

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

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IN RE: ATRIUM MEDICAL CORP. *
C-QUR MESH PRODUCTS LIABILITY * 16-md-2753-LM
LITIGATION * September 9, 2019
* 9:00 a.m.
*
* * * * *

TRANSCRIPT OF MOTION TO DISMISS HEARING
DAY ONE - MORNING SESSION
BEFORE THE HONORABLE LANDYA B. MCCAFFERTY

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P R O C E E D I N G S

THE CLERK: The Court has before it for consideration today a motion hearing regarding a motion to dismiss in case 16-md-2753-LM, In Re: Atrium Medical Corp. C-Quir Mesh Products Liability Litigation.

THE COURT: All right. Good morning, counsel. Would counsel and all lawyers who are in the well of the courtroom go ahead and introduce themselves for the record, and just state your name and spell your last name for our court reporter.

We'll start with the plaintiffs.

MS. LOWRY: Attorney Susan Lowry for the plaintiffs this morning, your Honor. Good morning. It's L-O-W-R-Y.

MR. GLASSER: Brian Glasser, your Honor, G-L-A-S-S-E-R, for the plaintiffs.

MR. ORENT: Good morning, your Honor. Jonathan Orent, O-R-E-N-T, for the plaintiffs.

MS. CHARONKO: Good morning, your Honor. Katherine Charonko for the plaintiffs, C-H-A-R-O-N-K-O.

MR. MATHEWS: Good morning, your Honor. Todd Mathews, M-A-T-H-E-W-S, for the plaintiffs.

THE COURT: All right. Go ahead.

MR. CHEFFO: Good morning, your Honor. For

1 the defendants, Mark Cheffo, C-H-E-F-F-O.

2 MS. ARMSTRONG: Good morning, your Honor.

3 Katherine Armstrong for the defendants,

4 A-R-M-S-T-R-O-N-G.

5 MR. CHABOT: Good morning, your Honor. Pierre

6 Chabot for the defendants, C-H-A-B-O-T.

7 MS. UNGER DAVIS: Good morning. Kate Unger

8 Davis, U-N-G-E-R, D-A-V-I-S.

9 MR. WILSON: Good morning, your Honor.

10 Lincoln Wilson, W-I-L-S-O-N.

11 MR. HERZKA: Good morning, your Honor. Jeff

12 Herzka, H-E-R-Z-K-A.

13 THE COURT: Okay. I think I see nameplates as
14 well that will help me throughout the hearing.

15 Let's just start with some housekeeping
16 matters. I understand there will be just opening
17 statements, if you will, legal arguments to begin, and
18 then there is a deposition, a live deposition that we
19 will be watching.

20 Let me ask counsel, who wrote excellent briefs
21 in this matter which I've carefully considered, to focus
22 very much on the veil piercing arguments, the alter ego
23 arguments. And I don't think I need to hear as much
24 with respect to the Daimler, Bristol-Myers cases and
25 general jurisdiction, but obviously if you want to make

1 arguments with respect to those issues, please do so,
2 but my focus for these three days will be largely on the
3 veil piercing/alter ego theories.

4 Now, the parties agree, as far as I can tell,
5 that Delaware and New Hampshire law would yield the same
6 result with respect to this veil piercing/alter ego
7 question. I think it's clear that you disagree on
8 Delaware law and maybe even disagree on New Hampshire
9 law. Certainly plaintiffs have a different view of
10 Delaware law, but it looks as though you both agree
11 Delaware and New Hampshire, that there wouldn't be a
12 material difference. Is that fair?

13 MS. ARMSTRONG: Your Honor, I think it depends
14 upon the interpretation of Delaware and New Hampshire
15 law.

16 From the defendants' perspective, we believe
17 that both Delaware and New Hampshire require broader
18 similar injustice in order to pierce the corporate veil,
19 that that's a relevant requirement under both tests.

20 To the extent that they argue that's not the
21 test under New Hampshire, then they would be arguing for
22 a conflict and we would disagree. But if our
23 interpretation of Delaware and New Hampshire law is
24 accepted, then we would say there's not a conflict.

25 THE COURT: All right. Understood.

1 MR. ORENT: Your Honor, I believe that our
2 position is sort of the opposite, which is we don't
3 believe that fraud is a requirement under the balancing
4 tests, but we believe, nonetheless, that the law -- our
5 interpretation of the law of Delaware and New Hampshire
6 is the same.

7 THE COURT: Okay.

8 Now, also it seems to me there is no
9 disagreement that the Court has personal jurisdiction
10 over Atrium in this case.

11 MS. ARMSTRONG: Correct, your Honor.

12 THE COURT: And that the parties agree that if
13 I determine that there are facts sufficient to bind
14 Getinge to this jurisdiction of this court, that if I
15 find facts sufficient to support plaintiffs' argument
16 that Atrium is an alter ego or agent of Getinge through
17 a veil piercing or alter ego theory, then the Court
18 would have jurisdiction over Getinge.

19 That's an unremarkable statement, but I just
20 want to put it on the record.

21 Counsel are shaking their heads in agreement.
22 All right.

23 I want to put counsel on notice, and I want to
24 hear argument with respect to this at some point when we
25 have a break today, it might be at the end of the day,

1 but the motions to seal in this case, they have been --
2 there have been many, and generally prior to this
3 hearing I would say that there have been assented to
4 motions to seal. I have had some concerns about the
5 broad swath of material that the parties agreed to seal.

6 Now, let me just focus on the motions, the
7 briefing for this hearing for the moment.

8 There's the defendants' memo of law, which is
9 the redacted version. The public version is document
10 No. 975. There was an assented to motion to seal which
11 was granted by an endorsed order with respect to each of
12 these actually. Plaintiffs' objection, redacted
13 version, is document No. 1028, and then the motion to
14 seal that was granted on March 22nd of 2019.

15 On the same day I also granted a motion to
16 seal the defendants' reply, which is document 1043, the
17 redacted version, and then plaintiffs' surreply is 1051
18 which I also granted an assented to motion to seal.

19 And I can give you the dates of those orders,
20 but with respect to the merits of this hearing, which is
21 what I'm concerned with right now -- and I'm not looking
22 at the exhibits, I'm talking just about the merits --
23 especially plaintiffs' objection was just filled with
24 redactions, and I will confess that having looked
25 through those when the original motion to seal came, I

1 deferred largely to counsel in terms of the agreement
2 that there was confidential material in there and looked
3 through those redactions at the time fairly quickly but
4 without the benefit of the preparation for this hearing
5 and the preparation on the merits, what the issues are
6 before the Court today.

7 So for this hearing the plaintiffs have taken
8 a new position with respect to sealing documents, and
9 the plaintiffs are objecting. And so again that causes
10 the Court to look closely at these questions.

11 So as you know from my order explaining what
12 I'm going to do to balance these rights, the right of
13 the public to have access to this info, the right of the
14 defendants to seek confidentiality for certain financial
15 documents and records, and balancing that also with just
16 the nature of this hearing and the Court's desire that
17 we get through the three days, that I decide the case on
18 the merits, and ultimately will come back to these
19 motions to seal and make final rulings with the benefit
20 of hindsight shortly after this hearing is over.

21 But with respect to the briefs on the merits
22 for this three-day hearing I am concerned about the
23 public's right to know, what are the arguments, what's
24 happening in this case.

25 And so I just want to hear at some point

1 today, perhaps at the end of the day, perhaps at a break
2 when there's a time when you're waiting for a witness
3 who may not be here, or we could shorten our lunch break
4 a bit, I do want to hear arguments with respect to these
5 briefs. It would be in the memo of law, the objection,
6 the reply, and the surreply. I'm not talking about the
7 exhibits at this point. Those I think fall into that
8 category of I will have a much better understanding of
9 what should be sealed along those lines after this
10 three-day hearing.

11 Now, because -- Attorney Orent, you have
12 objected now to any sealing for this hearing, and your
13 argument is primarily, and it's one that's a given
14 frankly, the public's right to know, which is an
15 absolute, irrefutable given.

16 But what I need you to tell me -- when we get
17 to that point in the argument, I need you to tell me why
18 it's not prejudicial to Atrium or Getinge to have the
19 information that they desire to be sealed, why that's
20 not prejudicial to them, because ultimately that's the
21 point at which the rubber hits the road here for me.

22 If it's going to prejudice and cause them
23 harm, I think there is case law that supports sealing
24 that information, but clearly the public has a right to
25 know and that is a weighty consideration and no one

1 disputes that here.

2 So what I want you to do for me is just tell
3 me why isn't it prejudicial. And as I looked through
4 the redacted briefing and I compared it, frankly we're
5 going to change our local rule so that in the future
6 when this happens a judge will see highlighted yellow
7 portions, because what I had to do was to take your
8 briefs and put them side by side and look at the
9 blacked-out portions and try to find in context what
10 you're asking me to redact. And frankly, the two briefs
11 are different and so the paging is off, and so it
12 becomes a real nightmare for a judge trying to figure
13 out what is it they're trying to redact.

14 But ultimately what I need to know with
15 respect to those redactions is, is there harm, is there
16 harm that would flow to Atrium or Getinge if the
17 particular redaction were to be public. And I found a
18 great deal that I did not think qualified for those
19 redactions, but again we haven't -- I haven't heard
20 argument on those. You filed assented to motions to
21 seal which were granted. I've heard arguments with
22 respect to this hearing, but I haven't heard you argue
23 the actual briefs, the merits, and obviously the
24 public's right to know that material is very high
25 because it's going to affect my -- it's dispositive on

1 this central question of personal jurisdiction.

2 So at some point I want to hear arguments on
3 those and perhaps reconsider those motions to seal.
4 Although, as I said, it's very hard. My judicial
5 assistant is now trying to highlight for me so that when
6 we do argue this I can actually see the real redactions
7 in context and have you justify those redactions for me.
8 All right. Now, those are the basic housekeeping
9 matters.

10 I just want to say finally that, you know,
11 judges have rules in their courtroom. There's one rule
12 here today, and that is just civility is the guiding
13 principle here today. That means counsel agree to
14 disagree, and there is absolutely no name-calling, no
15 insulting, no characterizing counsel's argument as bogus
16 or bad or other sorts of insults, and frankly
17 interrupting counsel. If you have a legal objection,
18 obviously, but otherwise I think it's fair to say we
19 should let counsel finish what they're saying.

20 And please don't interrupt me. If I'm asking
21 you something or saying something, interrupting me is
22 not a good idea.

23 Okay. Any other housekeeping matters from
24 counsel?

25 MR. ORENT: Just one, your Honor.

1 I noticed the sign outside talks about
2 sequestration of witnesses. I know having talked to Mr.
3 Cheffo we both have witnesses here in the courtroom and
4 we're wondering whether that applies to this sort of
5 hearing or --

6 THE COURT: Does counsel agree on
7 sequestration?

8 MR. CHEFFO: We agree it's fine to have the
9 witnesses as long as your Honor --

10 THE COURT: In the courtroom?

11 MR. CHEFFO: Yes, your Honor.

12 THE COURT: That's fine. As long as counsel
13 agree, I'll be fine with that.

14 MR. CHEFFO: Thank you.

15 MS. ARMSTRONG: Your Honor, one other
16 housekeeping thing.

17 One of the depositions that they intend to
18 play today, we've discussed this with Ms. Esposito
19 earlier today, it's one deposition but two volumes.

