17 Atrium Medical Corporation. It's actually a very
18 straightforward transaction.

19 Q. And I think, as we heard, there are certainly benefits of
20 a sales force, right?

21 A. Correct.

22 Q. But there's also significant costs and potential
23 liabilities, right?

24 A. Correct.

25 Q. You have to pay people. They could have medical issues,

1 they could have car accidents. There could be a host of issues
2 which require a significance cost to a company, right?

3 A. Correct.

4 Q. So, there's nothing wrong with essentially contracting
5 with another corporation or entity in order to help you perform
6 that function, right?

7 A. Right. And as part of my research when I was doing my
8 report is, this was one of the questions that I asked
9 Mr. Carlton during my interview, was, "Why did you transfer out
10 the sales force?" And, as he explained both in his testimony
11 yesterday and as well as in his affidavit, he gave very valid
12 business reasons as to why they would use this structure.

13 You can think about it just in its simplest term, is
14 some companies -- and companies can take different strategies.
15 Some companies can take the strategy that you want all of your
16 subsidiaries to do everything. So, all my subsidiaries,
17 they're going to do all their functions and do everything.
18 That's a possible strategy. Other companies use a strategy of,
19 I'm going to have my subsidiaries specialize in what they do
20 best. So, each subsidiary will do what it does best. What
21 Atrium does best is R&D and production, so it does R&D and
22 production, and another subsidiary will specialize in sales.

23 Q. And does this essentially contracting or outsourcing of
24 the sales function make Atrium any less viable as an
25 independent company?

1 A. No, not at all. I mean, there are lots of independent
2 companies that don't have sales forces. It's very common. In
3 fact, actually, one of my most successful clients didn't have
4 its own sales force. It conducted all of its sales through
5 IBM, all of them.

6 Q. And I think you just answered companies can be profitable,
7 successful without having their own sales force, right?

8 A. Correct.

9 Q. Now, since we've spent some time covering this, I'm not
10 going to go through the transaction again, but let me just ask
11 you this: Is everything that you've seen in your work in this
12 case and the documents and information, are they consistent
13 with what you heard from Mr. Carlton and how he explained the
14 transactions and the inner workings?

15 A. Yes.

16 Q. I want to talk about these security and guaranty
17 agreements that there was some time spent on, and I'd like to
18 start with a series of security and guaranty agreements that
19 Getinge USA entered into in favor of Getinge AB. Are you
20 familiar with these agreements?

21 A. Yes, I am.

22 Q. Would you briefly tell us what your understanding is of
23 them.

24 A. So, in July of 2013 there was a significant debt
25 arrangement that was made by one of the U.S. subsidiaries with

1 Getinge AB, so the U.S. subsidiary borrowed a significant
2 amount of money from Getinge AB, and in order to make that loan
3 arrangement similar to what would be a fair market or typical
4 loan arrangement with an outside party -- this is the
5 equivalent of the transfer pricing type of arrangement -- they
6 entered into the security and guaranty agreements, and what
7 happens with each of these agreements is that each of the U.S.
8 subsidiaries pledges all of its assets as collateral, and each
9 of the subsidiaries promises to repay the very sizeable debt if
10 Getinge AB were to call it.

11 Q. And in addition to reviewing the actual documentation, did
12 you speak with Erica Gallagher?

13 A. I did.

14 Q. Who is she, and why did you speak to her?

15 A. She is the head of U.S. Tax, and I think she works at
16 Maquet Cardiovascular LLC.

17 Q. And I take it you spoke to her because you wanted to get a
18 little more information and background?

19 A. I wanted to understand these agreements. I can understand
20 if you read the security and guaranty agreement -- this is one
21 of those -- you know, some things that I would -- when I did my
22 document review some things were very clear, and you go, "Okay,
23 I read that, I understand, I understand what's going on."

24 Other things I read -- I read the guaranty and security
25 agreement. That's a big deal. I can understand why somebody

1 would go, "That's a big deal," and so I wanted to understand
2 what was underlying that transaction.

3 Q. And Mr. Messina had a description of these documents and
4 this chain of events, correct?

5 A. Yes.

6 Q. Do you agree with it?

7 A. Actually, I don't remember his specific wording, but he
8 was --

9 Q. Well, can you explain what these documents actually do?

10 A. Well, as I said, what happens with -- so, with the
11 security agreement -- actually, I have to remember which one is
12 which. So, the guaranty is each of the subsidiaries saying
13 that they will jointly and severally repay the debt. So, in
14 theory, and I'm using my words very carefully in saying in
15 theory Getinge AB could go to any of its subsidiaries and say,
16 "You, subsidiary, you, only you, have to repay all of the
17 debt," and the debt here was over [REDACTED] dollars. And then
18 the security agreement was each of the subsidiaries pledging
19 all of their collateral.

20 Q. I think you said there was some benefit that Atrium
21 received as a result, right?

22 A. So, the benefit that Atrium received -- so the benefit
23 that all of the companies received is that they were able to
24 get a more favorable debt arrangement, so they were able to
25 borrow money at a lower rate, so it lowers the cost of capital

1 for each of the companies -- each of the U.S. companies in the
2 group.

3 Q. So, this was for Atrium and other companies, right?

4 A. Correct.

5 Q. And do you know whether Atrium AB (sic) has ever attempted
6 to collect on this pledge?

7 A. Getinge AB, to my knowledge, has not tried to collect on
8 this pledge.

9 Q. And to the extent that there was a statement that you
10 indicated that this was evidence of fraud, how would you
11 respond to that?

12 A. Yeah. I think that was a mischaracterization or a
13 misunderstanding of my deposition testimony by Mr. Messina.

14 Q. Just give us a little bit of background as to what you
15 actually meant to say and how you believe it was misinterpreted
16 by Mr. Messina.

17 A. So, what I said, roughly, during my deposition, and I'm
18 happy to say it again right now, is it is unimaginable that
19 Getinge AB would exercise its legal rights under the security
20 agreement or the guaranty against Atrium. With the pending
21 litigation it would be unimaginable that they would do that,
22 because any payment that would be made from Atrium to Getinge
23 under this wouldn't be some grand strategy of hiding your
24 assets from creditors. It would be a huge red flag to any
25 Court that this is a potential fraudulent conveyance, because

1 it's either Atrium has plenty of money to pay off all of the
2 creditors and also has plenty of money to honor this agreement
3 or it doesn't, and if it doesn't, then any of the creditors who
4 don't have money would say that transfer that you made under
5 the guaranty or the security agreement was a fraudulent
6 conveyance, and it would be unwound, and I don't think that
7 would be a very difficult -- it would be a very difficult case.

8 And so, I was explaining that in this particular case
9 Atrium actually gets all the benefits from this transaction.
10 So, they get the lower cost of capital, because that gets
11 shared by all of the subsidiaries, and, in fact, they are
12 probably not -- I would say stronger than probably not -- I
13 can't see any credible way that they actually would ever have
14 to honor this agreement.

15 Q. So, let's talk about Acute Care Therapies for a few
16 minutes, please, Professor. You're familiar with Acute Care
17 Therapies?

18 A. Yes.

19 Q. What's your understanding of it?

20 A. It's a business area.

21 Q. Okay. And that's described in their financial documents?

22 A. Well, it's actually described in Getinge AB's annual
23 report. I think maybe the point we're trying to make here with
24 this slide, so this is a reference to IFRS 8, so it's a similar
25 rule that we have in the United States. So, when you are a

1 publicly traded company you have to report your financial
2 statements out to your shareholders, right? Shareholders are
3 buying stock because they're hoping that they're going to make
4 money off of owning stock at some point in the future, and so
5 you've got to report out your financial statements, and they
6 get reported out on a consolidated basis, right? I'm buying
7 all of this consolidated cash flow, and that's beneficial.

8 At the same time, as companies got bigger and bigger,
9 that could actually be confusing, and you can start to hide
10 things by only reporting out one set of numbers. So, what is
11 required under GAAP as well as IFRS is you have to report
12 what's referred to on a segment basis. So, if you have a bunch
13 of companies that all do kind of similar things so that you
14 sort of get like this sort of group of companies that
15 financially does similar things, you have to report out how
16 that segment is operating so investors can understand a little
17 bit better; it gives them a clearer view of how the company is
18 operating so you would know, "Okay, we're doing well in this
19 segment, but we're doing poorly in that segment," and then that
20 would inform me as to whether I want to stay or not an
21 investor.

22 So, under IFRS 8, that's the requirement for the
23 segment accounting, and what Getinge has done is that they have
24 organized their business areas around their segments.

25 Q. And does that mean that Getinge AB controls the daily

1 operations of Atrium?

2 A. No, it doesn't.

3 Q. And is this the type of arrangement and reporting
4 situation that's common for multinational corporations?

5 A. Yes, it is. And, in fact, even if you'll take a look at
6 IFRS 8, the very first sentence talks about how it's not only
7 that you have to report out on a segment basis. You have to
8 have a segment manager. You have to have somebody who's
9 responsible for -- it's actually in the first sentence right
10 there -- you have to have somebody who's responsible for the
11 management of that segment, and they're doing that through
12 their business groups or business areas.

13 Q. Thank you. Let's move on to common branding issues.
14 You're aware that Atrium uses, as does its other subsidiaries,
15 the Getinge brand, correct?

16 A. Yes.

17 Q. Is there any problem from a corporate-formality
18 perspective in what Atrium is doing?

19 A. No. It's very common. It's very common for individual
20 companies to take on the parent's brand, and it can be a very
21 successful business strategy because, instead of each company
22 having to build good will in its own brand, it allows for
23 collectively all of the companies to build one big, giant brand
24 that can create greater value. Some companies decide to take
25 that strategy. And, in fact, even you see in Getinge they've

1 vacillated. At times they've had a stronger one-brand
2 strategy, at times they've had a less stronger one-brand
3 strategy.

4 Q. But if we were to look at many, if not all, major
5 corporations, branding would be something that is often
6 integrated between parents and subsidiaries, correct?

7 A. Correct.

8 Q. And not only is that appropriate; it's, in fact, mutually
9 beneficial to both parent and subsidiaries, typically?

10 A. Yes. And from a trademark law standpoint, once the parent
11 starts allowing its subsidiaries to use its brand, it has to
12 exercise a certain level of control over that as part of its
13 protecting its own brand.

14 Q. And to the extent that some companies might have a looser
15 view of the brand and others might have a more stringent view,
16 do either of those decision points on the spectrum indicate
17 that they're controlling the day-to-day operations of the
18 company?

19 A. No.

20 Q. You've had a chance to look at the employee manual that
21 you've seen probably a few times in the last few days?

22 A. Yes.

23 Q. Is that consistent with the concept of co-branding, in
24 other words, introducing employees to kind of a larger
25 corporate family?

1 A. Yeah, and feeling that they are a part of a larger group.
2 That's not uncommon.

3 Q. And what about -- we heard some testimony or at least
4 questions would someone know who they worked for or perhaps
5 have some confusion, particularly when you're working for
6 entities that have multiple companies or corporations. How
7 would you respond, or what is your view from a practical
8 perspective in the corporate world about employees'
9 understanding and any confusion that they may have about the
10 specific corporations they work for?

