

*NO COPY OF THIS TRANSCRIPT MAY BE MADE PRIOR TO MARCH 1, 2021

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

* * * * *

IN RE:	*	MDL NO. 2753
	*	
ATRIUM MEDICAL CORP. C-QUR MESH	*	MDL Docket No.:
PRODUCTS LIABILITY LITIGATION	*	16-md-02753-LM
	*	
THIS RELATES TO:	*	Case No.:
	*	1:17-cv-742-LM
CARRIE LEE BARRON and NICHOLAS	*	
BARRON	*	November 19, 2020
	*	1:02 p.m.
	*	

* * * * *

TRANSCRIPT OF STATUS CONFERENCE
HELD VIA VIDEOCONFERENCE
BEFORE THE HONORABLE LANDYA B. McCAFFERTY

Appearances:

For the Plaintiffs:

Jonathan D. Orent, Esq.
Motley Rice LLC

Russell F. Hilliard, Esq.
Susan A. Lowry, Esq.
Upton & Hatfield LLP

Anne W. Schiavone, Esq.
Holman Schiavone LLC

For the Defendants:

Katherine A. Armstrong, Esq.
Mark Cheffo, Esq.
Paul A. LaFata, Esq.
Dechert LLP

Court Reporter:

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

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

P R O C E E D I N G S

THE CLERK: For the record, this is a status conference and motion hearing in Carrie Barron vs. Atrium, et al, 17-cv-742-LM, part of the Atrium C-Qur Mesh MDL, which is 16-md-2753-LM.

THE COURT: Good afternoon, everyone. Good to see everybody.

I think what I'll do is just quickly have everybody just introduce themselves for the record again. I obviously see you, I know who everybody is, but just so the record reflects who is on the screen.

Let's start with --

MR. HILLIARD: Russ Hilliard --

THE COURT: -- Attorney Orent or, Attorney Hilliard, go ahead.

MR. HILLIARD: Oh, that's all right, your Honor.

Russ Hilliard, plaintiffs' liaison counsel. Thank you, your Honor.

MR. ORENT: Your Honor, Jonathan Orent for the plaintiffs. Good afternoon.

THE COURT: Good afternoon.

MS. ARMSTRONG: Is that everyone for your side, Jon?

THE COURT: I think Attorney Lowry --

1 MR. HILLIARD: Attorney Lowry is on the line.

2 MS. LOWRY: I was trying to unmute. I
3 apologize. Attorney Lowry for the plaintiffs. Good
4 afternoon.

5 THE COURT: Good afternoon.

6 MS. SCHIAVONE: Your Honor, Attorney Anne
7 Schiavone for the plaintiffs.

8 THE COURT: Good to see you again.
9 And I see the three defense counsel.

10 MR. CHEFFO: Yes, your Honor. Good afternoon.
11 Attorney Mark Cheffo for the defense.

12 MS. ARMSTRONG: Good afternoon, your Honor.
13 Katherine Armstrong for the defendants.

14 MR. LAFATA: Good afternoon, your Honor. This
15 is Paul LaFata from Dechert, also for the defendants.

16 THE COURT: Okay. Excellent.

17 All right. So let's just get started. Update
18 me -- well, it's probably easiest for me just to see
19 where we are.

20 Is there any agreement on Dunn?

21 MR. LAFATA: (Nods head.)

22 THE COURT: There is?

23 MR. ORENT: There is, your Honor.

24 THE COURT: I can -- and so I don't -- is it
25 fair to say I don't need to address Dunn at all today?

1 MR. ORENT: Correct, your Honor. We --

2 THE COURT: Great.

3 MR. ORENT: A linguistic issue in the
4 stipulation, what we'd like to do, if it's all right
5 with the Court, is read the stipulation into the record
6 and then provide a little bit of explanation so that the
7 record is clear as to where that one area where we
8 couldn't quite come up with the ideal linguistic term
9 would not be unclear by the language of the stip itself.