20 We do have confidentiality designations for
21 that. They've sort of been prepared in two ways. The
22 plaintiffs have the confidentiality designations on a
23 separate sheet. We also have a highlighted version of
24 the deposition that shows the confidentiality
25 designation, whichever is easiest for the Court. We

1 have tried to be narrow in our designations.

2 THE COURT: Okay. Can everybody stay in the
3 courtroom and watch this? It's just that the transcript
4 will be --

5 MS. ARMSTRONG: At the very least we would
6 like the transcript -- I understand that -- there is a
7 section of the deposition where he goes into line by
8 line of the profit and loss statements.

9 It's our preference that the courtroom be
10 sealed during that time, but if the Court is
11 uncomfortable with that, we will certainly defer to the
12 Court and not really press that issue.

13 THE COURT: Okay. Thank you. I appreciate
14 that.

15 I would prefer not to seal the courtroom. I
16 understand the arguments with respect to sealing the two
17 financial witnesses, but I hope you heeded my strong
18 admonishment to limit that.

19 So that to the extent there are members of the
20 press, members of the public, there are other
21 plaintiffs' counsel in the courtroom -- plaintiffs'
22 counsel and plaintiffs will stay for everything. But to
23 the extent that members of the public are here, if I ask
24 to seal the courtroom I would prefer to have to ask it
25 only once per witness.

1 MS. ARMSTRONG: Understood.

2 THE COURT: Okay.

3 MS. ARMSTRONG: One more question.

4 In terms of what your Honor was raising about
5 the motion to seal, the briefs on this motion, would it
6 assist the Court -- because we did really make a
7 concerted effort to narrow down our confidentiality
8 designations for this hearing. Would it assist the
9 Court if we went back and did that with the prior briefs
10 so that you didn't have to hear argument on every
11 redaction?

12 THE COURT: Yes. That would be helpful
13 because I think a lot of what I saw you would even agree
14 at this point could probably be public and it would help
15 me if there are areas of agreement, and I don't know how
16 you square that with the argument that nothing should be
17 sealed because your objection is just littered with
18 redactions. I don't know how you agreed to that. You
19 obviously probably just deferred to counsel and had them
20 propose redactions, but it is just filled with
21 redactions. How is the public to understand what the
22 arguments are?

23 MS. ARMSTRONG: Understood, your Honor.

24 I think Mr. Orent would agree that when they
25 provided us with their most recent briefs we've been

1 very limited in what we've proposed redacting from them,
2 and I think a similar effort with the prior briefs would
3 make sense.

4 Now, those are long briefs. I don't know if
5 it makes sense to defer the oral argument on that until
6 you get redacted copies of them, and maybe that could be
7 scheduled for another day so as not to take time dealing
8 with trying to undo the redactions.

9 THE COURT: How soon could you get those to
10 me?

11 MS. ARMSTRONG: Next week. We would get them
12 to you next week.

13 THE COURT: Okay. I think my judicial
14 assistant might be able to get me the briefs highlighted
15 so that I can see what it is you have redacted and I can
16 see it in context. So I may be able to have that in
17 time for a hearing at some point today.

18 My concern was just -- we're doing this
19 hearing. It's three days. The public -- how is the
20 public to understand what's in dispute if they can't
21 read your objection to the motion to dismiss?

22 Your original brief did not have many
23 redactions. It was your objection that was filled with
24 them.

25 MR. ORENT: One suggestion, your Honor, is

1 while we'll be playing a lot of videotaped depositions
2 today perhaps some counsel could be excused from the
3 court to work together to negotiate while the Court and
4 lead counsel are watching the testimony and they can
5 work on it and come back so that we're all --

6 THE COURT: To the extent you can take any
7 disagreements off the table for me for my decision, it
8 makes it easier and I would support that. That's going
9 to be up to you in terms of how you want to manage that.

10 I don't know. For me laying two of them side
11 by side and looking at blacked-out portions and
12 comparing it to the portion that wasn't blacked-out so I
13 could figure out what it was you were blacking-out --
14 it's difficult because the two briefs use different
15 fonts I think and ultimately, you know, you can't see as
16 you turn the page the material that's -- you can't see
17 it in context. So it's not easy for whoever gets
18 assigned that task.

19 MS. ARMSTRONG: If your Honor does not mind me
20 being absent from the courtroom while videos are being
21 played, I don't mind working on that, but I just want to
22 do whatever it takes to assist the Court.

23 THE COURT: I would have no objection to that.
24 I'm sure you're familiar with the video.

25 MS. ARMSTRONG: I am.

1 THE COURT: All right. Okay.

2 Now we'll just start with legal arguments.

3 I can tell you that I've read the briefing,
4 excellent briefs, both sides, and I'm eager to hear
5 argument.

6 And then we're going to spend most of today
7 watching this deposition or most of the morning?

8 MR. ORENT: Your Honor, the 30(b)(6) witness,
9 Mr. Hjalmarson, will go probably about four hours,
10 basically around four hours. We have the former
11 president of the company, about an hour of his
12 deposition that we think is important for the Court to
13 hear, and then a third witness about seven minutes.

14 So we think the majority of today will be the
15 legal argument and then the video depositions.

16 It is plaintiffs' intention to start tomorrow
17 morning with Mr. Messina, our expert, and then to close
18 our portion of the case down after that, and then I
19 believe defendants will put on their witnesses.

20 MR. CHEFFO: Your Honor, we actually exchanged
21 this, which was good and helpful, so we understood that
22 was going to happen today, and we'll be prepared to
23 start. We've actually given them a set of the witnesses
24 that we intend to call. That obviously may change
25 depending on what happens or comes in. So there's no

1 real surprises about what the order will be and what our
2 intentions are.

3 THE COURT: Excellent. All right. So we'll
4 be watching a lot of videotaped depositions. So if
5 folks need to stand up and just for whatever health
6 reasons, lower back issues, that's fine.

7 I'll need signals from counsel as to when you
8 need a break, when you think a break might be good. I
9 certainly will probably need a break every hour and a
10 half.

11 We won't have our court reporter unless
12 there's some sort of legal argument that needs to be
13 sorted out, you know, so I'm not as worried about her
14 need for a break. So I'll be interested in your need,
15 and I'm thinking an hour and a half is probably the most
16 we could all sit and watch videotaped depositions in one
17 chunk.

18 We'll take five or ten minute breaks between
19 every hour and a half. Does that make sense? And then
20 you can signal me otherwise if you need a break.

21 MR. ORENT: Thank you, your Honor.

22 MR. CHEFFO: Thank you.

23 THE COURT: All right. Attorney Orent.

24 MR. ORENT: One other housekeeping matter,
25 which is we have a stipulation that I think will be read

1 into the record at some point.

2 The parties to make this hearing go much more
3 efficiently have reached an agreement whereby we are
4 preserving our objections to each other's documents and
5 preserving our objections to deposition testimony so
6 that the Court is not going to be bothered with having
7 to hear argument on those issues so that everything can
8 just be moved in as evidence as is, both deposition
9 testimony and all of the exhibits on each side's list.

10 So we've prepared a stipulation and that will
11 be read into the record at some point later today, but I
12 wanted to just let the Court know that that is one of
13 the items that is off the agenda and doesn't need to be
14 addressed by you.

15 THE COURT: Thank you. I appreciate that.

16 All right. Let me ask a quick question of
17 Attorney Esposito.

18 (Off the record)

19 THE COURT: Okay. Go ahead, Attorney Orent.

20 MR. ORENT: Thank you, your Honor.

21 Good morning, your Honor. May it please the
22 Court.

23 Plaintiffs are here on defendants' renewed
24 motion to dismiss for lack of personal jurisdiction.
25 This issue has been before the Court in a variety of

1 ways over the last two years. We've worked hard to
2 uncover the facts that you will hear over the next three
3 days.

4 Our evidence is voluminous and goes to the
5 strength of the ties that Getinge AB has to New
6 Hampshire and to the United States.

7 Overall, Getinge AB has substantial contacts
8 with the United States. The Getinge Group, the Getinge
9 organization, has eight production sites between North
10 and South America. We believe that the evidence shows
11 that there are six sites in the United States alone.

12 There are 27 percent -- roughly 27 percent of
13 the market share of Getinge is here in the United States
14 in terms of sales. There's approximately 1,040 sales
15 personnel and 600 service technicians in the Americas.
16 That does not include manufacturing personnel or other
17 support personnel.

18 So Getinge is a company that has many names.
19 Getinge is sometimes referred to as Getinge, the Getinge
20 Group, Maquet Getinge Group, Maquet Getinge Group and
21 Getinge.

22 All these names are very confusing, but it
23 really boils down to this. Who is Getinge? Getinge AB
24 we believe is the same as the Getinge Group and is the
25 same as Getinge.

1 How do we know this? We served at the
2 beginning of this litigation a series of requests to
3 admit. You can see that the Getinge Group is a
4 trademark. You can see that it's admitted. That the
5 Getinge Group is a service mark. You can see that the
6 trademark Getinge Group is owned by Getinge AB and that
7 the logos we see are Getinge AB owned logos, as is the
8 Getinge Group, passion for life, moniker.

9 If you go to New Hampshire, if you go to the
10 facility in Merrimack, you will see the signage that is
11 owned -- with the logo that is owned by Getinge AB and
12 the Getinge name.

13 If you look at the parking lot, you will see:
14 We Are Getinge. One brand, one promise: Passion for
15 life.

16 If you look at the annual reports, you will
17 notice that these are the Getinge Group annual reports.
18 These are the legal documents that a public company has
19 to produce. Getinge Group.

20 You will note that the Getinge executive team
21 is referred to as the group's organizational structure,
22 and these are a variety of individuals that you will
23 come to know very well over the course of the next three
24 days, particularly Alex Meyers and Lena Hagman. Those
25 names will become very familiar.

1 Lena Hagman is one of the witnesses that we
2 had originally called. She does not live in the United
3 States and we're not able to bring her live.

4 So furthermore, you see from the discussion in
5 the annual report, again Getinge Group, their
6 organizational structure. Another copy of an annual
7 report, Getinge Group. Getinge Group in the definitions
8 within these documents refer to them as the same.

9 Now we took the deposition of Peter Hjalmarson
10 who you will hear this morning, and I read to him, I
11 said, "What I'm showing you as Exhibit 5 is taken from
12 Getinge's website, and you can see that by looking here
13 at the bottom of the page you can see "Getinge.com."
14 "What I want to ask you about is, first of all, I
15 apologize the way it printed out. The top line is kind
16 of printed over, but it says, "The responsibility for
17 management and control of the Getinge Group is divided
18 between the shareholders, the board of directors and its
19 committees, and the managing director in accordance with
20 the below."

21 Then I ask him, "When it says the management
22 in control of the Getinge Group is divided between the
23 shareholders, that means the shareholders of Getinge
24 AB?" And he says, "That would be my understanding."
25 Then I say, "And the board of directors would be the AB

1 board of directors", Getinge AB board of directors, and
2 he says yes.