11 A. I guess it's possible. I will say that it sounds like
12 Atrium actually does a very good job of managing that. I think
13 Mr. Carlton explained in his testimony yesterday between his
14 orientation -- which I think that already is very important,
15 and it sounds like they are even required to do that as part of
16 the consent decree to make sure that each of their employees
17 knows who they're working for. I did not notice any problems
18 at all.

19 Q. It's not any indication of fraud or undue influence?

20 A. No.

21 Q. These are some examples that you helped us put together of
22 co-branding?

23 A. Correct.

24 Q. Is there anything inappropriate or uncommon or unusual
25 about this?

1 A. No, not at all.

2 Q. In fact, if we were just to go on the internet, as we did,
3 and just basically try to find branding monikers or concepts
4 where companies say, "One X," it's pretty common, isn't it?

5 A. Yeah. I would say, back when I was doing deals, that was
6 one of the things on our checklist when you were taking a
7 company public, was at this point if you are planning on doing
8 a re-branding strategy, including taking any of the
9 subsidiaries you've acquired over the time and you want to do
10 everything under one brand because when you do a public
11 offering you get a lot of branding, this is the time to do it.
12 It's a very, very common strategy.

13 Q. And do you believe -- would it be a fair conclusion that
14 any of these companies attempted to mislead or somehow engage
15 in improper conduct by having a unified branding strategy?

16 A. I haven't looked at any of these companies in any
17 particular detail, but the concept that these companies are all
18 doing this, that doesn't surprise me. It does not raise any
19 red flags that this is somehow a nefarious act.

20 Q. Now, let's talk about the distributions, the 2014
21 distribution to Datascope. So, there's been some discussion
22 that there was something inappropriate about Atrium's
23 distribution to Datascope in 2014 and its contributions from
24 Datascope in 2016. Have you had a chance to look at both of
25 those transactions?

1 A. Yes, I did.

2 Q. And what's your view of those transactions?

3 A. They were a proper payment of retained earnings from a
4 subsidiary up to a parent company.

5 Q. And so, let's start with the 2014. You had a chance to
6 look at specific documents regarding that transaction?

7 A. That's correct.

8 Q. Are distributions from a wholly owned subsidiary to a
9 parent company common?

10 A. Yeah, very common. It's like any -- a shareholder owns a
11 corporation for a reason. They are for-profit corporations.
12 Their purpose is to generate a profit, and the shareholder's
13 purpose is to generate cash flow from owning that entity.
14 Whether the relationship is a public shareholder owning shares
15 in a public company, you own it to eventually earn cash flow,
16 or a parent company owning a subsidiary. It's the same
17 function.

18 Q. In the course of your work and your investigation and your
19 discussions did you learn additional information about the 2014
20 transaction where Atrium distributed revenue to its direct
21 parent, Datascope, not Getinge AB?

22 A. This is something -- I discussed this with Erica Gallagher
23 to understand what the rationale was, like why did they choose
24 in 2014 to make that payment, and they did that because at the
25 time there were, one of the U.S. subsidiaries -- I think this

1 is the time that they were -- they were redoing the debt
2 arrangements -- excuse me. They were doing a debt paydown in
3 2014, and Atrium was one of the companies that had a
4 significant amount of excess cash, and so this was a good usage
5 of that excess cash, was to pay down debt owed by the group.

6 Q. So, rather than have money sitting in a cash pool or some
7 other account, it wasn't being needed or used for R&D, it's
8 appropriate, then, to allow another entity to its parent
9 company to use it to pay down debt, correct?

10 A. Correct. Every corporation, when you've got -- when you
11 have excess earnings, right, when you've generated profits and
12 you accumulate some excess money, the corporation then needs to
13 decide what to do with that money. You can reinvest it in the
14 company, or you can pay it as a dividend to your owner. In
15 this case they paid it to the dividend as an owner. From a
16 group perspective it was a thoughtful thing to do, because it
17 helps with their overall debt arrangement, and then from
18 Atrium's standpoint this is the sort of thing you do as a
19 subsidiary. You operate to earn cash flow that can eventually
20 be paid to your owners.

21 Q. With respect to anything that you reviewed, anyone you
22 talked to, anything you heard today and in the last few days,
23 any of the depositions you've read, did you see anything that
24 would give you even the slightest concern that this was done in
25 order to -- back in 2014 in order to take away money that would

1 be available to creditors or plaintiffs in lawsuits?

2 A. No, not at all. And I will say I disagree with
3 Mr. Messina's assertions that in 2014, January 1, 2014 there
4 was this obvious sign of insolvency and that any financially
5 literate person would predict at that point that a mass tort
6 was going to form and that this was a strategy to start
7 stripping assets away from the company. That is not at all
8 what my investigation found.

9 Q. We may come back to that towards the end of our
10 examination, and I think we're moving towards there, but let
11 me -- before we do that, let me just continue with these so we
12 can wrap them up. This is now a contribution from Datascope to
13 Atrium, right?

14 A. Correct.

15 Q. And I think you would agree with me that, when a parent
16 infuses capital into a subsidiary, that's not evidence of
17 trying to treat them as a shell or a zombie corporation, right?

18 A. No. Essentially, I also talked to Erica about what
19 happened, why the need for the ratification in 2019 as to why
20 there was -- you know, why the Board minutes were done in 2019.
21 So, what had occurred was in 2016 Atrium had had some
22 exceptional negative events. They had had the FDA consent in
23 2015, which required them to make two \$6 million payments, and
24 then there was also the Sullivan litigation, which, if I
25 remember correctly, was an \$11.5 million payment.

1 As a result of it, they had less cash available. So,
2 now they were at a point where they didn't have a lot of excess
3 cash, and so what they did was their parent company, Datascope,
4 made two \$10 million equity contributions. And so, I asked her
5 at the time of the transaction, so in 2016, what were those
6 transactions, were they debt, were they something else? And
7 she confirmed to me that they were equity contributions in
8 2016, they were always equity contributions, they never
9 changed. All that had happened was, was that one of the
10 officers who would normally have done the paperwork at the time
11 wasn't in the office at the time, so the paperwork did not
12 occur. I can tell you I've worked for and worked with a lot of
13 corporations, and sometimes the paperwork doesn't get done.
14 They noticed that the paperwork wasn't done in 2019, and they
15 did the paperwork in 2019.

16 Q. So, there's no nefarious purpose, right, no backdating, no
17 effort to hide the ball here?

18 A. No. And, in fact, it's the exact opposite of that. This
19 is the sort of behavior that I would always encourage my
20 clients, like this is exactly what you want to do. A mistake
21 was made, you didn't do the paperwork you should have done, do
22 it now.

23 Q. And perhaps most importantly for our analysis, this
24 ratification essentially was just a paperwork ratification
25 stating what the original intent was, correct?

1 A. Correct.

2 Q. That didn't change at all?

3 A. That is correct.

4 Q. Now, let's turn to the October 2018 provision, briefly,
5 okay?

6 A. Okay.

7 Q. That's the provision regarding the mesh liabilities. I
8 think you know that.

9 A. Yes.

10 Q. And it was announced by Getinge AB. Did Getinge AB take
11 this provision?

12 A. No, it did not.

13 Q. And how would you respond to an argument that the
14 provision means that Getinge has assumed Atrium's liabilities
15 with respect to the C-Qur mesh claims?

16 A. It's a misreading of -- it's either a misreading of the
17 financial statements, or it's a misreading of the press release
18 and subsequent investor phone call that occurred in October.

19 Q. And if Atrium took the provision, why would Getinge even
20 be talking about it?

21 A. Because it's a consolidated -- it's one of the
22 subsidiaries that consolidates up into Getinge. So, Atrium
23 took the provision. It was Atrium's provision, but when
24 Getinge AB reports its consolidated financial statements the
25 provision will show up.

1 Q. And there are guidelines and policies, right, and
2 international standards when someone should take a provision,
3 correct?

4 A. That's correct.

5 Q. Is that what's on the screen here?

6 A. That's correct.

7 Q. Would you just briefly tell us what this means.

8 A. Well, I would say that you're now getting out of my area
9 of expertise, so I'm not an accountant. I'm very comfortable
10 with public-reporting issues, so the fact that I'm very
11 comfortable talking about consolidated financial statements, if
12 you start asking me about when a provision should be taken, I
13 mean, I can read the standard, but that's not my area of
14 expertise.

15 Q. Okay, fair. So, you did hear, though, Mr. Messina testify
16 that Atrium should have recognized, as I think you told us
17 earlier, that the mesh liabilities would have rendered it
18 insolvent no later than 2014, correct?

19 A. That's correct.

20 Q. And do you agree with that?

21 A. I do not.

22 Q. And is there a way to determine whether Atrium recognized
23 this provision at the appropriate time?

24 A. You know, I mean, just if I'm looking at the available
25 evidence, PricewaterhouseCoopers in Getinge AB's 2018 annual

1 report they describe and disclose the provision. They listed
2 the provision as one of their key audit matters, so this is an
3 area that the auditors gave particular attention to, and they
4 described the process that they went through, and that they
5 reached the conclusion that this was appropriate accounting for
6 this provision.

7 And, as Mr. Fernandez explained during his testimony,
8 there are options, right? It could have been that the auditors
9 could have said, you know, this is -- "No, this is too late."

10 And, remember, the auditors don't work for Getinge AB.
11 Getinge AB pays them, but they really work for the public.
12 They're public auditors, and they have duties to the public.
13 Their job is to check the accounting procedures and rules and
14 application that are done by publicly traded companies. If
15 they had found that the accounting was inappropriate they would
16 have had the ability, in fact, they would have had the
17 obligation to tell Getinge AB, "You need to restate your
18 financial statements for the prior years and account for the
19 provision for when it should have been accounted for," and they
20 did not reach that conclusion.

21 Q. And those auditors have access to a lot of information,
22 right? They typically come to the facilities, and they
23 interview people, and they could ask for a lot of information?

24 A. Absolutely. And, in fact, they describe their procedure
25 in some detail in the annual report, and they talk about who

1 they talked to. They interview lawyers, they interview the
2 internal accountants. They interview a fair number of people.
3 It's an extensive process.

4 Q. Now, I think our last section here that we're going to
5 cover, Professor, is to just address what we heard yesterday,
6 and I think in Mr. Messina's report he says, "If the hernia
7 mesh lawsuits had been reasonably considered, any financially
8 literate person would have found Atrium undercapitalized since
9 at least 2014." Do you see that?

10 A. Yes.

11 Q. He doesn't say "insolvent." He says "undercapitalized,"
12 right?

13 A. Right.

14 Q. And he testified about certain factors that informed his
15 view on this position, correct?

16 A. That's correct.

17 Q. And I think there were three of them. The first was, he
18 said there was a July 2013 FDA Class 2 device recall. Do you
19 remember that?