10 THE COURT: Excellent. Go ahead.

11 MR. ORENT: Okay. And Mr. LaFata will, I'm
12 sure, correct me if I am incorrect or using an incorrect
13 version.

14 So the language is: The parties agree and
15 stipulate that Dr. Dunn shall not testify about any
16 hazards associated with the C-Qur V-Patch device after
17 it has been implanted into the body, medical concerns
18 about implanting the device, performance of the device
19 inside the body, or that the device was defectively
20 designed. Dr. Dunn may testify about other opinions in
21 his report, including oxidation of polypropylene
22 generally or outside the body in failure mode effects
23 analysis.

24 The stipulation is not an admission of fact by
25 any party.

1 That concludes the stipulation itself.
2 However, we wanted to make clear that properly phrased
3 questions about the scope of the testimony that Dr. Dunn
4 is offering will not in and of themselves open the door
5 to testimony that has been excluded by this stipulation.

6 In other words --

7 THE COURT: Say that again. Say that again.

8 MR. ORENT: So properly phrased questions
9 about the scope of Dr. Dunn's testimony under this
10 agreement are not allowed to open the door to testimony
11 that is excluded under the stipulation.

12 And what we mean by that is a question like,
13 Dr. Dunn, you're not offering a question -- testimony or
14 an opinion about the hazards of polypropylene. That is
15 a fair question to ask that will not open the door
16 versus a question like, Dr. Dunn, you're not able to
17 offer a -- testimony on that subject.

18 And so with that attempt at clarification,
19 I'll put it over to Mr. LaFata to make sure I've got it
20 described correctly.

21 MR. LAFATA: And, your Honor, Attorney
22 Orent -- we've worked in good faith together in cobbling
23 this out. He's right to report on it.

24 It's noteworthy this is a stipulation about
25 the admissibility of Dr. Dunn's opinions and I think in

1 listening to it, you can imagine it took us some time to
2 get the wording right on the end of it.

3 So we didn't want to delay reporting back to
4 you that we have an understanding, but we're working on
5 getting that reflected. But Attorney Orent had
6 reflected that in his report to you.

7 THE COURT: Okay. And that -- that makes
8 sense to me. Everything that you've agreed to, it seems
9 consistent with -- you know, with my understanding of
10 his testimony, the scope of his testimony, and the
11 arguments that were presented about it. I'm happy not
12 to -- not to have to deal with Mr. Dunn today.

13 So we can move then into -- Spiegelberg and
14 Little, I think, are the only two that are left. Am I
15 correct that there's only one -- one challenge to
16 Spiegelberg's and Little's opinions left?

17 MR. ORENT: That's correct with one caveat,
18 your Honor, and that caveat is we filed a motion related
19 to FDA evidence overall and the --

20 THE COURT: Right.

21 MR. ORENT: -- and the defendants have agreed
22 that that motion encompasses the issue that we raised
23 here and so it does not need to be dealt with
24 separately.

25 But with that minor clarification, your Honor

1 is absolutely correct.

2 THE COURT: Okay. And that's true with Little
3 and Spiegelberg?

4 MR. ORENT: Yes, your Honor.

5 THE COURT: Yeah. They both had opined as to
6 Atrium's compliance with FDA guidance.

7 Okay. And then what are you doing with
8 Spiegelberg's opinion that polypropylene does not
9 degrade and arguing it's unreliable? What are you doing
10 with that one?

11 MR. ORENT: Your Honor, we have agreed to
12 withdraw that *Daubert* in recognition of your Honor's
13 reliance on the two cases that you cited often last
14 week.

15 THE COURT: Okay. All right. Good. All
16 right. I understand then the scope of this.

17 And what I think -- I know they're similar,
18 Spiegelberg and Little, and I'll ask counsel, would you
19 like to argue them separately?

20 MR. ORENT: For the plaintiffs --

21 THE COURT: In other words, deal with
22 Spiegelberg first and then deal with Little separately.

23 MR. ORENT: From the plaintiffs' perspective,
24 we can deal with these collectively. Our concern is the
25 same issue and --

1 THE COURT: Yeah.

2 MR. ORENT: -- I think the Court's guidance --
3 the Court doesn't need to issue two separate orders, in
4 our opinion.

5 THE COURT: Okay. Well, my guess is -- let's
6 do Spiegelberg and then I can make a decision and I
7 think it would be obvious how I would rule on Little,
8 I'm guessing.