3 Later in the deposition I ask him who the CEO
4 would be, and he says, it's the same CEO, Alex Meyers.

5 So, your Honor, we have two overarching
6 theories, and I recognize the comment that the Court
7 made today about the substantial direct contacts in the
8 United States. I think that -- I'm going to be as quick
9 as I can with that, but I think that there are some very
10 pertinent facts that the Court needs to be aware of,
11 because I think that the substantial direct contacts
12 themselves are dispositive of the issue and I think that
13 they are so overwhelming that the Court at least needs a
14 ten thousand foot view of them.

15 THE COURT: But you're still talking about
16 specific jurisdiction?

17 MR. ORENT: Specific jurisdiction; yes, your
18 Honor.

19 So the elements of personal jurisdiction,
20 generally speaking, specific personal jurisdiction, is
21 that Getinge has direct contacts to support personal
22 jurisdiction:

23 Number one, the plaintiffs' claims arise out
24 of Getinge's contacts with the United States; Getinge
25 AB's contacts represent purposeful availment of the law

1 in the United States; and finally, the exercise of
2 personal jurisdiction over Getinge AB is reasonable.

3 Now, plaintiffs' claims start -- in this
4 case plaintiffs' claims arise out of Getinge AB's
5 contacts with the United States.

6 By way of background, the FDA, the Food and
7 Drug Administration, conducts its inspections as part of
8 its due diligence in the United States of regulated
9 entities.

10 There was an inspection performed in September
11 of 2012. Specific to C-Qur, the Food and Drug
12 Administration found some violations of law and
13 ultimately issued a warning letter saying that C-Qur
14 products were misbranded.

15 Then in 2013 the FDA conducted another
16 inspection specifically related to C-Qur and found that
17 there were violations of federal law. Ultimately, the
18 violations -- the history of violations resulted in a
19 consent decree.

20 Atrium Medical Corporation, Maquet Holding
21 B.V., Maquet Cardiovascular, Maquet Cardiopulmonary AG,
22 are all corporate defendants, as well as employees of
23 the corporate parents Heinz Jacqui and Gail Christie.
24 These individuals had the power -- the full power of the
25 business area which was called Maquet.

1 You'll later hear the term ACT, or Acute Care
2 Therapies. This is one of the divisions of Getinge, it
3 previously had the name Maquet, and Heinz Jacqui and
4 Gail Christie were high-level officers of this business
5 area.

6 Now, the Court will note that nobody from
7 Atrium signed the consent decree. That's important
8 because Atrium as a company is bound by the consent
9 decree.

10 But our analysis doesn't end there. See, your
11 Honor, under the terms of the consent decree when an
12 employee leaves the company, they have to be replaced.

13 And what did Getinge AB do? When Gail
14 Christie, one of the individual defendants, left the
15 company, she was replaced by Lena Hagman. Lena Hagman
16 is an employee of Getinge AB.

17 Now, under paragraph 12 of the consent decree
18 Lena Hagman and the corporate defendants are charged
19 with responsibilities. It is these responsibilities
20 that Getinge AB voluntarily assumed that give rise to
21 the personal jurisdiction here in the United States.

22 So if we look at paragraph 12 --

23 THE COURT: What exhibit is the consent
24 decree?

25 MR. ORENT: It is Exhibit 184.

1 THE COURT: Okay.

2 MR. ORENT: So paragraph 12 says, "Corporate
3 defendants shall vest responsibility for all quality
4 system functions, as defined in 21 CFR 820.3(v) in the
5 Specified," which is the Atrium facility, "and
6 Additional Facilities," which were the other Getinge AB
7 subsidiary facilities that are part of this consent
8 decree, "an individual who shall be authorized and
9 responsible for all quality system functions at the
10 Specified and Additional Facilities, including
11 establishing, implementing, and maintaining a
12 comprehensive written quality program, to ensure
13 defendants' continuous compliance with this Decree, the
14 Act, the Food, Drug, Cosmetic Act, the QS, CR, and MDR
15 regulations."

16 Those are the regulations that medical device
17 manufacturers are required by federal law to follow in
18 order to legally market and sell a product in the stream
19 of commerce in the United States.

20 Here is just the 21 CFR reference for the
21 Court. It just defines: Quality system means the
22 organizational structure, responsibilities, procedures,
23 processes, and resources for implementing quality
24 management.

25 Now, under the terms of the agreement itself,

1 the terms that Lena Hagman and Getinge AB as an employee
2 assumed in the course of her official responsibilities,
3 it says:

4 1. Establish and maintain procedures to
5 control defendants' -- all defendants, including
6 Atrium -- devices' designs, in order to ensure that the
7 specified design requirements are met.

8 2. Ensure that all devices meet the
9 requirements for design development and planning, design
10 input, design output, design review, design
11 verification, design validation, design change, design
12 transfer and design history file.

13 I'm going to skip through this because the
14 Court can at its leisure take a look at Exhibit 184,
15 paragraph 5(A), i through ix, but I'm going to point out
16 a couple of the other really important ones.

17 v. Develop, conduct, control and monitor
18 production processes.

19 That's specific to C-Qur mesh products that
20 are here in the litigation.

21 vi. Establish and implement adequate written
22 procedures to control devices that do not conform to
23 specified requirements specific to C-Qur.

24 vii. Establish and maintain adequate written
25 procedures for corrective and preventative actions and

1 for documenting corrective and preventative actions.

2 Those are things like if they discover a
3 problem in the production, they have to come up with a
4 correction. So that's what that means. Again, that's
5 specific to C-Qur.

6 viii. Maintain accurate and complete
7 complaint files. One of the problems that the FDA in
8 those inspections had cited was that Atrium was not
9 properly documenting complaints from customers.

10 So here we have as part of the required
11 post-market surveillance Getinge AB directly through
12 Lena Hagman assuming personal responsibility in her
13 corporate capacity for complaint handling, and the list
14 goes on.

15 Now, if that's not enough, Getinge AB actively
16 manages the New Hampshire remediation. And how do we
17 know this?

18 "To further accelerate --" and this is Exhibit
19 215. "To further accelerate the progress of the
20 remediation programs that are currently running at the
21 sites mentioned in the consent decree, the Getinge
22 executive team has decided to implement a new governance
23 model and organizational structure for the sites in
24 Merrimack/Hudson, MCP, Hechingen/Rastatt, that's in
25 Germany, and Wayne, New Jersey. These changes are

1 effective today."

2 So Getinge -- under the guise again of Getinge
3 Group, Getinge AB dictating an organizational structural
4 change.

5 But then if you look in the next paragraph,
6 "Local site QA/RA functions will continue to report
7 solid line up through the quality organization and
8 report dotted line to each site managing director."

9 What that means is that the local day-to-day
10 staff report directly to Lena Hagman in a straight line
11 report.

12 And here, Plaintiffs' Exhibit 215, we see the
13 top four individuals: EVP, executive vice president,
14 Lena Hagman. As you see there, that's a straight line
15 report. She is a Getinge AB employee.

16 Underneath that, QRC CD site lead, John
17 Costello. John Costello by our information is not an
18 Atrium employee. In fact, if you go onto his LinkedIn
19 page, I believe it says Getinge.

20 GET site lead, Jens Viebke. He is not an
21 Atrium employee. He's a GET team member, Getinge
22 executive team member.

23 And then the managing director, Chad Carlton,
24 who you'll hear from when the defendants call their
25 case. We believe that the evidence shows that he is in

1 fact a Getinge employee and not an Atrium employee.

2 So the top four individuals we believe are
3 directly controlled and directly in line from Getinge AB
4 and are part of their direct contacts.

5 Now that's only, again, part of the story.
6 Getinge AB, also through a shared services set of
7 agreements, directly provides services and provision
8 services and makes money from the provision of services
9 to Atrium.

10 Those services include things like HR and IT,
11 R&D, marketing, all those sort of things. Those are all
12 activities that through the shared service agreement
13 Getinge AB is the required provider of.

14 Again, those things have to do with the
15 manufacture, production, control of C-Qur.

16 Here's another example of the IT service
17 agreement. That's Exhibit 88. And what we've done is,
18 just so your Honor can see in one place, I would
19 recommend the Court look at other agreements at Exhibits
20 87, 88, 89, 90, 91, 92 and 93.

21 So, your Honor, those we believe are the
22 direct contacts that specifically relate to the
23 production and injuries that our clients have suffered.

24 Number two, Getinge AB's contacts represent
25 purposeful availment.

1 The first thing that I want to point to the
2 Court is Exhibit 12. This is a Side Letter Agreement
3 between Zurich Insurance Company and Getinge AB.

4 Under the terms of this Side Letter Agreement
5 Getinge AB is actually paying the costs directly through
6 Chubb Insurance for the litigation and ultimately the
7 result. They are self-insuring the litigation, your
8 Honor. That's Exhibit 12.

9 Additionally, in terms of purposeful
10 availment, Getinge AB has filed lawsuits in the United
11 States. They filed a lawsuit, Exhibit 172, against
12 former CEO Steve Herweck. They alleged that the
13 liabilities of Atrium were essentially understated at
14 the time of the sale and they sought recoupment of some
15 monies. That's Exhibit 172.

16 Additionally, Atrium has consented to the
17 jurisdiction through contracts. They consent to
18 jurisdiction of the United States in a Cashpool
19 Agreement, and we'll talk more about the Cashpool
20 Agreement and the content of that itself, but as you can
21 see here, they accept federal jurisdiction in New York.

22 So if the Court pays attention to contracts at
23 Exhibit 7, Exhibit 41, Exhibit 105, 103, 172, 104, 106
24 and 47, the Court will see consent to jurisdiction in
25 New Hampshire, New Jersey, Delaware, and New York.

1 So based on those facts we believe that it is
2 entirely reasonable for Getinge AB to be brought before
3 a Court in the United States.

4 However, should this Court find that that is
5 not enough, we believe that Getinge and Atrium are
6 functionally one company such that Atrium is the agent
7 and alter ego of Getinge AB, and we know this through a
8 thorough review of the documents as well as some
9 corporate admissions.

10 So first, from a Getinge Group Annual Report
11 in 2015 they talk about, "Three independent business
12 areas will merge into one Getinge and thereby create a
13 more lean support an administration of the Group as well
14 as reduced management levels. This will be achieved by
15 structure simplification, backbone consolidation,
16 process harmonization and continued development of the
17 shared services function." That's that same services
18 function I talked about before.

19 I want to pause here, your Honor, and talk
20 about the content of this particular paragraph because I
21 think that this paragraph is very important.

22 What this paragraph talks about -- and Mr.
23 Messina who in addition to being a financial expert
24 previously was the head of the Steinway Piano Company, a
25 multi-national conglomerate, testifies that when

1 businesses make decisions about efficiency, there is a
2 balance that CEOs take. CEOs are very well aware of
3 corporate formalities, and they must balance between
4 efficiency and maintaining the separate corporate
5 structure. They understand this and they deliberately
6 make decisions based upon it.