20 A. That's correct. Relating to the C-Qur mesh.

21 Q. Relating to the C-Qur mesh. How would you respond to the
22 position that that somehow, that 2013 Class 2 recall should
23 have provided a company like Atrium notice that in perhaps six
24 or seven years later they would see a significant influx in
25 product liability cases?

1 A. I think Mr. Messina did what I refer to as a "headline
2 analysis." He read the headline, and the headline sounds
3 really bad, but when you actually read the recall notice you
4 would see that the recall notice is not -- I'm not a medical
5 device expert, so I don't want to say not a big deal, but it
6 probably is not the sort of thing that would trigger a great
7 deal of concern for investors or anybody else who would be
8 doing any type of analysis and thinking about Atrium at that
9 time.

10 Q. And just to be clear, it actually didn't require any
11 recall of the product, right?

12 A. So, there was no product recall. The specific FDA recall
13 dealt with the fact that, if the mesh devices were stored in
14 hot, humid conditions, and if I remember correctly from the
15 actual recall notice, if you store your device in sort of
16 normal temperature, 77 degrees, no problem at all. You can
17 even store your device in temperatures up to 104 degrees, as
18 long as it's for a short period of time. But if for a long
19 period of time you store them in hot, humid conditions, then
20 the device, the mesh sticks to -- and I'm not good enough with
21 the product to be able to describe it properly, but it sticks
22 to something so that, when you would open it up and try to use
23 it, you can't use the device anymore.

24 Q. And the requirement was the FDA don't recall it but
25 basically just --

1 A. They said, "You have to relabel and relabel so that people
2 know how to properly store the mesh."

3 Q. Right. The second thing was a lawsuit, the Herweck
4 lawsuit?

5 A. Correct.

6 Q. Remember the Getinge AB versus Herweck? And, as I
7 understood Mr. Messina's testimony, he said it was involving
8 several lawsuits, and there was a 33, \$34 million claim, so,
9 therefore, that's how he estimated that those cases must have
10 had substantial value?

11 A. Right, and gave the impression that what was happening was
12 that Getinge AB was already suing the former owner of Atrium
13 for products liability as a result of the C-Qur mesh. Now,
14 what was going on in that lawsuit, any time you do an M&A
15 transaction it is absolutely standard, it is absolutely the
16 norm that a portion of the purchase price will be held back.

17 So, in this particular case Atrium was purchased for
18 \$680 million, and there was a 5 percent holdback, so \$34
19 million does not immediately go to the seller when you close
20 the deal. That money gets held in an escrow account. And the
21 purpose of that -- it serves a couple of functions, but the
22 main function is, when you're buying a company, you're buying a
23 company because you're predicting that company is going to
24 generate a bunch of money for you in the future, and in order
25 to do that you need information, because I need to build my

1 predictive models as to is that company going to be profitable
2 in the future, and I need information from the seller in order
3 to build those predictive models.

4 So, what you then do is, to put a little bit of teeth
5 on that, it's, not only are we going to have the right to
6 potentially sue you for having made statements to us that are
7 false, we're going to make this a little easier. We're going
8 to put a portion of the money in escrow, and if in the first
9 couple of years after the deal closes we start finding out that
10 anything you told us wasn't entirely accurate, I get a discount
11 on the price. And, in fact, the way this one was structured,
12 basically Getinge AB waives its right to sue for most of your
13 breach of contract claims, and it can only sue to get back the
14 escrow. This is a 5 percent escrow.

15 And it turned out that there were some problems. Now,
16 none of the problems that are cited in that lawsuit, none of
17 them related to the C-Qur mesh.

18 Q. That didn't come through from Mr. Messina's testimony, did
19 it?

20 A. They related to patent infringement lawsuits, they related
21 to a licensing agreement that was not properly disclosed during
22 the due diligence, and so it turned out that Atrium had to pay
23 a license agreement that had not been disclosed. So, it
24 related to those types of matters, and it had nothing at all to
25 do with C-Qur mesh. So, if the insinuation was that at a time

1 when there were a handful of lawsuits, that the handful of
2 lawsuits along with the recall -- and I would say when you lay
3 it out with the headlines it sounds bad. FDA recall, lawsuit
4 by Getinge AB against Atrium insinuate it has something to do
5 with the C-Qur mesh, and then a couple of C-Qur mesh lawsuits,
6 of course anybody is going to predict that that's going to
7 become this sharp line here. I just think, when you actually
8 look at what the actual recall was and when you look at what
9 the actual lawsuit was, I don't think it's credible to say that
10 any financially literate person would have predicted that the
11 company was undercapitalized as a result of all of these
12 potential future liabilities.

13 Q. And the third issue was the consent decree in 2015?

14 A. That's correct. And that was actually part of the Herweck
15 lawsuit, was that there were -- some of the problems were
16 arising from the FDA -- that gave rise to the FDA consent
17 decree.

18 Q. Right. It's also at least not clear to me how an event
19 that comes after 2014 would have given someone notice, right,
20 in 2014?

21 A. That's right. Correct.

22 Q. But putting that aside, would the consent decree have put
23 any financially literate person on notice that the company was
24 undercapitalized? You see on the right -- I think you can
25 probably assume this, but March 18 is when you really start to

1 see a very substantial --

2 A. And, if anything, something like a consent decree, it's
3 very common in the market that you'll see this kind of event
4 occur, and then all of a sudden the stock price will go up
5 for -- assuming it was a parent company you'll see the stock
6 price go up, and that can be confusing to people. But all that
7 happens, you get the consent decree -- it's no secret that the
8 FDA -- that Atrium was having an FDA problem. The concern
9 oftentimes will be, well, what is it, like, how big is it,
10 what's the scope of this problem? Once you get the consent
11 decree, in many ways that could be viewed as a very positive
12 event, because now you know, okay, this is \$12 million. I'm
13 sure the company was not excited about writing two \$6 million
14 checks, but at least now you know -- you've eliminated the
15 uncertainty. Now it's we've got things fixed, and we can move
16 forward.

17 Q. And then we know in December 2016 this MDL was formed,
18 right?

19 A. Correct.

20 Q. And this is when the provision was taken, correct?

21 A. Right.

22 Q. Now, let me just perhaps, if I could, end where we
23 started, which is, as a result of the work that you have done,
24 and listening to all this testimony, what is your conclusion
25 about whether the company operated in a normal and customary

1 fashion and how its operations may be similar or dissimilar
2 from average operations of multinational corporations?

3 A. This was well within the range of behavior that I would
4 expect to see. The relationship between Atrium and Getinge AB
5 is well within the reasonable range of behaviors between a
6 parent company and its subsidiaries.

7 Q. And did you see any information or any evidence that would
8 justify consistent with what you understand the piercing
9 concepts that apply to corporations that would apply here?

10 A. Again, I don't want to give any legal opinions, but I can
11 just say that their behavior is well within the range. They
12 didn't do everything perfect, but the mistakes they made tended
13 to be little mistakes that you would have any time you've got a
14 company that has to deal with hundreds, thousands of
15 transactions between the two of them. I thought they did --
16 their behavior was well within the range of reasonable
17 behavior.

18 MR. CHEFFO: Thank you, Professor.

19 No further questions, your Honor.

20 THE COURT: Go ahead, Attorney Glasser.

21 CROSS-EXAMINATION

22 BY MR. GLASSER:

23 Q. Let me just start where he kind of ended. It's also the
24 case that Mr. Messina cited a third thing, which is that a
25 \$40 million distribution in 2014 was a large distribution

1 relative to the then-remaining capital of the company. He did
2 mention that as well, correct?

3 A. Correct.

4 Q. A fifth thing that he said was that changing the ability
5 of Atrium to earn the [REDACTED] profit margin it had earned
6 in 2013 and 2014 on a going-forward basis was relevant to his
7 view of undercapitalization, didn't he?

8 A. Yeah. The change in the sales force. That's correct.

9 Q. And a sixth thing that he said was that the change from
10 2013 to 2014 in that year alone as a result of that material
11 decision to change the sales force -- transfer away the
12 customers, cost the company on that GAAP was a [REDACTED]
13 swing in profit of the company.

14 A. That's inaccurate, and I think Mr. Fernandez addressed
15 that I thought well during his deposition. I don't think that
16 Mr. Messina accounted for -- I don't think he understood the
17 financial statements.

18 Q. Okay. The sixth thing that he said was that the
19 \$34 million Herweck lawsuit approximated the level of members'
20 equity at the time. That's why he said the 34 million was
21 relevant, right?

22 A. I don't think that's what he was -- that was not the
23 impression that I got in listening to his testimony.

24 Q. A sixth thing that he cited in his opinion was that the
25 company had got a letter from the supplier of the polypropylene

1 saying, "Don't put this in human beings," right?

2 A. That's correct, yes. He did cite that.

3 Q. All right. And an eighth thing that he said, he didn't
4 say you should take a provision for it in 2014. He said it was
5 a contingent risk that should have been footnoted on the
6 financial statements because it was out there, didn't he?

7 A. Subsidiaries of publicly traded companies don't generate
8 footnotes for their financial statements. Honestly, I didn't
9 understand why he was talking about footnotes.

10 Q. He was saying that he didn't know the exact year they
11 would decide to take the provision, but the risk existed.

12 A. Right. But I'm saying what he was discussing was
13 incorrect, because a subsidiary of a publicly traded company
14 doesn't generate footnotes. The purpose of the footnotes are
15 to help a broader audience understand the financial statements.
16 In this case you don't need that because the subsidiary's
17 parent can understand, and if they have a question when they're
18 rolling up the financial statements they call the company and
19 ask. There's no reason for footnotes.

20 Q. But Mr. Messina did not say they should have taken a
21 provision in 2015 or 2016 or 2017. He said there was a
22 contingent risk out there that was known and knowable, right?

23 A. Honestly, I don't know if that's exactly what he said.

24 Q. Now, you, yourself, do not render any solvency opinion in
25 this case?

1 A. That is correct.

2 Q. And I think you conceded on direct examination that, if
3 the company was insolvent at the time of any transfer out of
4 assets, that would be illegal, problematic, and that would be
5 unjust?

6 A. If it's an illegal dividend to -- if you are making
7 dividend distributions when you are insolvent that's an illegal
8 dividend. That's correct.

9 Q. And unjust?

10 A. Sure.

11 Q. Okay. And so, while you talked about it in relation to
12 the granting of the 2018 security interest, it would also be
13 true if they were insolvent for the \$40 million distributions
14 in 2014, assuming they were insolvent, correct?

15 A. Can you rephrase that question?

16 Q. When Mr. Cheffo asked you the questions, you were talking
17 to him about the 2018 security interest when you said they're
18 not going to enforce it because it would be a fraudulent
19 transfer to enforce it?

20 A. You run that risk, and I would be surprised -- I would be
21 absolutely surprised if they were to run that risk.

22 Q. Right. But just assume -- you're an expert now; you have
23 to assume things. Assume for purposes of my question the
24 company is, in fact, insolvent in 2014 at the time of the
25 \$40 million of distributions. Those two would be fraudulent

1 transfers. Same exact analysis.