9 So let's talk about -- let's do Spiegelberg
10 then and we'll -- we'll start with you, Mr. Orent. This
11 is motion -- it's document number 88. It's your motion
12 to exclude opinions and testimony of Stephen
13 Spiegelberg.

14 Originally, with regard to Spiegelberg, there
15 were three arguments. One, his opinion should be
16 excluded to the extent he opines as to the polypropylene
17 manufacturer's motives for warning that its product
18 should not be used in implantable medical devices. That
19 argument is still live before the Court.

20 The second argument, Spiegelberg is not
21 qualified to opine as to Atrium's compliance with FDA
22 guidance in developing its product, has essentially been
23 withdrawn because parties agree to be bound by my ruling
24 on the motion in limine that's related to that.

25 MR. ORENT: (Nods head.)

1 THE COURT: And then the third argument, that
2 his opinion that polypropylene does not degrade, you've
3 withdrawn because you think I'm likely to rule it goes
4 to weight, not admissibility.

5 MR. ORENT: (Nods head.)

6 THE COURT: So have I stated that correctly?
7 The only argument live before me now is his opinion as
8 to the polypropylene manufacturer's motives for the
9 warning.

10 MR. ORENT: That is correct, your Honor.

11 THE COURT: Okay. Well, let's go ahead and
12 start with that. And you've got 15 -- 15 minutes. Go
13 ahead.

14 MR. ORENT: Well, your Honor, I think I'll be
15 far briefer than that, quite frankly.

16 This issue is a very narrow issue and what we
17 are seeking to preclude is an opinion from this expert
18 that the manufacturer of the polypropylene plastic used
19 to make the base mesh in the C-Qur V-Patch that
20 Ms. Barron was implanted with included language on their
21 manufacturer's safety data sheet prohibiting the use of
22 the product in medical implants, as well as a 2009
23 letter warning defendants not to use this polypropylene
24 in medical devices; that that prohibition was based
25 solely or in part on liability.

1 Our opinion -- or, excuse me, we move this
2 under several different bases, but, number one, this is
3 the classic type of intent motive testimony that your
4 Honor heard argument about last week. I won't go
5 through the same litany of cases, but this is squarely
6 within the speculation as to the motives of others.

7 This is not an opinion -- an opinion that
8 would be based upon any discernible methodology, subject
9 to the *Daubert* factors of cross-examination. It would
10 be prejudicial to take what is essentially an argument
11 that is unsupported by fact and allow it to be bolstered
12 by the testimony of an expert.

13 And then, finally, to the extent that this --
14 even if this information were factually true, which we
15 believe there is no factual support for this, that it
16 would not be within the purview of any expert requiring
17 any type of explanation or opinion testimony to clarify
18 or to contextualize.

19 Now, it is important to clarify what we are
20 not seeking to exclude just as much as what we are
21 seeking to exclude.

22 We are not seeking to say that Dr. Spiegelberg
23 cannot testify that he has not seen any evidence that
24 the manufacturer had a scientific basis for including
25 this language on the document. Instead, what we are

1 focusing in on is actually testifying that the
2 manufacturer did, or likely did, or some gradient within
3 that, put this warning on their product and have this
4 policy due to liability concerns.

5 The factual record of this case indicates
6 that, number one, Lyondell Basell at all material times
7 had a policy not allowing the manufacturers to -- excuse
8 me -- the manufacturer of medical devices to use this
9 product for implants; that this warning was placed on
10 their product in a variety of different ways. It was
11 placed on manufacturer safety data sheets, technical
12 data sheets, they had a written policy, and they would
13 send cease-and-desist letters from time to time if they
14 learned of noncompliance.