7 I want to share with the Court a couple of
8 other statements that Atrium has made. This is the CEO
9 at the time, Alex Meyers, Plaintiffs' Exhibit 54:

10 "We are merging three business areas into one
11 single company, one Getinge." That becomes the moniker
12 for the new single company.

13 And we see here again the notion that I just
14 described. Getinge will transform from a group of
15 companies in a so-called holding company structure.

16 That's what defendants are maintaining.
17 That's defendants' argument is that Getinge AB is
18 nothing more than a holding company.

19 So Getinge will transform from a group of
20 companies in a so-called holding company structure to
21 become one Getinge.

22 As we see, that's one company.

23 This will create the conditions for
24 collaboration and a leveraging scale to better
25 capitalize on the opportunities in a changing market.

1 That means that they're going to take
2 advantage of the synergies and that they're going to
3 lower the corporate wall. They recognize it, they
4 balance it, and they make an affirmative decision to
5 move forward with the synergies.

6 And finally, the gentleman you'll hear from
7 this morning, Peter Hjalmarson, the 30(b)(6) witness,
8 the only disclosed witness to talk for the company on
9 this particular issue, says -- I ask him, "The Getinge
10 Group collectively is a single economic unit? That's
11 the legal term, single economic unit that moves in the
12 same direction?" And the answer is yes.

13 So under the piercing the veil single economic
14 unit test there are seven parts. However, this is a
15 balancing test and the plaintiffs need not show every
16 element and it is a balancing weighing of the factors.

17 That being said, we believe that the evidence
18 is so strong in this case that we can meet every single
19 one of these elements.

20 So let's look at these elements:

21 Getinge dominates Atrium's operations, assets
22 and policies. That's the first point.

23 Getinge has a series, and one example is
24 Exhibit 20, of operating manuals or modules. These come
25 down from corporate and they dictate how various

1 activities will be done. They talk about the
2 organization's roles and responsibilities, annual
3 strategy and operational cycles, process and frameworks,
4 functional meeting structure, and key process and
5 indicators, key points that the companies use to measure
6 success.

7 As we see, the company has -- Getinge has
8 organized into three business areas, and you'll hear
9 from Mr. Hjalmarson on that. The area of interest in
10 this lawsuit is the Acute Care Therapies business.
11 Acute Care Therapies, as you can see, is made up of a
12 president, Jens Viebke, CFO Gary Sufat -- Gary Sufat was
13 the CFO of Atrium at one point and has been elevated up
14 to become Acute Care Therapies CFO. The VP of human
15 resources, Thomas Marschal. You will see his name
16 later. He's not an Atrium employee.

17 And then you see a variety of different sites.
18 Chief commercial officer, Ajey Atre. Chief technology
19 officer, Ulf Andersson. These are names that will come
20 up later as you see who the officers and directors are
21 or were of Atrium.

22 I want to focus now on Chad Carlton. Chad,
23 who is in the courtroom here today, will be defendants'
24 first witness. He's listed as managing director
25 Hudson/Merrimack.

1 So if you look specifically at New Hampshire's
2 organization -- now, they call it the Atrium Medical
3 Corporation, QAUS Site Organization. That's moniker for
4 what has now become colloquially Merrimack. You see
5 Jens Viebke, president of Acute Care Therapies, and his
6 executive assistant, Chad Carlton.

7 Then we see John Costello here. If you
8 remember, John Costello was the gentleman who was a
9 direct line report through Lena Hagman earlier today,
10 and we see three stars next to his name. Again, he's
11 not AMS, not on-site.

12 Then we look down and we see marketing, Ajey
13 Atre, Acute Care Therapies. We see from the last side
14 and the three stars, not on-site, not an Atrium
15 employee.

16 You can see -- if you look through Exhibit 1,
17 you will see that in key functions throughout the
18 organization there are non-Atrium employees functioning
19 at high-level positions of authority.

20 So additionally, the documents demonstrate an
21 extremely high-level control that Getinge AB exerts over
22 control of the company.

23 There's something called the Ten Golden Rules,
24 and Trevor Carlton, one of our witnesses, will talk
25 about this. He was former president of Atrium.

1 And the Ten Golden Rules was an e-mail that
2 was a series of rules that the Getinge Medical Systems,
3 which Atrium used to be a part of -- when we talk about
4 Acute Care Therapies, Medical Systems, and Maquet, those
5 are all synonymous as a division, if you will, of
6 Getinge.

7 And so the Ten Golden Rules come from the top.
8 It talks about:

9 1. Appointing or dismissing any manager
10 directly reporting to the general manager, president,
11 vice president, or managing director.

12 So you need corporate consent to do any of
13 those things.

14 Any search for one of these positions is to be
15 supported and coordinated by the HR manager of Getinge
16 Medical Systems.

17 That means you have to go outside your own
18 company to hire any of those direct reports.

19 You will hear testimony that they have now
20 nicknamed it as a much subtler term called the
21 grandfather principle.

22 2. Entering into or terminating any
23 commitment binding the SSU, that's a sales service unit,
24 which at the time Atrium had a portion of it, and we'll
25 talk about that later, so this is directly attributable

1 to Atrium, for longer than two years.

2 They can't contract or terminate any agreement
3 that ties up money for more than two years.

4 3. Entering into or terminating any
5 arrangement with distributors, sub-dealers, or technical
6 supporters.

7 4. Entering into any partnership, strategic
8 alliance, joint venture or new branch offices or legal
9 entities.

10 These all require corporate approval.

11 5. Buying, selling, renting, letting,
12 leasing, or mortgaging any property.

13 6. Establishing, altering, or terminating
14 major loan or overdraft arrangements with banks or other
15 financial institutions.

16 We'll talk about that later because Atrium is
17 forced at the outset to be part of a commingling --
18 excuse me, a commingled fund with Getinge and all of the
19 other Getinge entities.

20 6. The SSU will regularly report to Getinge
21 Medical System headquarters on bank or other credit card
22 facilities indicating the amount credited, their due
23 dates, and any collateral given, and list of customers'
24 bills indicating their amounts and maturity dates.

25 Again, a high level of micromanagement here.

1 7. They're not allowed to set up or alter any
2 information technology or management information system.

3 They can't control their own tech.

4 8. Establishing or altering any pension plan,
5 profit sharing, or shadow stock option, or retirement
6 plan.

7 They can't give employee benefits on their
8 own. They can't make those decisions.

9 9. Establishing or altering salary,
10 remuneration of any manager.

11 They can't affect salary of managers.

12 10. The general manager, president, vice
13 president, managing director, division heads, or CFO
14 play an active role in Getinge Medical Systems' annual
15 planning cycle. Their duties encompass the annual
16 market and competition analysis of this territory, the
17 forecasts of sales and contribution and the negotiation
18 of the overall budget of the SSU with the general
19 managers of the business units. The so-called completed
20 annual budget will be presented in a joint session in
21 Rastatt, which is in Germany, to at least one member of
22 the management board, the Medical System's management
23 board, which would be the equivalent of the ACT
24 management board, including Getinge team members. This
25 session will be scheduled in sufficient time prior to

1 the start of the new business year, and that comes out
2 of Rastatt, Germany.

3 So Getinge has a complex capital expenditure
4 request system. We know from the testimony of Peter
5 Hjalmarson that Getinge cannot -- excuse me -- that
6 Atrium cannot spend more than -- excuse me -- ordinarily
7 wouldn't be able to spend more than \$30,000 without
8 corporate approval, but because Mr. Carlton, the current
9 managing director and president, has a dual appointment,
10 he's also head of a company called Lesiotat in France,
11 he's allowed up to \$300,000 to spend, but there's a
12 complex expenditure process. That's Exhibit 14.

13 New product development goes through the ACT
14 board, the Acute Care Therapies board, and there's a
15 model and presentation process. It's Exhibit 15.

16 Now, Getinge even micromanages things that
17 involve the day-to-day minutia. There are Guides to
18 Building a Strong Brand, Exhibit 71; How to Create
19 Content, Exhibit 72; Digital Guidelines, Exhibit 73;
20 Distributor Guidelines, E-Learning Guidelines, Exhibits
21 74 and 75; How to Exhibit at Symposium and Conferences,
22 Exhibit 76; How to Identify and Promote the Brand,
23 Exhibit 77; Facility Guidelines, Exhibit 78.

24 And if you look closely at Exhibit 78 and
25 reference back to the photos of the Atrium facility

1 bearing the Getinge name, you can see they follow that.

2 Merchandise Guidelines, Exhibit 79; Office
3 Material Guidelines, Exhibit 80; Product Branding
4 Guidelines, Exhibit 81; Service Vehicle Guidelines,
5 Exhibit 82; Signage, Exhibit 83; Video Guidelines,
6 Exhibit 84; Writing Guidelines -- they even talk about
7 in the writing guidelines using American English as the
8 standard language, and they micromanage the way that you
9 should communicate in writing; and then Brand
10 Architecture, 86.

11 Now, Getinge -- again, Getinge AB equals
12 Getinge Group equals Getinge -- also provides employee
13 benefits. You'll note that the employee health plan is
14 Getinge Group and that the incentive plans are Getinge
15 Group.

16 Exhibits 21, 22, 23, 33, 34, 35, 41 and 42 are
17 all the various types of employee benefits from
18 retirement to health care to short and long-term
19 incentive plans that all talk about the benefits that
20 Getinge provides under the Getinge name to employees
21 here in New Hampshire.

22 Also, in addition to managers that we saw in
23 terms of hiring and firing before, e-mails have proven
24 that Atrium has a -- excuse me -- Getinge has a complex
25 process for proving hiring and firing.

1 So as you see here, Plaintiffs' 98, "Please
2 review attached file for approval to replace 8 key
3 positions, including 7 professional positions and 1
4 customer service position. In addition, we have
5 received requisitions for 15 new positions related to
6 the current production support and/or the moving
7 production lines to Merrimack."

8 Remember, they were once in Hudson. When the
9 FDA came in and forced -- and shut them down under the
10 consent decree, certain production lines were moved to a
11 facility that was under production in Merrimack -- under
12 construction. That's what this is referring to.

13 So they're looking to add staff. And you see
14 here on the e-mail Maquet. Again, it's before it went
15 to the Acute Care Therapies. It's under the Maquet name
16 and the address.

17 "Please review this version of recruitment
18 requests. I have made changes to the original sent to
19 you on April 28th. I deleted the new unbudgeted
20 requests as Frank Kozar and I have not approved them as
21 of yet. We are working on solutions that will require
22 fewer additional head count." This is from Thomas
23 Marschal. Again, if you remember the org chart before,
24 not an Atrium employee.

25 Here's another one, "Before filling any,

1 except blue collar, workers' vacant or open position,
2 regardless if replacement or new position was budgeted
3 or not budgeted, you will need an approval from either
4 Heinz," which is Heinz Jacqui, "or Michael."

5 Neither Heinz nor Michael are employees of
6 Atrium.

7 "For those positions that were approved before
8 and are already in the internal/external recruitment
9 process, you are requested to obtain a reapproval from
10 Heinz Jacqui."

11 2. Atrium is inadequately capitalized.

12 So when Atrium was purchased, the evidence
13 will show it was purchased for 600 and something million
14 dollars. It was a profitable enterprise through 2011.