2 A. Yeah. I have no reason to believe they were insolvent.

3 Q. But you haven't offered a solvency opinion.

4 A. Right. I mean, I've seen two solvency opinions.

5 Q. Well, at your deposition you told me that you were relying
6 on Fernandez --

7 A. That's correct.

8 Q. -- for the proposition that the company was solvent,
9 correct?

10 A. Correct. I think his opinion had not yet been delivered.

11 Q. But you've heard him testify in open court he didn't offer
12 an opinion for any day prior to December 31, 2017?

13 A. But what he also said is what you're looking at -- so,
14 what he was trying to explain is -- a solvency opinion is for a
15 date. It is for a day. So, he was being accurate in that
16 statement. So, you could -- for example, if I'm in law school
17 and I have to make crazy hypotheticals, you could have a
18 situation, I guess, where you give a solvency opinion and on
19 January -- or December 31, 2017 you're solvent, but for some
20 strange reason on December 30 you were not insolvent.

21 You don't go and do insolvency opinions for every
22 single day. You give a solvency opinion in 2017, and any
23 reasonable assumption would be that for the period of time that
24 you covered for that analysis it is a very, very fair
25 assumption to assume that the company was solvent during that

1 entire time frame.

2 Q. I would like you to just bear with me. Just, please, I'm
3 going to ask you a question. Can you answer the question I
4 ask?

5 A. Sure.

6 Q. Okay. So, if, taking the assumption there was also a
7 \$9 million assignment, distribution of a note, if the company
8 were insolvent at the time of that \$9 million distribution you
9 would agree that would be a fraudulent conveyance?

10 A. If the company was insolvent at the time, yes. But,
11 again, I saw nothing that would cause me to believe that.

12 Q. But you didn't offer a solvency opinion yourself in this
13 case?

14 A. That is correct.

15 Q. Now, I want to draw your attention -- you talked to
16 Mr. Cheffo about the -- well, actually, before I get to that,
17 let me ask you this: You were present in the courtroom when
18 Mr. Carlton went through his employment agreement, right?

19 A. Yes.

20 Q. And you agree that, according to his testimony, there was
21 no legally cognizable existent entity as a counterparty?

22 A. He stated that -- yeah, that's what he stated. I'm not
23 sure he's correct about that, but that's what he stated.

24 Q. Are you saying that because you believe -- and there was
25 also a contract that had a company in it for the sales

1 arrangement, Maquet Systems USA, which wasn't an LLC either, it
2 wasn't a company either, according to Mr. Carlton's testimony,
3 right? Remember he was asked about two contracts?

4 A. You mean the distributorship agreement?

5 Q. Yeah.

6 A. Okay.

7 Q. Remember that testimony?

8 A. The 2012 agreement? Yes.

9 Q. All right. So, these are two instances where, at least to
10 Mr. Carlton, who you agree with, as president of Atrium, he
11 should be a very knowledgeable person, right?

12 A. I think he is a knowledgeable person.

13 Q. At least, based on what he said in open court, he believes
14 he contracted with two nonentities, right?

15 A. Yes.

16 Q. All right. How does it respect the corporate form to
17 contract with a nonexistent entity?

18 A. So, I did not do any analysis specifically on his
19 employment agreement to be able to decipher exactly who is the
20 counterparty to the contract. I am confident that there is a
21 counterparty to the contract. I did not do that particular
22 analysis.

23 Q. All right. So, let's go through the legal possibilities.
24 The counterparty could be a natural person. We know that's not
25 true, right?

1 A. Right.

2 Q. There's no human being on the other side of his employment
3 arrangement, right?

4 A. Correct.

5 Q. And we know that it's not exactly -- well, he says it's
6 not Getinge AB; it's a thing called the Getinge Group, right?

7 A. And I have to admit I don't have the full contract in
8 front of me right now. I'd want to look through. Sometimes
9 it's one where -- I cannot tell you how many times I have
10 reviewed contracts where the "Whereas" clauses were done in a
11 very sloppy manner that causes all kinds of confusion, and then
12 it becomes an interpretation matter because maybe it was
13 cleared up later in the contract. I don't know.

14 Q. So, a remaining possibility is actually an unincorporated
15 association, right, a partnership?

16 A. I'd be surprised if that's the outcome. No.

17 Q. But isn't that the only legally cognizable remaining
18 option?

19 A. No.

20 Q. It's either a legal entity or it's a partnership. It
21 can't be with nothing.

22 A. Well, no, because it could just be that it's a mislabeled
23 contract.

24 Q. So, it has to be with something?

25 A. Yeah, sure.

1 Q. And that has to be a natural person, a legal entity --

2 A. Correct.

3 Q. -- or some unincorporated association that's legally
4 cognizable, correct?

5 A. Yeah.

6 Q. Same is true with contracts with a thing called Acute Care
7 Therapies, right?

8 A. I have to admit I have not thought enough about the
9 contracts with Acute Care Therapies.

10 Q. It has to be a natural person, a legal entity or an
11 unincorporated partnership, doesn't it?

12 A. Yes, that's true.

13 Q. That's the entire Venn diagram of possibility legally,
14 right?

15 A. Yeah, I think that's true.

16 Q. Now, you talked to Mr. Cheffo about the potentially
17 significant transaction of selling the hernia mesh part of the
18 business, right?

19 A. Correct.

20 Q. Remember those discussions?

21 A. Project Star, yes.

22 Q. So, I think, since that was going to be like a \$15 million
23 transaction and it didn't even happen -- but they had a
24 corporate meeting about it in October of 2018 at Atrium, right?

25 A. Yes.

1 Q. And you would agree that's the only corporate meeting
2 minutes that you've seen in this case for Atrium, meeting
3 minutes for an actual meeting?

4 A. That is correct.

5 Q. All right. You would agree that the decision to transfer
6 out all the customers was equally, at least equally significant
7 and momentous, right?

8 A. Yes, I would agree.

9 Q. All right. And it is the case that there is no corporate
10 Board meeting -- there are no corporate Board meeting minutes
11 where the Board of Atrium actually meets to consider the pros
12 and cons and determine it is a good business reason to transfer
13 out these customers? There is no record of such a meeting?

14 A. That's correct.

15 Q. There are no minutes of such a meeting?

16 A. That's correct.

17 Q. There is no unanimous consent to such a decision?

18 A. That is correct.

19 Q. I'm putting on the ELMO the tiers that you've been talking
20 about.

21 A. Yes.

22 Q. It is also the case that there is no evidence of any
23 meeting, minutes or unanimous consent at Datascope discussing,
24 ordering or asking Atrium to do that; isn't that true?

25 A. That I don't know. I did not do -- I don't have all of

1 Datascope's Board minutes.

2 Q. You've never seen any such thing, right?

3 A. I have not seen it, but that doesn't mean it doesn't
4 exist, so I don't know that.

5 Q. But you cannot testify that there is?

6 A. I cannot testify to that.

7 Q. All right. Similarly, there is no evidence that Getinge
8 USA Holdings "Two Sticks," Inc., ever met, had a Board meeting,
9 a Board meeting with an actual discussion of this business
10 decision, or a unanimous consent to ask Datascope to do this,
11 right?

12 A. I have not done a review at all of -- I have not done a
13 review of Getinge USA Holdings' Board minutes.

14 Q. Similar answer to Getinge USA, Inc., right?

15 A. That's correct.

16 Q. No evidence of a meeting, no evidence of a unanimous
17 consent, right?

18 A. That's correct.

19 Q. The decision to sign up to take [REDACTED] worth of
20 debt, the same answers adhere for Atrium Medical Corporation,
21 right?

22 A. Correct.

23 Q. No meeting minutes, no unanimous consent?

24 A. That's correct.

25 Q. You also describe that on your direct examination as a

1 significant transaction, right?

2 A. Yes, that's a significant transaction.

3 Q. You didn't see any evidence that Datascope had any meeting
4 minutes or unanimous consents to order Atrium to make that
5 significant decision, did you?

6 A. That is correct.

7 Q. There's no evidence in this case or anything you've seen
8 that Getinge USA Holdings "Two Sticks," Inc. had any meeting to
9 discuss the pros and cons or to ask Datascope to do something,
10 right?

11 A. You are correct.

12 Q. And the same is true of Getinge USA Holdings Inc., right?

13 A. That is correct.

14 Q. So, the most momentous decisions this company has ever
15 taken did not respect the corporate form; isn't that true?

16 A. I don't know if I would say it's the most momentous -- I
17 would not use those words. When we're talking about a
18 subsidiary, there are lots of ways for companies to
19 communicate, there are lots of ways for the Board to do things
20 now. They're not all the examples of perfect corporate
21 governance, but this is exactly the type of behavior that I
22 would expect to see in this type of relationship. Sometimes
23 they do things perfectly, sometimes they do things less than
24 perfectly. And, frankly, what you find quite often is it takes
25 a while for a company to develop optimal corporate governance

1 as a subsidiary. And I expect that you've seen they have
2 improved over time, and the example -- their Board minutes in
3 October of 2018 are an example of them improving over time.

4 MR. GLASSER: I don't have any further questions, your
5 Honor.

6 MR. CHEFFO: I have two, really, maybe three.

7 THE COURT: Go ahead.

8 REDIRECT EXAMINATION

9 BY MR. CHEFFO:

10 Q. I'm not sure if I heard counsel correctly. I thought
11 there was a question regarding this transaction with the Sales
12 Group. I think the question was did this reference or did this
13 exhibit a decision to transfer out all of the customers?

14 A. Maybe I misunderstood the question. I hope I rephrased as
15 to what I thought I was answering, which is the transfer of the
16 sales function from Atrium to effectively Maquet U.S. Sales,
17 yeah, that was a significant transaction.

18 Q. Right. But they didn't transfer the customers, right?
19 They basically had a sales force. They contracted to have a
20 sales force, correct?

21 A. Correct. Right. They outsourced their sales function.

22 Q. They still had their same customers; they just had
23 somebody else driving the trucks and doing the logistics.
24 That's your understanding, right?

25 A. Yeah, that's correct.

1 Q. And to the extent that there are Board minutes --
2 unanimous consents of the Board, those are important and
3 operative and customary and ordinary for subsidiaries to use,
4 correct?

5 A. Correct.

6 MR. CHEFFO: Thank you, your Honor.

7 THE COURT: All right. Can Mr. Orcutt be excused?

8 MR. GLASSER: Yes, ma'am.

9 THE COURT: All right. Thank you, Professor. You're
10 done.

11 (Witness stepped down)

12 MR. CHEFFO: That's it for us today, your Honor.

13 THE COURT: Okay. All right.

14 MR. CHEFFO: We talked about -- we're obviously at
15 your Honor's pleasure. We could do some post-hearing -- it's
16 getting a little late.

17 THE COURT: Would you like five minutes to gather
18 yourselves? Are you ready to go?

19 MR. CHEFFO: Yeah, I think we could probably. I think
20 we have a little more time today. That's fine.

21 THE COURT: There's an hour left of court time.

22 MR. CHEFFO: Maybe we can agree on, like, 20 minutes
23 each.

24 MR. ORENT: Your Honor, the order that you had
25 previously entered that we had negotiated contemplated

1 plaintiffs would go, the defendants would go, the plaintiffs
2 would go. So, what I would say is 20 minutes each, and then we
3 could have another six or seven minutes afterwards.

4 THE COURT: And I'm okay with anything up until 5:00,
5 and I am also fine with briefing after this, assuming counsel
6 wants the opportunity to do that.

7 MR. ORENT: Your Honor, we would oppose that. We
8 think that the record is very complete at this point. There
9 has been a lot of briefing from the parties.

10 THE COURT: I agree.

11 MR. ORENT: I don't know that there is anything new
12 that anyone could offer. There's certainly no evidence. I
13 think the parties have sort of left everything on the field, if
14 you will, your Honor.

15 THE COURT: Well, it was presented to me I think as a
16 sort of either/or, closings or briefing. Do you have a
17 preference on that?

18 MR. CHEFFO: Really on this one I would speak strongly
19 if I felt strongly, but ultimately it's really for the Court.

20 But I will just say this: While it is true we tried
21 to marshal the information, if we were to look at all the
22 exhibits and all the transcripts and everything else, I'm,
23 frankly, trying to put myself in your Honor's position, having
24 an extra 10- or 12-page brief that just says, "Okay, here is
25 where everything is, here is tying it together," that your

1 Honor can look. It seems to me that's typically the way I've
2 done it in these types of hearings. I don't think it's
3 particularly burdensome. We can do it on ten days, not a huge
4 thing. But I think tying it together for your Honor or your
5 clerks to look at is typically helpful, because there's kind of
6 a mountain of information to go through.

7 THE COURT: Are you still opposed?

8 MR. ORENT: Like I said, I think we've already
9 submitted volumes upon volumes of evidence. I think that the
10 case we've both sort of laid out. That being said, if the
11 that's the Court's strong preference we would certainly go with
12 it. It would be my hope that there would be no additional
13 evidence put forward at this point, now that both sides have
14 produced their cases and we've questioned all of the witnesses.

15 MR. CHEFFO: We would agree to that.

16 THE COURT: Okay. So, I am not calling for further
17 briefing, but if counsel would like further briefing and both
18 assented I would certainly yield. But I think at this point
19 I'll hear closing statements, and then that will be sufficient.
20 All right.

21 MR. CHEFFO: Thank you, your Honor.

22 MR. GLASSER: Five minutes, your Honor?

23 THE COURT: You want five minutes? Sure, I will give
24 you five minutes.

25 THE CLERK: All rise.

1 (Recess taken from 4:03 p.m. to 4:10 p.m.)

2 THE CLERK: All rise for the Honorable Court.

3 THE COURT: Just for the record, that clock is a
4 little fast, by the way. Okay, Attorney Orent. Go ahead.

5 Actually, before we start with closings, can I ask you
6 a couple of questions about the sealing? Because that's
7 something I want to get to right away, and I just want to make
8 sure I have a handle on where counsel is, particularly defense
9 counsel, because I think I know where plaintiffs are.

10 So, do you have the work product that you did,
11 Attorney Armstrong, early on in the case? You took essentially
12 the briefs in this case, and you whittled it down with I think
13 opposing counsel.

14 MS. ARMSTRONG: Yes.

15 THE COURT: And found, frankly, only five pages, I
16 think, of sealed material, and it was all in plaintiffs' memo.

17 MS. ARMSTRONG: Yes. And I have -- I didn't print out
18 three copies of the entire brief, but I printed out multiple
19 copies of the pages.

20 THE COURT: Okay. So, if you don't mind, just so I
21 can get a general sense of these questions.

22 MS. ARMSTRONG: They're not actually collated.

23 THE COURT: Do you have the tabs? I'm looking at the
24 first one on Page 28.

25 MS. ARMSTRONG: Page 28.

1 THE COURT: Yes, 28. Let me start with 28. So,
2 there's a series of statements that are highlighted that talks
3 just in general terms, no specifics, really, about selling
4 products to customers at a loss. Do you still believe that
5 that is something that has to be sealed? It seems general
6 enough to me.

7 MS. ARMSTRONG: It's pretty general. We don't
8 actually agree with this characterization, so we don't really
9 believe that products were sold at a loss, but usually profit
10 margin is the type of thing we would assert confidentiality to.
11 This suggests that we had a below margin, that we had a
12 negative profit margin. Again, it's a characterization we
13 disagree with, but we don't really want profit margin to be
14 public. I don't feel strongly about this one, I don't think.

15 THE COURT: All right. I'm going to, then, check that
16 one off. Let's move to the next.

17 I do think Page 29 is very specific and detailed with
18 respect to numbers. Do you have a problem, Attorney Glasser,
19 with keeping just Page 29, those highlighted materials under
20 seal?

21 MR. GLASSER: Just because we represent thousands of
22 people, we'll stand on our prior position, but I don't need to
23 argue it.

24 THE COURT: Okay. Because, yeah, I need to know how
25 they would not be harmed by that information being publicized,

1 and I think those kinds of numbers and level of detail is
2 precisely the type of thing that I would be inclined to protect
3 the confidentiality of.

4 MR. GLASSER: Yeah. The only countervailing thought
5 or fact in my mind is, if you're a vendor here and you're
6 selling pipe and equipment over at Atrium and you don't know
7 there's [REDACTED] of debt in front of you, you might want to
8 go COD. So, I do think there is a public interest in it, but
9 we're happy to stand on our position.

10 MS. ARMSTRONG: Are we talking about Page 29?

11 THE COURT: Yes, yes.

12 MS. ARMSTRONG: So, I don't know what Mr. --

13 MR. GLASSER: Well, it's saying that the company is
14 operating at a loss each of these five years, and if I'm a
15 normal vendor out there in the world I might think about my
16 credit policies with that company.

17 MS. ARMSTRONG: As a usual matter, vendors do not get
18 access to a company's entire private financial statements
19 unless they've reached an agreement with the company to provide
20 them. These numbers reveal profit margins, which are highly
21 confidential, proprietary and generally not shared with the
22 world.

23 THE COURT: All right. Well, I'm going to keep under
24 seal Footnote 51 and then the matters that are highlighted on
25 Page 29 and find that, in fact, that does rise to the level of

1 material that, if public, could harm Atrium. All right.

2 MR. GLASSER: Very good, your Honor.

3 THE COURT: Now, the number [REDACTED] is
4 highlighted. That's on Page 31.

5 MS. ARMSTRONG: 31 and 42, your Honor.

6 MR. GLASSER: And I've already kind of had my say on
7 that.

8 THE COURT: Is there any reason -- that's, obviously,
9 been something that has been talked about publicly in this
10 proceeding with various witnesses.

11 MS. ARMSTRONG: Your Honor, I mean, Getinge AB is a
12 publicly traded corporation. It does report its liabilities on
13 a consolidated basis. I don't think it drills down and reports
14 the individual debt obligations. We have been in this
15 courtroom a lot, and I can consult with my client further, if
16 you would like me to do so, quickly.

17 THE COURT: That would be great, because it would be
18 preferable to me to seal as little as possible, and, if not, I
19 would want to hear how you're going to be harmed.

20 (Pause)

21 MS. ARMSTRONG: Your Honor, again, for the reasons
22 that I've stated, the company has obligations to report,
23 Getinge AB does. Atrium's finances are completely
24 confidential. They get consolidated up. Getinge has certain
25 publicly facing obligations, but, again, they don't usually

1 drill down, and this type of information is usually not
2 available to their competitors about what individual loan
3 obligations might be. We think we've been narrowing this and
4 that we just redacted the number.

5 THE COURT: You have, and I appreciate that. How does
6 this harm?

7 MS. ARMSTRONG: Any time a competitor has access to
8 detailed financial information that would not otherwise be
9 public they can put that into their strategic planning to
10 compete with the company.

11 THE COURT: Okay. And you would suggest there would
12 be harm, but the harm should be publicized. Is that a fair
13 characterization?

14 MR. GLASSER: Yes, ma'am. I'm saying that vendors to
15 this company would actually find this valuable information.

16 THE COURT: I think that's exactly what she would
17 argue as well. So, I'm going to go ahead, and I'll keep that
18 number under seal for now.

19 And then Page 47 is another thing that is a
20 characterization, really, [REDACTED].

21 MS. ARMSTRONG: Yeah. Your Honor, if I may speak to
22 this, first of all, we don't agree with the characterization of
23 the insurance program in this litigation, and they keep
24 focusing on Zurich as if it's the primary layer of insurance,
25 and it's not, and we've disclosed the primary layers to them in

1 our Rule 26 disclosures, and there are several under Zurich and
2 ones that we think are the relevant ones, not Zurich.

3 But putting that aside, insurance companies negotiate
4 with insurance companies. They don't just sign routine -- like
5 you and I, we may go get an insurance policy, and we don't have
6 any choice about what terms go into that insurance policy.
7 That's not the way corporations work. These are big
8 transactions, they actually negotiate with them, and whenever
9 you negotiate with somebody and you give them this, they give
10 you this, you get concessions. You don't want the next
11 insurance company that you're going to negotiate with knowing
12 the terms of the deal that you struck with another insurance
13 company. So, usually these types of contracts are kept
14 confidential. You don't necessarily publicize these types of
15 arrangements. You can say, "We have insurance," but you don't
16 necessarily publicize the details. Again, we don't agree with
17 the characterization of these details, but we also don't want
18 them publicized to the world as these are the details that
19 we're making.

20 THE COURT: Your same argument?

21 MR. GLASSER: Yes, ma'am.

22 THE COURT: I'm going to keep, then, Page 47 under
23 seal for now.

24 And with respect to sealing and unsealing material, I
25 know that counsel have done a really good job, and I appreciate

1 highlighting for me portions of exhibits that you would still
2 want under seal. I understand plaintiffs' position on that,
3 and I would like to look at those and weigh that, and if
4 there's any decision that I'm going to be making that would be
5 different than what you have proposed, I'll get you on the
6 phone.

7 MS. ARMSTRONG: Your Honor, I've also discussed with
8 Ms. Esposito that they have provided you with our
9 confidentiality designations for the depositions, which only
10 apply to Mr. Hjalmarson, and you may recall that he discussed
11 [REDACTED], he discussed the profit and loss
12 statement. So, they're consistent with what we've done
13 elsewhere. I can provide the Court -- they did it on a
14 separate document. I've offered to provide the Court with a
15 highlighted version of that, and I can still do so. So, I can
16 email that to Ms. Esposito, if that would help.

17 THE COURT: Okay. And I understand the highlighting
18 comes from defense.

19 MR. GLASSER: That's fine, your Honor.

20 THE COURT: And it helps me, because I can quickly
21 look at whatever it is in context, and if I'm going to disagree
22 with any of Attorney Armstrong's designations, again, I'll get
23 you on the phone, because ultimately I need to make specific
24 findings that there will be harm as a result or potential harm,
25 certainly, as a result of the disclosure of sealed material.