15 The evidence in this case will show that in
16 the years principally starting around 2014 through to
17 the present that the assets have been systematically
18 drained from Atrium to the point where it is only a
19 manufacturing entity and it is essentially a zombie
20 company.

21 And we see from 2013 what's called an early
22 warning report prepared by the auditors at
23 PricewaterhouseCoopers, and speaking specifically about
24 Atrium in New Hampshire it says, "The SSU," referring --
25 again, we talked about SSU applying to Atrium, that's

1 referring to Atrium here, "coordinates sales of products
2 and services with external customers and, upon order
3 placement, purchases inventory intercompany," that means
4 it sells from one Getinge company to another Getinge
5 company, "and sells the inventory to end customers." So
6 then that other Getinge company flips those products to
7 the end users. "Inventory is purchased at 35 percent
8 below average sales price." So not an arm's length
9 transaction, okay?

10 But what happens in 2014 is that all sales
11 functions and the sales force are shipped over outside
12 of Atrium to a Maquet entity, and what happens?

13 Number one, if you look at this chart here,
14 you can see that Getinge intentionally undercapitalized
15 Atrium. What they do is instead of where Atrium was in
16 2011, it was selling externally. That means that it was
17 selling to medical facilities and doctors directly.

18 Internal sales are those sales between Atrium
19 and another Getinge entity. And you can see that going
20 from a profitable, almost \$260 million of sales in 2013,
21 you see a sudden drop-off beginning in 2014. All of the
22 sudden both the sales numbers and the ratio of internal
23 to external switch.

24 What happens is that Atrium starts selling
25 their products to another Getinge entity at a loss,

1 meaning it costs a dollar to make a cup of lemonade and
2 a kid on the street sells it for 75 cents, and that's
3 what happens here. And you see over the years from 2014
4 to the present Atrium has not made a profit and it has
5 lost.

6 Now, Getinge and Atrium's funds are actually
7 commingled. Further proof that they are that single
8 economic entity that Peter Hjalmarson was talking about.

9 They engage in what's called a Cashpool
10 Services Agreement. Basically all money gets pooled
11 together into Getinge AB's account.

12 Now, the important thing under this agreement
13 is that Atrium has no independent right to collect any
14 money from it. They do not have a right to themselves
15 access that money. They have to seek permission from
16 Getinge AB who is the bank holder.

17 If you look at the cash statements, Atrium has
18 actually very little cash of its own. Now, you may hear
19 from witnesses in this case that, well, they have
20 separate ledgers, but that doesn't uncommingle the
21 funds. They're kept in one account.

22 The legal and business definitions of
23 commingling are exactly what this Cashpool Agreement is,
24 Exhibit 147.

25 Now, you'll also see that Getinge, Mattias

1 Perjos, held a teleconference on October 15th where the
2 CEO of Getinge AB made a provision related to the
3 surgical mesh lawsuits. And we can see from the Ten
4 Golden Rules earlier, Atrium couldn't have done that on
5 their own.

6 4. Atrium failed to observe corporate
7 formalities.

8 This is testimony from the former president,
9 Trevor Carlton, and you will watch his video. This was
10 actually taken from a different deposition of Trevor
11 Carlton, and we don't have video of that, but it's
12 important testimony.

13 So he's asked:

14 "So after the acquisition did your board
15 membership change?" And his answer, "It disappeared,
16 yes, there was no longer a board." "So Atrium no longer
17 had a board?" "Correct." "So your responsibilities as
18 CEO, were they to any kind of organization or just
19 simply to the individual, Mr. Keller?" I don't know how
20 it was formally structured, but I was instructed that it
21 was to Mr. Keller. No board."

22 I think the documents will show that there was
23 no actual board, but on paper there was a board.

24 The point is, your Honor, the president of the
25 company testified that they did not follow corporate

1 formalities, and we can see that, too. Over the course
2 of time, Exhibits 90 and 91, as well as Exhibit 187, you
3 can see a set of interesting transactions to say the
4 least.

5 Exhibit 187. In June and February of 2016
6 Datascope, which is the immediate parent company and
7 intermediate parent company of Atrium, made two
8 \$10 million contributions to Atrium.

9 The interesting thing about this is that they
10 were reclassified as contributions in 2019, in March of
11 2019, just a few months ago. They looked back three
12 years and realized that this was a loan obligation and
13 that it had to be reclassified as a contribution by a
14 board of director meeting minutes.

15 That's clearly a failure to observe corporate
16 formalities, and it also results in the dubious
17 characterization of some financial transactions.

18 Atrium is a facade as a company.

19 If you go onto the Getinge website, you will
20 see hiring, and this is Exhibit 134. You can actually
21 go on and see what jobs are available, and you can find
22 jobs on the Getinge AB website that advertise for
23 positions here in Merrimack, New Hampshire.

24 I looked the other day. There were twelve
25 positions open in Merrimack, New Hampshire. There is no

1 indication that this is for a place called Atrium.

2 In fact, if you're lucky enough to get hired,
3 you get given an employee handbook. The employee
4 handbook mentions Getinge almost 250 times. And you
5 know what, your Honor, there's only one mention of
6 Atrium and it refers to legacy Atrium employees. That's
7 it. That's the only mention in this entire
8 50-something-page handbook. It refers to them as legacy
9 Atrium employees. Everywhere else they're described as
10 Getinge employees. This is the employee handbook.

11 But it doesn't stop there, your Honor. If you
12 go to the LinkedIn or CVs of many of these witnesses who
13 have been testifying in depositions, Gary Sufat,
14 Plaintiffs' Exhibit 132, describes himself as an
15 employee of Getinge. Ajey Atre, who is not at Atrium
16 but also calls himself a Getinge employee. Anthony
17 Horton, another New Hampshire guy, describes himself as
18 being Getinge. Paul Martakos, Keith Faucher, and
19 Chastity Murray all describe themselves on paper as
20 being Getinge employees.

21 6. Atrium and Getinge share common officers
22 and/or directors.

23 If you go through the board of directors and
24 meeting minutes, and we did this with Mr. Hjalmarson,
25 Exhibit 137, you can see he checked that each of these

1 people -- you'll see Johan Malmquist, Ulf Grunander, I
2 pointed him out earlier, T. Christopher Dorsey, Heinz
3 Jacqui, Christian Keller, Jon Snodgres, Reinhard Mayer,
4 who the Court would be familiar with was the 30(b)(6)
5 who was pulled down at the last minute, Serge Exshaw,
6 Gerhard Mayer, Jorg Dalhofer, Michael Vallon, Raoul
7 Quintero, and Jens Viebke all held Atrium positions on
8 the board.

9 So injustice would result from a failure to
10 pierce the corporate veil.

11 So just to give a brief timeline here, the FDA
12 cleared Atrium C-Qur for sale in the United States
13 through the 510(k) process in March of 2006. Atrium was
14 sold in October 2011 for approximately \$680 million.

15 Atrium received in October a first warning
16 letter from the FDA, and the first C-Qur mesh lawsuit in
17 the country was filed in October of 2012.

18 In August of 2013 Atrium issued a Class 2
19 recall of portions of the C-Qur Edge mesh, and in July
20 they executed a security agreement pledging all of
21 their -- all of Getinge Holding USA assets to Getinge
22 AB. Our financial expert will explain what that
23 security agreement does and why it didn't benefit
24 Atrium.

25 In January of 2014, Atrium -- their entire

1 sales force is moved off, as we saw earlier, to another
2 Atrium entity -- excuse me -- to another Getinge entity.
3 This is effectively a large distribution of cash to the
4 parent company, Getinge AB.

5 Then June 30, 2014, a \$13.7 million
6 distribution goes from Atrium to Datascope. So it's
7 being kicked up to the parent, eventually up to Getinge
8 AB.

9 I did forget to mention that prior to the
10 integration of the sales force net cash distribution
11 Getinge AB filed suit against Steve Herweck in the
12 United States about the buildup of liabilities of the
13 old company.

14 December 15th of 2014, 27.2 million is moved
15 from Atrium up the corporate chain.

16 February 3, 2015, the Court enters a consent
17 decree to stop the distribution of misbranded medical
18 devices, which included C-Qur.

19 June of 2015 is interesting. Jens Viebke, who
20 is the president of Acute Care Therapies, he served as
21 interim for about a year as the CEO or president of
22 Atrium as well, his indemnification agreement was with
23 Getinge itself, and that strongly suggests that he knew
24 that by 2015 the process of undercapitalization was well
25 underway.

1 December 15th of 2015, Atrium liquidates
2 Atrium Europe and the account receivable asset goes to
3 Getinge AB.

4 February 29, 2016, Atrium is given money from
5 Datascope in the amount of \$10 million. That's later
6 reclassified in 2019 as an equity contribution.
7 Otherwise, it would have been debt if it had not been
8 reclassified in 2019.

9 And then Chad Carlton in 2017 upon becoming
10 president of Atrium receives indemnification from
11 Getinge. That's right. The president of the company
12 that he manages receives indemnification from the parent
13 company.

14 Then there's that second contribution, Exhibit
15 187, of \$10 million. Again, that would have been a loan
16 but for the 2019 activity that reclassified it as
17 equity.

18 October 15th, Getinge CEO and CFO report 900
19 or so lawsuits at that time, and they essentially set
20 aside through the provision \$200 million.

21 And then in March of this year the Atrium
22 board backdates two \$10 million contributions.

23 Oh, by the way, Getinge USA is dissolved and
24 all assets transferred out.

25 So the injustice is, quite simply, your Honor,

1 that should the veil not be pierced and we go to trial,
2 there is a very high likelihood that Atrium no longer
3 has the funds and ability to pay a judgment because of
4 the systemic and intentional activities on the financial
5 end to undercapitalize the company. That damages all
6 1500 plaintiffs in this case, and that's substantial
7 injustice.

8 Now, in terms of the plaintiffs' case, the
9 Court will hear from Trevor Carlton, who is -- one of
10 his titles was former senior vice president, but he was
11 also president of Atrium; Dana Messina, the plaintiffs'
12 financial expert; Mark Brown, who's a national sales
13 manager; and Peter Hjalmarson, who is a 30(b)(6)
14 witness.

15 So from these witnesses, as well as our cross
16 and the documents that we have provided, the Court will
17 see that there is no mistake, number one, that there is
18 personal jurisdiction through direct contacts over
19 Atrium. And at a minimum, at a minimum, the Court can
20 pierce the corporate veil, and alternatively, that there
21 will be a finding of agency because clearly a company
22 operating and controlled by a foreign corporation meets
23 the test of veil piercing.

24 Thank you, your Honor.

25 THE COURT: Thank you. I think we'll take a

1 ten minute or so break. So around 10:30, 10:35. Thank
2 you.

3 (RECESS)

4 THE COURT: Go ahead.

5 MR. CHEFFO: Thank you, your Honor.

6 Let me just start by thanking your Honor and
7 your staff because we know that these types of hearings
8 the parties spend a lot of time. We know the Court and
9 your staff does as well, so we thank you for blocking
10 out such a significant amount of time for us, and I know
11 I speak for all the parties.