1 says, "Once an individual defendant ceases to be employed or
2 otherwise act for all of the corporate defendant entities,"
3 "all of the corporate defendant entities," Lena Hagman, and
4 you've heard nothing to the contrary, is the individual charged
5 by law, by contract, and voluntarily charged, and she
6 personally submits to the jurisdiction of the Court, and she
7 personally in her official capacity was brought on the hook and
8 creates the link for specific personal jurisdiction here.

9 The consent decree covers the items that BMS
10 discusses, so the Bristol-Myers Squibb test, when that case
11 looks at contacts it talks about things like manufacture and
12 production, complaint handling. Your Honor, this consent
13 decree requires to establish and maintain procedures to control
14 defendants' designs in order to ensure that the specified
15 design requirements are met.

16 And the consent decree on -- this is now Exhibit 184,
17 Page 6, requires the defendant and Lena Hagman, Getinge AB, to
18 ensure that all devices meet the requirements for design,
19 development, planning, design input, output, design review,
20 design verification, design history files, validate processes,
21 CAPAs, Corrective and Preventive Actions, complaint handling.
22 These are the very issues that your Honor is going to be
23 hearing evidence about in the trial of these cases and the
24 defendants' inability to properly maintain systems from the
25 earliest time through to the present, your Honor. And so,

1 these continuing systematic contacts relate exactly to the
2 products at issue in these cases. Exhibit 215 demonstrates
3 that this was carried out through an operating model, and we
4 can see, even reading the new Governance Model for Structure
5 for Consent Decree Sites, it says, "The Getinge Executive Team
6 has decided to implement a new governance model for
7 organizational structure in the sites of Merrimack, Hudson,"
8 and the other sites. And then it puts Lena Hagman right on top
9 of the org chart for site remediation for QRC. That's the
10 quality control portion of things.

11 Then, your Honor, we have a series of shared service
12 agreements beginning in -- purporting to begin and backdate to
13 2011, where Getinge is called the "provider." Getinge secures
14 services, the very services that the defendants use for their
15 computer systems, to store all of the key documents in these
16 cases, for the design, their HR so that their employees can
17 create these products. It involves the benefits for those
18 employees. The provision of those benefits go through the
19 shared HR functions. All of these contacts are sufficient
20 contacts to grant personal jurisdiction on these particular
21 cases.

22 And I think that this issue is dispositive on its own,
23 but then if your Honor considers the joint venture that we
24 discuss in our brief and I think that has been made evident by
25 Mr. Carlton's testimony here today and certainly by

1 Mr. Orcutt's testimony, if you'll recall, your Honor,
2 Mr. Carlton testified that these unincorporated entities, they
3 contract, they have officers, they market in the names of those
4 unincorporated entities. They function in the real world, and
5 they've got to be someone. So, if they're not a human being
6 and they're not a corporate entity, they've got to be a joint
7 venture, and under New Hampshire law they are liable for the
8 injuries caused to our clients.

9 Now, in a moment, your Honor, I'm going to go
10 through about the ten dispositive pieces of evidence in
11 plaintiffs' favor, but a lot of attention has been brought to
12 the attempt to recharacterize some of the evidence in this
13 case, particularly one quote of Mr. Hjalmarson, this right
14 here, the single economic unit question that your Honor has
15 come to hear. But that, your Honor, ignores the admission of
16 Alex Myers. "We are merging three business areas into one
17 single company." Also says, "Getinge will transform from a
18 group of companies in a so-called holding company structure to
19 become one Getinge."

20 Now, the other quote from Mr. Hjalmarson that was
21 ignored throughout the last few days is this: I asked him, "So
22 when Alex Myers says, 'We're merging three business areas into
23 one single company,' what he's talking about is practically, in
24 a real-life, practical sense one company, correct?" And then I
25 continue, "But not merging the legal entities into one company.

1 Is that your understanding?" And he doesn't equivocate. He
2 says, "Yes." He says, "Yes."

3 Your Honor, then we start looking at the evidence,
4 what I'm going to call the ten key pieces of evidence in this
5 case. Your Honor, the ten key pieces of evidence in this case:

6 Number one: The sales agreement with Maquet. That
7 sales agreement was not approved by the Board of Atrium and was
8 the effective action that transferred the sales force from
9 Atrium to some other entity. Importantly, this particular
10 document was not with a legal entity. It was backdated, there
11 was no price list, and no way to calculate the price list. So,
12 even assuming it was with a legal entity for a moment, you're
13 still left with the question of how did they transact business?
14 A multimillion-dollar company is going to sell millions of
15 units of product for millions and millions of dollars without a
16 contract for two years? It doesn't make sense, your Honor.
17 But then when you add in the fact that it wasn't approved by
18 the Board, it's not with a legal entity, and it's backdated, no
19 price list, no explanation for how to calculate transfer
20 prices, it becomes dispositive.

21 Second: Sales agreement with Getinge USA. This one
22 is with a legal entity, but it, too, is backdated, your Honor.
23 There's no price list attached, and there's no precision on how
24 to calculate these transfer prices. Effectively, Atrium has
25 gone almost a decade without having a valid sales contract for

1 the sale of its products at a time where, if you listen to
2 plaintiffs' experts and believe plaintiffs' evidence and
3 actually trust the books of defendant, defendants are selling
4 their products under the cost to make them.

5 Three: Service agreements, backdated. As I said
6 before, this document is enough on its own to consent to
7 jurisdiction, but what it says is, is that the corporate parent
8 has taken over HR, finance, all these other functions, legal,
9 without any kind of contract. How are they paying them? Where
10 does the markup come from? Almost two years.

11 And then we have another service agreement in 2017.
12 Getinge charges a markup for these services, Getinge AB, that
13 is, but, yet again, this one is backdated. We have no idea how
14 these dollars are calculated.

15 Then, your Honor, there's the [REDACTED] missing loan
16 agreement. It took your Honor questioning defense lawyers, and
17 it took them to go back more than a half an hour to figure out
18 who this loan was even with. This debt could be called in at
19 any time, but there's no loan document, there's no terms and
20 conditions. You don't just lend [REDACTED] to somebody on a
21 whim. It's got to be with a close relationship.

22 Then we talked about the two \$10 million
23 reclassifications in 2019. Those reclassifications came --
24 what Mr. Orcutt testified was he called somebody and they said,
25 "My secretary was sick and forgot the paperwork." Your Honor,

1 when I was in school, "My dog ate my homework," didn't work for
2 an excuse, and when you're talking about [REDACTED], I don't
3 think that that cuts the mustard. We're not talking about
4 \$100. We're talking about [REDACTED]. When you add those two
5 together that's [REDACTED] without a contract, forgetting
6 about the sales force.

7 Your Honor, the profit and loss statement. This is
8 one of the key, if not the key, document in this case for
9 solvency. On the face of this document it proves that the
10 defendant is insolvent, Atrium is insolvent. The only way that
11 the defendants get around it is by these telephone calls
12 essentially asserting that this document is erroneous or a
13 fraud. Defendants have to ignore their own document. And
14 that's presuming that you get past the issue that the
15 defendants only offered solvency testimony for one day.

16 Eight: Lack of Board meetings. From 2011 to 2019 the
17 Board met in person approximately one time. We heard
18 Mr. Carlton say, "Oh, they met, but we didn't take records."
19 That doesn't cut the mustard, too, your Honor, when you're
20 talking about tens of millions of dollars and 500 employees.

21 Nine: Mr. Hjalmarson's admissions.

22 And ten: Overwhelming level of micromanagement of the
23 daily operations at Atrium.

24 So, I want to focus just for a minute on some of the
25 legal representations and slides that we saw at the beginning

1 of this process. We saw a quote that said common central
2 management oversight of subsidiaries' business plans and
3 marketing strategy, monitoring subsidiary performance,
4 supervision of finances, approval of capital expenses,
5 formulation of policies, involvement in subsidiaries'
6 acquisitions and divestments, provisions of loans or other
7 financing, overlapping officers and directors, common cash
8 management system, co-branding, and use of a parent logo,
9 consolidated financials, common website information management
10 were effectively not enough. That's what the argument we heard
11 was.

12 The law is that a parent can be held directly liable
13 when the parent operates the facility in the stead of its
14 subsidiary or alongside a subsidiary in some sort of joint
15 venture. And what we've seen here is joint venture with the
16 parent, we've seen joint venture with the medical group,
17 whether you call it ACT or Maquet. It certainly meets that
18 test.

19 We've also heard the novel legal argument that we have
20 to pierce each of the four layers of the corporate veil.
21 However, that adds a new element that is not in the case law,
22 and it ignores the notion of control. If control is an
23 element, why would you need to pierce it four times? Piercing
24 the veil pierces it to who has control, who's doing the
25 undercapitalizing, who's committing the fraud or injustice. In

1 the case law from Delaware there's no indication in the
2 two-part test that it may only be applied to a direct
3 relationship such as a parent and subsidiary. Rather, the test
4 requires that the companies operate as a single economic entity
5 tied to an overall element of injustice.

6 If you drive up to Continental Boulevard, this is what
7 you see, this is what customers see, this is what the world
8 sees.

9 When we talk about failure to absorb corporate
10 formalities, the defendants cannot explain how the president of
11 the company had no idea that the Board even existed, no idea.
12 He said:

13 "Question: "So, after the acquisition did your Board
14 membership change?"

15 "Answer: It disappeared. There was no longer a
16 Board."

17 "So, Atrium no longer had a Board?"

18 "Correct."

19 "So, your responsibility as CEO, was it to any kind of
20 organization or just simply to an individual, Mr. Keller?"

21 "I don't know how it was formally structured, but I
22 was instructed it was Mr. Keller."

23 And then we see the distribution agreement with a
24 nonlegal entity, again backdated. It's not possible that a
25 document signed on December 31st, 2012 was actually created on

1 April 17th, 2013. October 1st, May 18th.

2 Your Honor, I want to focus just for a moment on some
3 of the milestones in this litigation, just to put in context
4 the effect of the backdating of records. Chad Carlton was
5 president in 2016. The C-Qur MDL was filed 12/8/2006. The
6 defendants filed their first Motion to Dismiss on 6/6/17.
7 Outside sales go through Getinge USA on 10/1. The order
8 allowing personal jurisdiction discovery begins on 11/14. The
9 court hearing related to the 30(b)(6) notice.

10 If you remember, Reinhard Mayer was the original
11 30(b)(6) deponent instead of Mr. Hjalmarson. Still,
12 Mr. Hjalmarson -- excuse me -- still no document.
13 Mr. Hjalmarson starts preparing for his deposition in April.
14 We notice his deposition in June. Still no contract with
15 Getinge USA. His deposition is scheduled for 7/19 and
16 miraculously on 7/6/2018, right before our deposition, this
17 document memorializing a relationship that occurred for like 18
18 months before suddenly appears. If we had taken Reinhard
19 Mayer's deposition in April he would have testified there was
20 no contract, because it didn't exist at that time. There was
21 no legal proof that there was any relationship to sell these
22 products. I think, your Honor, that that is dispositive in and
23 of itself.

24 I guess I'm out of my time.

25 THE COURT: You're close. That really -- 5:05 is the

1 time that we'll end today, so you have just a few extra
2 minutes, but I think you are finished up with your time for
3 now.

4 MR. ORENT: That's fine, your Honor.

5 CLOSING ARGUMENT

6 MR. CHEFFO: Thank you, your Honor. There is a fair
7 number of slides, so I'm not going to try and do one of those
8 commercials where I talk really fast. We can give your Honor a
9 copy of the slides supplied by both sides. But I would like to
10 just start really I think where I, again, started last time or
11 end where I started. A few things here.

12 We've heard, as we kind of previewed for you, that
13 there would be a lot of information. We heard hours and hours
14 of testimony. At the end of the day this is an incredibly,
15 incredibly rare remedy that the plaintiffs are seeking, and the
16 plaintiffs basically started by showing you some of their
17 plaintiffs, and I understand that, but I also think it's
18 important for the Court to know when people here, when these
19 500 employees in this state come to work every day, and
20 basically the plaintiffs are asking you to make a finding that
21 they work at a phantom shell company, when they make 50,000
22 stents or 2,000,000 chest drainage devices or 100,000 products,
23 when they come to work every day and work their long shifts and
24 try to make medical devices to help people, the idea that they
25 are basically -- this is just some fraudulent shell game like

1 the owner with the Bentley, it's just there's no case in
2 America that's consistent with what the plaintiffs are asking
3 your Honor to do here. Frankly, I don't think it's ever
4 happened.

5 What we do know is the only two times that Atrium has
6 ever needed money, a capital infusion, it happened, right?
7 They got the \$10 million, they got the \$10 million. You've
8 heard all of these bells and whistles, but you haven't heard,
9 if this was such a company on dire straits since 2011, who
10 would be doing business with them? There would be
11 foreclosures. There would be firings. They wouldn't have this
12 property. None of these hospitals would do business with a
13 shell, phantom corporation in this day and age. They've never
14 declared bankruptcy. They've never missed a payment. There's
15 no significant issues of debt here. So, what you're hearing is
16 basically trying to take what is supposed to be used in the
17 most narrowest of situations and apply it in a situation that
18 it's never been, in my view, applied before, and there's no
19 evidence of syphoning.

20 So, what we did say and what I think is true, and I'll
21 talk a little bit about specific jurisdiction, but the Supreme
22 Court precedent is clear here, and this is an extraordinary
23 remedy. Yeah, we've spent a lot of time talking about are
24 there things that could have been done better in filing forms,
25 but they haven't tied together any fraud here or injustice. In

1 fact, just the opposite. They've basically said, "Well, no, we
2 don't do a fraud analysis, we haven't looked at that." And
3 you'll hear the only thing that ties this together, the only
4 thing, and that's why they're trying to now pivot, I think, to
5 specific jurisdiction, is this statement about two thousand --
6 Mr. Messina's statement, which we'll talk about in a minute.
7 So, there is no likelihood that they will meet specific
8 causation.

9 They've essentially disregarded this concept of the
10 four levels, but we haven't heard a single word about it. The
11 idea that you don't have to look at corporate parent forms, I
12 mean, you can't have it both ways. When they get the money
13 from Datascope and they pay the money, even to the extent
14 there's an agreement or obligation, it's with Datascope; yet
15 you haven't heard a single word, other than just putting it up
16 on a screen, about how you would pierce that corporate veil. I
17 think it would be totally inconsistent with the factual record
18 to basically suggest that this company with 500 employees and
19 Mr. Carlton and all the people that are operating and go to
20 work every single day don't control the operations.

21 And, frankly, you heard the vast number of things --
22 we tried to make a list in our cross-examinations, and perhaps
23 it went a little longer than we needed it to, but the reality
24 was they were trying to line up all the things that they said
25 were unusual, and I think 90 percent of them were things that

1 their own expert said were perfectly fine and he had done in
2 his own corporation, right? So, we had a lot of time spent
3 about branding and things. Then, when we asked their expert,
4 "Is this okay?", and he said, "Yeah that's fine. No problem."

5 So, let's talk about this. I'm not going to fault
6 them in a sense, but I think when your Honor read the briefs
7 and read the papers, we all did, we thought this was about we
8 were here to talk about piercing, because this wasn't about
9 specific jurisdiction or general jurisdiction, right? So, I
10 think, you know, it's telling we see kind of a pivot, right,
11 and we've seen this pivot to -- and it's really almost
12 exclusively focused on the consent decree. So, let's just talk
13 about specifically what the consent decree is.

14 I mean, the idea that this is somehow -- these claims
15 arise out of the consent decree, there's no connection; these
16 claims have nothing to do with the consent decree. Getinge is
17 not even a defendant in it, right? So, there was, obviously,
18 conduct to which the FDA required a consent decree, but this
19 lawsuit is about -- it's a product liability lawsuit, right?
20 It's about things that happened years before the consent
21 decree.

22 And to the extent there is any ongoing obligations,
23 it's not uncommon -- your Honor has seen these types of
24 situations -- governments come in, they say, "Look, we want one
25 person, we don't want to deal with 27 different people." So,

1 Lena Hagman comes in and she says, "Okay, I'm ultimately the
2 person of corporate responsibility." Your Honor can't put on
3 blinders to understand how the government and how these
4 situations work, but it's not a Getinge employee who's
5 overseeing the operations and the consent decree. It's clearly
6 said, and Mr. Carlton said, "She delegated that responsibility
7 to me, and I and my team of professionals employ all of these
8 issues."

9 So, I think it would be an incredible misreading of
10 this kind of hyper-technical language, when it says
11 "defendants" somehow it means "everybody," and that's the basis
12 to have specific jurisdiction over Getinge. I don't think
13 that's what anyone intended, and I don't think that's what that
14 document in any way states. And, frankly, even if it did,
15 again, none of the claims here arise out of Lena Hagman's
16 substitution or any violation of the consent decree.

17 You've seen this before, but, again, counsel basically
18 talked about dispositive, it's dispositive when you have a
19 piercing case and you don't talk about the chain. I'm not
20 going to spent a lot of time on this, but we had to -- again,
21 because essentially what this case I thought was about or what
22 this issue was about was a typical piercing situation where
23 someone says, you know, "You're using this as a candy store.
24 You're disregarding the corporate form." So, that's what our
25 witnesses were prepared to talk about.

1 You had somebody who's literally since he was like a
2 summer intern, Mr. Carlton, who's worked for the company for
3 20-something years, come here and have every opportunity for
4 the plaintiffs and in his deposition to ask, "Are you some
5 shill? Are you kind of off on some island and not really doing
6 anything? Is this like some fake company?" And, obviously,
7 that's not the case. And, again, I'm not being pejorative, but
8 the idea is this is a real company. It's a real company like
9 any that -- sure, they've made some paperwork mistakes, they've
10 actually made some mistakes, that's why there's a consent
11 decree, but they're not a phantom company that deserves to
12 basically say all of its corporate form should be disregarded.

13 I don't know, maybe it's me, but there was a quote
14 that was just up from Mr. Hjalmarson. It said, basically,
15 putting aside the fact that there are going to be separate
16 corporate entities is this one organization, right? I'm, like,
17 well, that's the point, right? If you put that aside he
18 answers the question, "Yes," but what he says in his testimony,
19 he says, "What is doing the products?" In other words, he's
20 asking what does it mean to make the products, and he says
21 that's the R&D, that's the design, this is the production, this
22 is the whole value chain around the production, this is the
23 local responsibility. So, what he's saying is, to the extent
24 we're talking about medical devices, it is with Atrium and it
25 always has been.

1 You've seen this previously. Other than put it up, I
2 won't reiterate it to say this idea of one Getinge, all these
3 charts and signs, I mean, if this is the basis for piercing the
4 corporate veil virtually every corporation in America would be
5 subject to that standard.

6 We come back to this concept that this is supposed to
7 be -- that's why when you search, when you type in "pierce the
8 corporate veil" there's not a crushing number of cases that
9 come forward, frankly. If the types of things we've heard
10 throughout these three days were sufficient to show fraud,
11 injustice, again, you heard this over and over, but it really
12 is true, there would not be probably any corporation of any
13 size that would not be subject to that type of standard.

14 And that's why they talk in terms of really harsh
15 language: "Sham entity." I mean, can anyone really with a
16 straight face, as an officer of the court, get up and say for
17 the last 12 years, 10 years, 8 years this is a sham entity? I
18 mean, is this an elaborate shell game? Is that what we heard
19 today, or did we hear, "Yeah, you may have signed things a
20 little bit differently." "Maybe we could have done things a
21 little bit differently than that. Maybe there's some room for
22 improvement." We agree, right? And that's what -- we all do
23 better. But intended to abscond? Did we see anything and hear
24 a single word from anyone? Even their own expert didn't go
25 that far. He never said this is a sham, he never said that

1 there was fraud, he never said it was a shell game. The most
2 he would say is back at some point in time when he was kind of
3 divining certain information maybe they were undercapitalized,
4 but that's not the basis for a piercing determination, and it
5 certainly doesn't even meet the standard that your Honor has
6 before it right now.

7 So, we heard -- this is not a situation where the
8 plaintiffs haven't had a full and fair opportunity, and they're
9 extremely good lawyers, right, they know what they're doing.
10 But we sat through all this testimony. There's no evidence of
11 fraud. We then had their expert, and he basically sat up there
12 and said, you know, "I don't determine fraud," and he basically
13 listed all of the things that, and we tried to run through
14 them, and virtually every one of them he said, "No, I don't
15 think that there's any fraud or injustice," with any of the
16 evidence that we heard for hours and hours and hours.

17 Cash pool agreements, integrated subsidies, major
18 branding initiatives, all of these are commonplace. There's
19 nothing wrong with them. And even if they're generally common,
20 that doesn't mean that we get a pass completely, but if there
21 was some evidence, take the cash pool, that all of a sudden,
22 yes, there's a cash pool and it's normally appropriate, but in
23 this case here's why there was fraud, you know, where they
24 didn't account for it and there was [REDACTED] that went out
25 and the balance sheet only said 500, right? Obviously, that

1 didn't happen, but that would be the type of thing you would
2 see, not just the fact that there's a few guidelines about
3 coffee cups. We don't pierce the corporate veil for that kind
4 of stuff.

5 And then all the experts agree that there is no
6 question about any of these shared services, co-branding, cash
7 pool agreements. Mr. Orent and I disagree. Obviously, that's
8 the nature of case law; you're going to find things
9 differently. I stand by everything. These are cases, and
10 they're all cited just below, like they were, that basically
11 say, again, sham, abscond. These are not the types of things
12 that you necessarily can use to point to piercing the corporate
13 veil.

14 This is, I think, perhaps the most -- probably the
15 most important point that I will raise, because, look, suffice
16 it to say, again, they have their interpretation of it. It's
17 unclear to me how someone can keep saying, you know,
18 backdating. I think the record is clear on things like that.
19 I think it's very clear as to what Mr. Hjalmarson said. But we
20 have the benefit that your Honor sat here and paid extreme
21 attention, and you will determine credibility, you will figure
22 out who you think is credible, so I'm not going to spend a lot
23 of time. Obviously, it won't surprise you I have my
24 perspective on that, but that's for your Honor to decide.