12 I think this is the first time I'm before your
13 Honor, so it's nice to be here.

14 Your Honor, if I could proceed. I'm hopefully
15 going to be a little briefer, and then we'll be able to
16 get to some of the video.

17 As your Honor knows, we're here for an
18 evidentiary hearing to determine whether plaintiffs can
19 show a likelihood that they can in each of the necessary
20 elements establish personal jurisdiction over Getinge,
21 which is a Swedish company, as you know, here in New
22 Hampshire.

23 The plaintiffs -- and we'll talk a little bit
24 about the general and specific causation. I think I was
25 intending to be guided by your Honor's initial comments,

1 to focus more on the piercing issues.

2 But the plaintiffs, as your Honor knows, have
3 attempted to meet the standard by primarily trying to
4 show that Getinge -- that Atrium is an alter ego of
5 Getinge.

6 So with that, you know, as your Honor knows,
7 to prevail under the standards plaintiffs have to meet
8 several of the significant burdens that we've discussed
9 in our brief, and Getinge submits that the evidence will
10 show that they cannot meet these hurdles, much less any
11 of them, much less all of them.

12 The due process issues have been briefed. I'm
13 going to cover them very briefly because I think counsel
14 did raise them, so I would like to at least address
15 those, but I'm not going to spend a whole lot of time on
16 that.

17 I would highlight that your Honor knows that
18 -- and this is something I think we all probably haven't
19 dealt with as much particularly as litigators, but I
20 don't think things have changed from law school. It's
21 an extraordinary, you know, kind of effort and an
22 extraordinary remedy particularly in a situation when
23 you have an ongoing existing business, as we'll talk
24 about, and you have, you know, a company that has 500
25 employees. I think we'll talk about some of the cases

1 that the plaintiffs have cited and show why this is just
2 so substantially different than those.

3 And I think -- going to your Honor's, one of
4 your first questions, what I think we will talk about
5 this morning and also throughout is that this is not --
6 in order to have this extraordinary remedy, veil
7 piercing is not just showing that there's complex
8 transactions, that there may have been some technical
9 violations of a corporate form or a missed signature. I
10 mean, if that was the case, as we know, every single
11 company -- because no one's perfect and they're very
12 complicated, so I think it requires much more than
13 complexity or overlapping issues.

14 And as you'll hear from the testimony, and
15 even from their expert, the idea that there is
16 coordination, integration, is exactly why we have
17 corporations and why we have corporate families, and
18 that's certainly something that we all know from kind of
19 just living, you know, in America that that happens.

20 Now, we know of course that there can be
21 certainly situations where the veil is pierced or there
22 can be alter egos, but what's critically important is
23 that it requires, you know, a fraud or a similar
24 injustice.

25 And we respectfully submit that,

1 notwithstanding anything you heard this morning, you
2 didn't hear anything that would rise to the level of
3 fraud or substantial injustice in terms of any
4 intentional effort to defraud, and we'll talk about some
5 of the cases I think that really highlight this for us.

6 And as your Honor indicated, you set the
7 standard, they must show a likelihood of existence of
8 each fact necessary to support personal jurisdiction,
9 and that's, you know, more like an injunctive standard
10 than it is a summary judgment standard.

11 And also one of the things we'll talk briefly
12 about but we didn't hear this morning is that, you know,
13 there are actually four levels of corporate form that
14 would have to be essentially pierced in order for your
15 Honor to determine that there's jurisdiction over
16 Getinge.

17 So let's just talk briefly about, you know,
18 what Atrium is, because we are certainly -- it's not our
19 view that any information about Getinge is irrelevant or
20 the Court should not focus on it, but really the
21 question here, we submit, is really how Atrium, you
22 know, functioned and its corporate form, and did it, you
23 know, commit some type of fraud.

24 And I think when we look at that one, you'll
25 hear from Mr. Carlton and others, Atrium has 500

1 employees that manage its day-to-day affairs.

2 And this is really important, designing and
3 manufacturing the medical devices, because that's
4 ultimately what this litigation is about, right? What
5 the claims in this litigation are about and to the
6 extent they arise out of, it's the manufacture. It's
7 the design. It's the warnings of a medical device. And
8 that all has and continues to fall with the
9 responsibility of Atrium, not Getinge.

10 Now, to the extent that -- and there's a
11 little bit of, you know, a kind of finding it just
12 right, a Goldilocks quality, because as your Honor
13 knows, you know, a corporate parent, particularly a
14 publicly held company like Getinge, it has a fiduciary
15 responsibility to its shareholders, just like any
16 company does, to make sure that it is conducting
17 appropriate oversight, right? So it can't, you know,
18 overstep those bounds, but to the extent that it is
19 creating -- and we saw a number of things about
20 guidelines, and we'll talk a little bit more about
21 those, but to the extent that a corporation exercises
22 some level of control and some level of oversight over
23 its subsidiaries, that's frankly what we would expect it
24 to do. And frankly from a business perspective, to the
25 extent that they want to have, you know, a separate

1 corporate culture or kind of presentation of what a
2 consumer or what business partners might expect, that
3 happens every single day in America and probably around
4 the world.

5 So as I said, there's no evidence of fraud or
6 injustice. And I would just highlight -- and I'm going
7 to be very mindful -- and it's I think -- Mr. Orent's
8 and probably my natural setpoint either, you know, we
9 may disagree but we're going to kind of -- this is not
10 that hotly contested in the sense that it's not
11 emotional issues, but we do disagree on the issue of
12 single economic unit. I think I heard Mr. Orent say
13 that that's a legal test, that's a legal standard.

14 We respectfully disagree. We think that the
15 standard is that there has to be fraud or a similar
16 injustice. And I think, as you'll hear, the single
17 economic unit is in fact a financial term, and it's a
18 financial term of art, not a legal term of art. And so
19 while we would disagree that it has any kind of legal
20 bearing, I think you'll hear some explanation throughout
21 the hearing that in fact it's required. It's a term of
22 art for international accounting that you do certain
23 things when you are in kind of a corporate situation
24 like this.

25 Again, the type of transactions -- and we'll

1 go into some detail. You'll hear about them throughout
2 the course of the next few days, but these are ordinary
3 and proper transactions. These aren't the types of
4 transactions that we've all seen in the case law, which
5 I think I'll get to in a minute, which are just clearly
6 intended to defraud or to, you know, conceal assets. I
7 don't think you'll see any of that, your Honor.

8 And what I would say -- you know, I certainly
9 don't intend by making this comment, and I won't say it
10 too many times to create a parade of horrible, sort of a
11 slippery slope, but I think it is worth noting that, you
12 know, at least from our perspective, what the good
13 lawyers on the other side are asking the Court to do is
14 essentially forge new ground here and would create, you
15 know, kind of a very unusual and inhospitable kind of
16 economic environment, you know, in this jurisdiction by
17 kind of going so far and holding a company responsible,
18 a parent company, because again the way that Getinge and
19 its subsidiaries function, you'll hear from our experts
20 and you'll just see it today, is very consistent with
21 the way corporations function throughout every single
22 day, and that's why we have such a high standard, and
23 the courts are very I think careful to look at these
24 issues, as your Honor is doing.

25 So this just lays out for the Court, you know,

1 the three steps -- the four different steps I think we
2 heard a lot about, you may have seen a document, and I
3 think I caught some of this in there, about Datascope.

4 But the fact is there are four different
5 corporations, four separately, and, you know, it's our
6 view, and we think supported by the law, that the
7 plaintiffs would need to establish each of the factors
8 with respect to each of these various different
9 subsidiary corporations and really just can't kind of
10 wave their hand over it and just say it's all Getinge
11 and it's all Getinge AB.

12 So we would urge your Honor as we go through
13 to focus on each one of these and making sure that each
14 one of the elements -- the plaintiffs meet their burden
15 of talking with respect to each one of those.

16 I want to just briefly -- and maybe a little
17 less briefly than I might have. Candidly, I think
18 coming into the hearing, reading the briefs carefully as
19 your Honor did, there wasn't a lot of focus, I think
20 that's fair to say, on general or specific causation. I
21 think some of the things we heard today were not in the
22 briefs, but then again I guess that's why we're here.
23 We'll try and address it throughout the course of the
24 hearing.

25 But I guess my kind of quick answer to it is,

1 if you looked at certain of the documents, really all of
2 the documents, they don't -- certainly they don't meet
3 the standard. We know general jurisdiction -- the
4 Supreme Court has ruled on this a number of times,
5 right, this kind of general doing business -- the fact
6 that you have people here and you employ people and
7 service folks, I think the Supreme Court has been very
8 clear that the general jurisdiction issue has to be
9 where you make your home or your principal place of
10 business, and I think that's from the last three Supreme
11 Court decisions on that issue.

12 So to the extent that -- you know, the focus,
13 or the Court's analyzing, the plaintiffs are focussing
14 on the specific jurisdiction. Again, really what you
15 saw, and I tried to jot them down quickly, but we saw
16 consent decrees, we saw a few other documents, and none
17 of them, you know, arise out of the design, manufacture,
18 and the sale of C-Qur, because in fact I don't think
19 there's any dispute that that was all done by Atrium and
20 continues to be. And as I said, there's 500 employees.
21 Now, they don't all work on these specific issues, but
22 what this case is about are not those issues.

23 And just briefly, the consent decree, 184. So
24 again, I just want to highlight for the Court, this
25 was -- as your Honor knows from these consent decrees,

1 certain things the government has a strong say in who
2 signs these things and what they want, but you'll notice
3 that there are multiple corporations, right, that are
4 listed here.

5 And then you'll also notice on page 3 -- you
6 know, it was highlighted that there were certain
7 signatures from various different entities, but what I
8 think is important for the Court to focus on is if you
9 look at the additional facilities in B, those are not
10 Atrium facilities, right?

11 So to the extent that folks are signing for
12 different entities and for different manufacturing
13 facilities, it's because they represent -- and they were
14 at issue in the consent decree. It wasn't just about
15 Atrium, and you had someone who was from a different
16 entity.

17 And I think if we could just turn briefly to
18 215. That's it. Thank you.

19 So part of this Mr. Orent did highlight, but I
20 just want to highlight a little section I don't think
21 that was highlighted. It says, "Each site will be led
22 by a managing director with full executive authority."

23 And then if you look down under the Merrimack,
24 it says, "Chad Carlton will assume the managing director
25 position for Merrimack."

1 So I think this is fully consistent with
2 really what we have been highlighting for the Court,
3 which is that, yes, to the extent that there is
4 integration, coordination, communication between the
5 various parent and subsidiary organizations, that
6 doesn't amount to fraud or substantial injustice, and it
7 certainly doesn't arise out of the claims that are
8 really at issue here today.

9 So -- and obviously I know your Honor will
10 stop me if you have specific questions, but I'm just
11 going to keep going at this point.

12 So the bar is very high. A corporation is an
13 entity distinct from its shareholders even if the
14 subsidiary stock is wholly owned by one person. As a
15 consequence, piercing the corporate veil is an
16 extraordinary remedy. Further, when dealing with
17 multiple layers of parents and subsidiaries, as with
18 Atrium, the corporate veil must be pierced at each
19 level.

20 Now, we've cited, you know, many of these
21 cases in our brief, but I think it's worth really just
22 highlighting. As I said from the get-go, that this is
23 really an extraordinary relief that the plaintiffs are
24 seeking. So piercing the corporate veil requires that
25 effectively the corporation must be a sham and exist for

1 no other purpose than as a vehicle for fraud. The
2 corporation is a sham entity designed to defraud
3 investors or creditors. Companies are involved in an
4 elaborate shell game or are otherwise abusing the
5 corporate form to effect a fraud. Defendants'
6 shareholders intended to abscond with equity invested in
7 plaintiffs' companies and seize the substantial payments
8 to the corporation for their own gain and purposes.

9 And again, respectfully, to the extent that we
10 credit everything that the plaintiffs have put forward,
11 none of that rises even remotely to this very, very high
12 standard.

13 So just talking briefly about some of the
14 cases, and I think this really highlights really the
15 disparity of the facts in this case to what, you know,
16 we see typically.

17 So in that case it was a member using the bank
18 account as one of its pockets into which he reached --
19 into which he needed or desired funds for his own
20 personal use. The LLC gave its sole member a \$350,000
21 Bentley at the same time that it refused to pay its own
22 debts. These are the cases that the plaintiffs have
23 cited and relied on as examples.

24 Veil pierced where members set up an LLC with
25 insufficient assets and were never paid consideration

1 for their shares. LLC owners drained the LCC of liquid
2 assets through personal loans and distributions while
3 the LLC was subject to hundreds of thousands of dollars
4 of liability to plaintiffs.

5 This other New Hampshire case, sufficient
6 evidence to veil pierce where a defendant amidst
7 litigation against this LLC made unusual and ostensibly
8 arbitrary business decisions to form a new LLC with the
9 same address and telephone number and transfer old LLC
10 clients, its only asset, to its new LLC.

11 So those are the plaintiffs' cases.

12 We've heard -- you know, I don't know if these
13 exactly frankly align with all of the arguments you
14 heard today, but I think they generally do, and in the
15 briefing in some of the issues we've been litigating.

16 What I think is really important is that the
17 cases that we've, you know, kind of looked at and tried
18 to assemble for your Honor, what they establish are
19 really each one of these things are not evidence of
20 fraud or injustice. They are essentially the types of
21 things that happen in companies.

22 And let me just stop for one minute because
23 we'll talk about -- you'll hear a lot about insolvency
24 throughout this, and there may be a dispute about this
25 between the parties, but at least my understanding of

1 the plaintiffs' expert in this basically says, you know,
2 if you're insolvent, then essentially that's a way to
3 pierce the corporate veil. And I think that really --
4 and what the cases as I understand them say really turn
5 that on its head, because it seems to me the whole point
6 of having corporations and corporate protections is that
7 as long as you are operating in a certain way, you are
8 able to protect certain assets and you're able to have
9 subsidiaries.

10 And all of the things that we talked about,
11 you know, the common central management, those are not
12 unusual. Oversight of subsidiaries' business plans and
13 marketing strategies. Again, that happens all the time.
14 It happens to various degrees in different companies,
15 and certainly some companies will set certain thresholds
16 for how much a particular person can spend or whether
17 they can enter into certain types of contracts, but
18 those are the types of things that are just extremely
19 commonplace. Monitoring subsidiaries' performance,
20 wanting to know -- in fact, they probably would be
21 breaching their fiduciary duties if they didn't have
22 some element of control or oversight over the
23 subsidiaries.

24 We saw a fair amount of things about
25 guidelines, about the formulation of policies. I think

1 to the extent that really any national company or
2 international company wants essentially a corporate
3 culture or perhaps a uniform or certain provisions for
4 IT so there can be integration, these are not evidence
5 of fraud. In fact, in most regards they're evidence of
6 good business and efficiency which is why you often have
7 corporate groups, so that you can have shared services
8 agreements.

9 You'll hear a fair amount about the pooled
10 funds. I mean, the idea is that if you have a lot of
11 different people trying to access bank accounts with
12 different loan arrangements and different interest
13 rates, but you can pool them, right, together, so that
14 you can get synergy, so you don't need ten different
15 CFOs or ten different accountants and you might be able
16 to get better terms with your bank, those are the types
17 of things that are not fraud or injustice. They're the
18 types of things that make sense from a corporate
19 perspective.

20 And frankly, in many regards -- if we were in
21 a different forum and perhaps practiced in a different
22 practice area, it might actually be held to be a
23 negative thing if a corporation wasn't using all of its
24 attributes and assets to marshal them together to
25 coordinate so that it can get best shareholder value.

1 So I won't go through all of them, but I would
2 just highlight, you know, as your Honor is listening and
3 kind of reading throughout this, that, you know, there
4 will be complex transactions, you know, we stipulate to
5 that, and there will be, you know, interactions, there
6 will be communications, and there will be reporting, and
7 there will be sometimes when someone needs to get
8 approval for something and make sure that they are
9 consistent with the corporate brand, but that is not,
10 you know, kind of what makes veil piercing.

11 I won't highlight too many of these, but in
12 similar types of arguments this Goldthrip case, the
13 parent's involvement in medical product subsidiary and
14 co-branding was determined to be insufficient to trigger
15 alter ego status.

16 These are in, you know, medical devices. So
17 we tried to find situations where there were claims by
18 plaintiffs in connection with the similar types of
19 claims that we're seeing here, and the courts, unlike
20 some of the cases that the plaintiffs have cited that
21 really I think are not on all fours with this, I think
22 when you look at these cases, they are much more
23 consistent with the facts that we have here.

24 The Seedman case, it was an Australian medical
25 device, a parent involved in the decisionmaking about

1 wholly-owned Delaware subsidiary, that was insufficient
2 to show the unity of interest and ownership.

3 And in the Wright Medical Technology case,
4 total ownership alone is insufficient to establish the
5 requisite level of control.

6 As I said, as we go through each of these
7 transactions, which are admittedly complex, I think
8 you'll have an opportunity, as best we can, to have
9 folks, particularly Mr. Carlton and maybe some of the
10 experts, explain to you -- and let me be clear, because
11 you see Professor Orcutt's name and I know your Honor
12 has -- you know, I don't want to mischaracterize it. I
13 think your Honor has done what we expect a Court to do,
14 which is say, I understand what the law is and I don't
15 need an expert to tell me what the law is. So I just
16 want to at least introduce the concept of why we think
17 Professor Orcutt, you know, will be helpful and also be
18 mindful of what we think his appropriate role in
19 assisting the Court is and what your Honor's role, and
20 it's not to tell you what the law is or it's not to tell
21 you ultimately what the resolution should be. It is
22 much more like I would akin to, you know, a regulatory
23 expert basically who is basically going to talk about
24 corporate form, corporate structure, what corporates do,
25 because those may be things that are outside, you know,

1 our kind of normal understanding as lawyers and judges.

2 But obviously all of this is for your Honor's,
3 you know, information and if you decide that you, you
4 know, want to hear more or less, we will obviously do
5 that.

6 You'll also hear a fair amount -- and this is
7 an area I think of, you know, relatively significant
8 disagreement.

9 So to be clear, we think the evidence,
10 particularly at the timing that's appropriate, shows
11 that Atrium was solvent, so we disagree, but we also
12 think, you know, it's important for the Court to look at
13 the appropriate time factor, because again, if you
14 really think about this, the idea that, you know, your
15 Honor is asked to determine really from a point in time,
16 right, whether there's jurisdiction or not, and so what
17 we've tried to do is basically -- and your Honor could
18 look at it when claims are filed or when the motions to
19 dismiss were filed, but they're all around the same
20 period of time. And that's really where we focused our
21 efforts is basically saying at that time -- you know,
22 because if your Honor had the luxury, or we did, of
23 having a hearing the next day and there was a fully
24 formed record, that would be the appropriate time. We
25 know that that's not the way things work with timing and

1 discovery.

2 So what we focused on and what I think you'll
3 hear from our experts is that there was solvency. We
4 also, frankly, just fundamentally disagree that -- I
5 mean, solvency can be a factor in piercing the corporate
6 veil, but, you know, again I think if you really think
7 about the idea that if you're insolvent automatically
8 you would pierce the corporate veil, that would tend to
9 make corporate law and corporations essentially a
10 nullity.

11 So I just want to take a minute or two and
12 introduce very briefly what you'll hear.

13 You'll hear from Mr. Carlton. He's the
14 current president. He will explain to you that Atrium
15 is an ongoing, functioning company. It's certainly not
16 a sham company. It's here in New Hampshire. There's
17 500 employees. And I'm sure Mr. Carlton will do his
18 best to try and explain some of these admittedly
19 complicated transactions. Again, really to highlight
20 for the Court both that they are ordinary and regular
21 for both Atrium and other companies, and also that the
22 purpose here -- there was business purposes for these.

23 And again, as your Honor knows, the standard
24 is not, you know, whether someone ultimately made a
25 right decision or whether it turned out well or didn't.

1 The question here is whether this was intended to
2 defraud.

3 We also will be calling, to the extent
4 necessary, Mr. Fernandez. He's a CPA, and he was asked
5 to look at the issue of capitalization and whether
6 Atrium was able to meet its operational needs as of the
7 time that the plaintiffs attempt to assert jurisdiction.
8 As I said, that we think is a point in time when the
9 claims were filed.

10 And he will also tell you that solvency must
11 be evaluated based on the substance, and not the form.
12 It's not just a mechanical application of just looking
13 at a balance sheet. It requires much more analysis than
14 that.

15 And you will hear from Professor Orcutt, as I
16 just explained, and I think that, you know, what he will
17 try to do is put in context some of these transactions,
18 that they are ordinary, appropriate, and what you would
19 expect to see from a large company, a publicly traded
20 company. And again, consistent with what I had
21 indicated before, that to the extent that these types of
22 transactions were deemed to be consistent with a veil
23 piercing, that it would essentially really cause a
24 floodgate because these are the types of things that are
25 done every day.

1 Now, the plaintiffs you've heard -- I didn't
2 know, but I certainly was aware that Mr. Hjalmarson -- I
3 didn't know it was four hours. We'll hear a fair amount
4 from Mr. Hjalmarson this afternoon.

5 Let me just say two things. I think that
6 there has been, you know, at least some comment that
7 essentially our view is to take an inconsistent position
8 with Mr. Hjalmarson, and I would just suggest to the
9 Court that's in fact not the case, and I think this goes
10 back to the point of single economic unit that I raised
11 earlier. I think what you'll hear is it is true, and I
12 think there was a big board up where he said, yes, it's
13 a single economic unit.

14 What I think you'll hear throughout the course
15 of the next few days is that that's an international
16 term for financial professionals about how they treat
17 and how they're supposed to treat their companies when
18 they have parent subsidiaries, particularly for European
19 entities.

20 So by him saying it's a single economic unit,
21 that was not a concession that, you know, yes, pierced
22 the corporate veil. He thought it was something
23 different, and I think the evidence will show that as
24 well.