25 But what I think is really important is to focus on

1 two things, right? They've now, again, pivoted a little bit to
2 the specific jurisdiction issue, which I don't think is even
3 remotely appropriate in this situation; and, secondly, if you
4 really think of what they're doing, right, there is no fraud,
5 and there's no injustice, right? So, the only way that they
6 can try to establish that is to basically try and show some
7 type of insolvency, right? And even there what Mr. Messina
8 said is, if it was insolvent, then maybe you would have a
9 fraudulent transfer, right? So, their whole kind of analysis
10 is trying to push it back, and, frankly -- and let's talk about
11 that, because I just don't think that -- maybe it's a theory,
12 he's entitled to his opinion, but the idea that your Honor
13 would make a determination that we should go forward against
14 Getinge and essentially tell the 500 employees that they're
15 working for a shell corporation because an expert who
16 admittedly didn't even read half of or all of the affidavits,
17 has extremely limited information, he was asked is he
18 speculating. He had numerous factual mistakes in his -- I'm
19 not saying he did it intentionally, but it was not the model of
20 clarity or nor was it the model of I think candor both in his
21 testimony and also in his report.

22 And basically what the plaintiffs are largely relying
23 on almost exclusively is this, right? That he is saying back
24 in 2014 that the company should have known it was
25 undercapitalized. And just briefly to talk about that, right?

1 So, you heard that this isn't even what we would consider a
2 recall, right? It was this thing about packaging and humidity.
3 I don't want to personalize this too much, and probably Mr.
4 Orent would agree, but the idea if I -- and I've been doing
5 this for a fair amount of time, and I do a lot of product
6 liability work with respect to medical devices -- but if I
7 could go to Pfizer or Bayer or Atrium or others and say, "You
8 know what? I can figure this out. There's three or four
9 lawsuits, and I'm pretty good, and I've been doing this for 30
10 years. I know probably in six years you're going to have a
11 mass tort and an MDL." One, not only would I probably make a
12 fortune as a nonlawyer, because I would short the stock and I
13 could figure it out, but I would go and I can divine it. The
14 reality is it's just impossible. No one could say that they
15 could do that, that you would know, based on information. And
16 then you saw kind of an effort -- again, good lawyers, I'm not
17 in any way criticizing -- but to bolster, "Oh, let's show the
18 endo issues." It's a different corporation. It's transvaginal
19 mesh. It has nothing to do with these issues. So, yes, they
20 were aware of it; yes, they got a letter six years before this
21 from Basell (ph); yes, there was this information. No one is
22 suggesting that they wouldn't take three or four lawsuits
23 seriously, but the idea that this somehow was a vision into the
24 future that they were going to essentially have thousands of
25 lawsuits and then anything -- because if you really take what

1 he's saying, any distribution, anything after that point
2 they're saying is essentially the company was insolvent or
3 should have known and it was a fraudulent conveyance, and that
4 just can't be true.

5 Again, I'm glad that Professor Orcutt had a chance to
6 explain this, because, when you really look at this, it's a
7 typical type of post-acquisition lawsuit. Actually, he didn't
8 even talk about the specific claims. You heard it was about
9 patents and all kinds of other issues. So, when you combine
10 those two issues -- and there may have been one or two things,
11 I just don't remember them, frankly, but none of them would
12 basically put any -- you can't say a financially illiterate
13 person, you know, anyone other than that would have known. So,
14 that's so important, because your Honor would essentially have
15 to make a determination that kind of as a matter of law this
16 was enough to figure out that really anything after that would
17 have been fraudulent transactions, because if you don't do
18 that, and we submit that you really should not and it would be
19 inconsistent with the record and the law, you know, all of
20 these other issues are really what happened.

21 And the last thing I will say, before I turn it back
22 over to Mr. Orent, is remember you heard -- you didn't even
23 hear their expert say there was anything wrong with the
24 provision. You heard that there were auditors looking at it,
25 and no one has reclassified, no one has recharacterized it.

1 Yes, we've now spent a lot of time, a lot of paper. That's
2 fine, that's what we do. But at the end of the day we have
3 some distributions, we have some errors, but for the most part
4 we don't even have that. It's not a lot of sloppiness. You
5 heard explanations for almost everything that the plaintiffs
6 have kind of thrown up on the wall in order to show these
7 issues, and I think the witnesses have really tried to meet
8 that as credibly and honestly as they can, admitting where they
9 could have done better, which, for the vast majority, what
10 you've heard is a company that operates in the real world with
11 real people and real human beings, not a sham corporation, your
12 Honor. So, I'm going to stop there.

13 THE COURT: All right. Thank you very much.

14 You have till 5:05, so go ahead, as of that clock.

15 REBUTTAL CLOSING ARGUMENT

16 MR. ORENT: Thank you, your Honor. If I could just
17 turn on the ELMO. To start, I think that quote from
18 Mr. Messina has been blown way out of proportion. What
19 Mr. Messina was basing his opinions on was this level of sales
20 and profit that have disappeared. Effectively, the evidence in
21 this case shows that Atrium is nothing more than a cost center
22 now. My colleague on the other side of the aisle used the term
23 "piggybank." That's just exactly what Atrium has become. Its
24 parent companies took more than ██████████ out of this company
25 and saddled it with more than ██████████ of debt, debt that

1 it could never repay. When I mentioned my ten points earlier
2 we didn't hear them being refuted. What we heard was that this
3 is some sloppiness, this is okay, this is just how it happens.
4 The sums of money that we are talking about, it is implausible,
5 it is so implausible that [REDACTED] could be unaccounted for
6 without a contract, that the sales organization could be sent
7 away without a contract, without a Board vote. It's
8 implausible.

9 When we talk about evidence, we talk about what it is,
10 not an explanation of why it needs further explanation. The
11 consent decree is on its face evidence of direct contacts. The
12 fact that Lena Hagman may have delegated some sort of
13 responsibility to Mr. Carlton doesn't have any effect on her
14 legal obligation. It is a nondelegable legal obligation. She
15 had to submit an affidavit to the FDA assuring them, assuring
16 them that she was going to personally be responsible for fixing
17 the things at the Atrium facility.

18 I was thinking back, how can we make these things that
19 are going on and bring the consent decree to your Honor's
20 immediate focus and attention, when it occurred to me science
21 day. We were here on science day, and if your Honor recalls I
22 opened up a piece of C-Qur mesh and we put it under the ELMO
23 and we saw that there was human hair in there. That's one of
24 the things that the consent decree was about. Sticking to the
25 packaging doesn't sound like a big deal, unless that coating,

1 the missing coating, is implanted into you and it erodes into
2 your bowel and you get a fistula and walk around with an open
3 wound and lose part of your bowel. That's foreseeable. This
4 is a company that had 631 complaints that they never went
5 through. 230 something of those needed to be reported to the
6 FDA. This is at a time before the consent decree, before the
7 distributions, at the height of mesh litigation in this
8 country.

9 Just a little over 150 miles south of here is
10 Providence, Rhode Island, where I'm from, and there was an MDL
11 there that Mr. Carlton talked about, and Mr. Carlton talked
12 about recognizing that the liability that was ultimately paid
13 in that litigation was almost \$200 million. Sounds familiar.
14 And here we have hundreds of cases piling up, of complaints
15 piling up. You have a recall, FDA activity. Those are all the
16 ingredients necessary for predictability of result.

17 You know, it's sort of like baking. If you take some
18 flour and some sugar and some milk and you mix them in the
19 right proportions you know what you're going to get, and in
20 this case it was very foreseeable that Atrium knew what they
21 were going to get. The level of conduct was such that actually
22 the manufacturing at their facility was shut off. This isn't
23 just any consent decree. This was a permanent injunction that
24 was entered against them for the Hudson facility. They had to
25 stop manufacturing C-Qur altogether, and the only way that they

1 were allowed to even start remanufacturing was under this
2 consent decree and refocused under Lena Hagman. But before
3 Lena Hagman was Heinz Jacqui and Gail Christie, and they, too,
4 were corporate overlords representing Maquet, an unincorporated
5 company, just like ACT, and they had direct personal
6 responsibility.

7 So, from day one this has been a focus of corporate.
8 We saw it in the Board meeting minutes that
9 Mr. Hjalmarson talks about. So, Getinge's fingerprint is all
10 over this from day one, and no matter how hard Mr. Cheffo tries
11 he cannot explain away the ten pieces of evidence.

12 The profit and loss statement does not lie. Since
13 2014 Atrium has not made a profit. And they say, "Oh, there
14 are a series of extraordinary events." They point to the
15 consent decree. However, there are three sites in the consent
16 decree, your Honor, three, yet Atrium bore all of the costs.
17 They can't explain that. Three sites. We've heard that over
18 and over and over. We've heard that that's why no one from
19 Atrium was needed to sign. Yet, Atrium's president testified
20 he had no negotiation ability. He didn't talk. He wasn't
21 involved in the process. Atrium foots the bill, and everybody
22 else benefits. That's the story in this case, your Honor. It
23 happened with the FDA, it happened with the [REDACTED], it
24 happened with the [REDACTED] of debt.

25 And with that, your Honor, I'll conclude. Thank you.

1 THE COURT: Thank you very much.

2 Thank you very much to counsel. I appreciate the way
3 you've conducted yourselves in this three-day hearing and
4 appreciate your litigation in general, and thank you for
5 keeping everything civil and keeping the trains running on
6 time. I really appreciate it. And I found the three days of
7 testimony somewhat riveting, to my surprise, and I will work
8 very hard to get you a decision swiftly. Thank you.

9 THE CLERK: All rise.

10 (WHEREUPON, the proceedings adjourned at 5:07 p.m.)

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

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

C E R T I F I C A T E

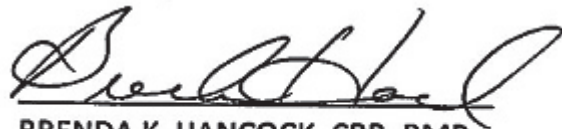
I, Brenda K. Hancock, RMR, CRR and Official Court Reporter of the United States District Court, do hereby certify that the foregoing transcript constitutes, to the best of my skill and ability, a true and accurate transcription of my stenotype notes taken in the matter of In Re: Atrium Medical Corp. C-Qur Mesh Products Liability Litigation, No. 16-md-02753-LM.

Date: 9/30/19

/s/ Brenda K. Hancock
Brenda K. Hancock, RMR, CRR
Official Court Reporter

I, Brenda K. Hancock, certify that the foregoing is a true and correct copy of the transcript originally filed with the Clerk of Court on 9/30/19 incorporating redactions requested by the Hon. Landya B. McCafferty in accordance with Judicial Conference Policy. Redacted characters appear as a black box on the paper copy and a black box on the electronic transcript.

Date: 10/31/19


BRENDA K. HANCOCK, CRR, RMR
OFFICIAL COURT REPORTER