25 And I'm always -- I try to be careful. This

1 is not a challenge to Mr. Messina. I've had a chance to
2 read his deposition a few times and look at it. I did
3 not discern, you know, anything about fraudulent or
4 injustice. There were a number of comments -- again,
5 you will hear from him, but I think a lot of his
6 testimony was kind of criticism about the corporate form
7 and whether things should have been done in one way or
8 the other based on his experience.

9 Though I think you will hear from him also
10 that many of the same things that he is critical of were
11 exactly the kind of things that he did and his company
12 did when he was the CEO I think for 15 years at
13 Steinway.

14 Again, not critical at all. In fact, just the
15 opposite, right, that's kind of our point, which is he
16 was on the board of another subsidiary. There were
17 exchanged services. There were requirements that, as
18 you might expect with a very prominent company like
19 Steinway & Sons, right, that you couldn't just change
20 the logo. You had to follow certain requirements. If
21 they had distributors or sales folks, they wanted to
22 make sure that they were operating in a standard that,
23 you know, met the standards of that fine company.

24 So those types of things are exactly what you
25 see here, and the fact that, yes, there's a sign outside

1 that may say Getinge. But again, we all know that
2 corporations try to have a brand and they try to have a
3 responsiveness with their clientele and their customers,
4 but that doesn't pass the legal standard in our view for
5 piercing the corporate veil.

6 And as I said, many of the -- or the types of
7 challenge transactions that we'll talk about here were
8 the types of things that Steinway did as a matter of
9 course.

10 So I think, your Honor, I'm going to wrap up
11 by just, you know, really ending where I started, which
12 is that -- a lot of information. Very complicated
13 corporate structures. You will hear explanations, I'm
14 not going to do it today, and you saw a lot of financial
15 information about why it would look like someone was
16 insolvent or why the cost structures were different or
17 why it changed. Of course you'll hear that, well, that
18 was before, they were apart and integrated, and you will
19 hear an explanation as to why the way certain
20 transactions and transfers and costs are put on the
21 books for accounting purposes, but you will also hear
22 that those are ordinary, proper, there was no fraud, no
23 one has -- there's no governmental entity that's
24 determined that these were fraudulent financial books,
25 and I don't think there's been any allegation of that or

1 that there's any injustice here.

2 Again, you still have an ongoing 500 person --
3 I can't say that there's never been a case with -- the
4 types of cases we've seen here, we've looked, are
5 usually kind of mom and pop LLCs or much smaller
6 companies.

7 The idea that this company is kind of a zombie
8 corporation, I think was what we heard this morning, or
9 was a total shell or was a scam I just think is
10 inconsistent with the fact that they're still
11 functioning in this state with, you know, 500 folks.

12 THE COURT: May I ask you a question?

13 MR. CHEFFO: Yes, your Honor.

14 THE COURT: And apologies that I originally
15 said don't talk to me about specific jurisdiction, just
16 focus on veil piercing, but just in terms of the
17 three-part test for direct contacts. Number one, the
18 contacts have to cause the claim. There has to be a
19 relationship between the contacts and these claims, and
20 then purposeful availment, and then is it reasonable.

21 And so putting veil piercing to the side, if
22 in fact Getinge has a corporate structure that allows it
23 to build a manufacturing plant in the United States, and
24 all that plant is is a manufacturing plant for Getinge,
25 but that plant has 500 employees who all think,

1 according to Mr. Orent, that they work for Getinge, the
2 sign says Getinge, if in fact it really is a
3 manufacturing plant and that's what it does and that's
4 what its 500 employees do but it's controlled by
5 Getinge, why wouldn't that -- even putting veil piercing
6 aside, why wouldn't that be the kind of contact with New
7 Hampshire, with the United States, that would suffice
8 for specific jurisdiction?

9 MR. CHEFFO: Fair question, your Honor.

10 So I would have a lot harder time I think in
11 that fact pattern than I do today, but I want to answer
12 your Honor's question directly.

13 Let's assume, you know, Getinge decided
14 tomorrow that it was going to start a facility, right,
15 and it basically -- you know, in Vermont, right, and it
16 broke ground and they built it and it was Getinge and
17 that's really what it was, then I don't think there
18 would be, you know, kind of an issue. I mean, they
19 still may have a subsidiary, right, which you would
20 expect, right, from a corporation, and as long as they
21 have the corporate form, right? So I think almost
22 anyone -- any foreign corporation -- you know, I'm not a
23 corporate lawyer, but I would assume it would be, you
24 know, Getinge USA, Inc., right, and I think they would
25 still be protected just like if Coca-Cola or Bayer or,

1 you know, any of the other companies came.

2 But assuming your kind of -- following your
3 hypothetical, if they did this, they were just
4 manufacturing, they were Getinge employees, then, yeah,
5 that would be a different case.

6 But I think -- remember, what we have here is
7 we have a company, Atrium, and Mr. Carlton will talk
8 about this, that was an existing company, right? It
9 wasn't a Getinge company. It was acquired by Getinge.

10 It continued -- as many other companies -- so
11 Getinge has, you know, various different interests
12 around the country. What this case ultimately is about,
13 right, is the mesh products and whether they were
14 designed properly, whether there was warnings, whether
15 there was, you know, a defective issue with them, and
16 all of that relates to the operations of Atrium, right,
17 and frankly always has.

18 So to the extent they then became part of a
19 corporation family in some regards, the idea that -- you
20 know, what the claims arise out of is not, you know,
21 years later somebody signing a consent decree, because
22 in fact -- I always hate to talk in absolutes -- I don't
23 believe there's any claims for violating the consent
24 decree. So there's nothing about this that said, you
25 know, in fact what this litigation is about is someone

1 from Getinge came in, signed the decree, and it's a
2 securities case about that. What the claims are about
3 is about the mesh, and that is exclusively related to
4 the issues of Atrium.

5 So I think the fact pattern which would be
6 harder for us and probably, you know, be easier for the
7 plaintiffs to argue injustice, unfairness, lack of
8 equity, would be the situation that you said, but I
9 think really what we have here is just the opposite,
10 right? We have a company that had an ongoing existing
11 business that manufactured products. We have a dispute
12 about whether they were defective or whether there's
13 causation. We'll deal with that at another time. We
14 have another company who came in and kind of acquired
15 those assets, we believe followed the corporate form,
16 right? It had some interaction. It did superimpose
17 some of its policies and procedures and guidelines over
18 that, and frankly you'll hear all of its other -- you
19 know, just assume if Coca-Cola bought a bottling company
20 in another country, or vice versa. Let's take a foreign
21 company. Pick out, you know, if Bayer Pharmaceuticals
22 decided to buy an existing pharmaceutical company here
23 and then had certain policies and procedures, maybe they
24 even used similar R&D, maybe they had quality control
25 the same because they had learning, right, because they

1 wanted to be efficient, those are the types of things
2 that happened here. And particularly when you have now
3 four steps, again we haven't heard anything about that,
4 the idea that you would say that we're going to
5 essentially make this corporate parent, you know, an
6 insurance company, I think would be inconsistent with a
7 hundred plus years of kind of blackletter corporate law,
8 but it would also, you know, frankly, have a very
9 chilling effect, right? If you are now company X and
10 that's the law in New Hampshire, you know, and it's not
11 the law from your perception in New York, Vermont, you
12 know, Massachusetts, wherever else, you're going to take
13 that into consideration. I think that's why courts have
14 been so, you know, concerned absent the most obvious,
15 blatant, clear examples of misconduct, fraud, malice,
16 injustice.

17 There's really -- on that point, you know, the
18 empty pockets, I don't -- that's not -- you'll see that
19 that's not the case. I mean, the company has been
20 defending itself. It continues to defend itself. It's
21 an ongoing operational company with 500 employees.
22 There are some years, like with many companies, as
23 you'll hear throughout the day, that they probably could
24 have done better, wish they had done better, but there's
25 other issues.

1 But this is not a sham, frivolous corporation
2 that someone took the last \$350,000 out to buy a Bentley
3 in order to leave the plaintiffs, you know, without any
4 recourse. This is just not that case, your Honor.

5 THE COURT: Thank you.

6 MR. CHEFFO: Thank you.

7 THE COURT: Okay. So now we're going to begin
8 the video deposition testimony. Is that correct,
9 Attorney Orent?

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

11 But before we do that, I would like to read
12 the stipulation the parties have reached.

13 THE COURT: Go ahead.

14 MR. ORENT: "The parties have agreed in order
15 to further the efficient conduct of the hearing that it
16 will not be necessary for them to object at the hearing
17 on any basis that has been stated and set forth in
18 response to the parties' respective exhibit list and
19 deposition designations, which shall preserve any and
20 all available objections under the evidentiary rules set
21 forth therein."

22 "Any exhibit as to which no objection has been
23 previously stated shall be deemed as admitted for the
24 purpose of this hearing only."

25 THE COURT: Thank you.

1 MS. ARMSTRONG: Your Honor, before we begin,
2 may I be excused to go back and work on the redactions?

3 THE COURT: You may be, and I will tell you
4 that my judicial assistant has already gone through and
5 highlighted, at least for me, the portions of the
6 original proposed redactions, so I at least have that,
7 but if you're able to significantly narrow those, then
8 that will moot her work on it and I will look at a whole
9 different set of redactions with highlighting that
10 you'll create for me.

11 MS. ARMSTRONG: I'm sorry that I wasn't able
12 to save her time before now, but I will go and do my
13 best to save us future time.

14 THE COURT: We're changing our local rule. It
15 has nothing to do with you. It's just the way this has
16 worked in electronic filing of two different types of
17 documents.

18 So it's just taking a case like this to make
19 the Court aware of sort of how difficult it is to figure
20 out exactly what the parties are asking be redacted. So
21 you are excused to do that.

22 And I think our court reporter is also going
23 to excuse herself at this point and we will then --

24 Oh, no. Go ahead, Attorney Orent.

25 MR. ORENT: Your Honor, I just wanted to

1 formally move all of our -- under the stipulation move
2 all of the exhibits that we have on our list into
3 evidence for purposes of the hearing.

4 THE COURT: Okay. Any objection?

5 MR. CHEFFO: No, your Honor.

6 THE COURT: Okay. And the same will be true
7 for defense counsel's exhibits?

8 MR. CHEFFO: Yes, your Honor.

9 THE COURT: Okay. And are the PowerPoints you
10 used also going to be exhibits? Can you make those
11 exhibits?

12 MR. ORENT: We are happy to if the Court
13 wishes.

14 THE COURT: Would you also do that?

15 MR. CHEFFO: We can, your Honor, sure.

16 THE COURT: All right. Terrific.

17 Okay. So now we will -- court is only
18 adjourned for purposes of this transcript, and otherwise
19 we'll begin the videotaped deposition of the 30(b)(6)
20 deponent. I know I will mispronounce his name.

21 I suspect maybe around 12:15, 12:20 we will
22 break for lunch unless somebody signals me that they
23 need a break sooner than that. All right?

24 MR. ORENT: Thank you, your Honor.

25 THE COURT: Thank you.

1 And I'm hoping somebody is in charge of the
2 technology.

3 (Videotaped deposition testimony of Peter
4 Hjalmarson is played)

5 (RECESS)

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C E R T I F I C A T E

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

Submitted: 9-24-19


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