15 Throughout the factual discovery in this
16 case, we had the opportunity to question a number of
17 representatives and individuals within research and
18 development at Atrium as well as in the manufacturing
19 and other areas of Atrium and the testimony leads to the
20 only conclusion that there was no one who, in fact,
21 asked Lyondell Basell why this was put on there. So
22 there is no factual information within the company's
23 records to support that it was put on there for
24 liability reasons only.

25 And, finally, no third-party discovery has

1 been done that indicates that there was a liability
2 reason.

3 So ordinarily I would say that this sort of
4 testimony would also involve a 403-type analysis and
5 would look at whether or not this is a hearsay or not
6 hearsay purpose behind the reason we're seeking to
7 introduce this evidence, the nonhearsay purpose being
8 notice and knowledge to which the factual merits of the
9 claim don't matter.

10 But in this particular case, because it's
11 unfounded -- in fact, there's no bases in terms of the
12 factual record other than the statement in the expert's
13 deposition that in his personal experience dealing with
14 manufacturers, they sometimes use a policy like this
15 because of liability, there's no other basis for this
16 statement and allowing such a statement into evidence
17 would be prejudicial and bolstered improperly by an
18 expert.

19 So for those reasons, your Honor, we believe
20 that this is not appropriate testimony to come in
21 certainly through an expert at this point and
22 particularly Dr. Spiegelberg.

23 Thank you, your Honor.

24 THE COURT: All right. And who is up for the
25 defendants on this one?

1 MR. CHEFFO: Ms. Armstrong is, your Honor,
2 who's on mute.

3 THE COURT: All right. Excellent.

4 MS. ARMSTRONG: Sorry. I apologize for that.

5 Your Honor, I don't think I will need the
6 entire 15 minutes either.

7 The lighting in my office is not the best, so
8 I apologize if I go dark periodically. I'll do my best
9 to try to stay in the light.

10 And I want to preface my argument by saying
11 that for purposes of the argument today, we're assuming
12 that the Court overrules any objection that we may have
13 to the MSDS coming into evidence or being used for
14 particular purposes at trial. Those issues aren't
15 before the Court today, so this assumes that the factual
16 record that Mr. Orent referred to in his argument is, in
17 fact, allowed into evidence and the issue before the
18 Court is just the question of whether or not or how our
19 expert is allowed to address it.

20 So to begin with, just to review
21 Dr. Spiegelberg's qualifications, because they are
22 relevant to the issue, he's a chemical engineer and a
23 polymer expert. He's the president and cofounder of
24 Cambridge Polymer Group, Inc., and in that capacity, he
25 directs a team of scientists who perform contract

1 research, analytical testing, and device development for
2 biomedical and polymer communities. He has a PhD in
3 chemical engineering from MIT, he's a postdoctoral
4 fellow at Harvard, and he's published numerous articles
5 in various fields.

6 So, for context, that's his background. His
7 qualifications aren't challenged, but I think the
8 background is -- is relevant to the issue before the
9 Court.

10 Now, to look at the exact statement in his
11 report that has triggered their motion and what they're
12 trying -- the opinion that they're trying to exclude is
13 this. And this is -- I'm quoting from his report:

14 I regularly deal with raw polymer suppliers
15 when we are developing prototype medical devices. The
16 concerns these manufacturers have about supplying
17 polymers for medical devices result from liability
18 concerns, rather than technical concerns.

19 That's the statement. It's not specifically
20 directed at Basell or Basell's state of mind -- and I'll
21 get into that a little bit more specifically -- but
22 that's the statement that's at issue.

23 And that -- and, by the way, when we're
24 talking about the statement that was made by Basell --
25 I'm going to say Basell as opposed to Lyondell Basell

1 because it's easier for me and as we noted last week, I
2 sometimes have a -- have a problem with certain words,
3 speaking out loud. But I'm going to say Basell because
4 it's easier for me.

5 When we refer to it as a warning, I'm going to
6 call it a disclaimer. The language is what it is. But
7 we would not necessarily -- we would not agree with
8 plaintiffs' characterization of it as a warning. It's a
9 disclaimer. And -- but it speaks for itself.

10 But the first reason why this does not
11 constitute a state of mind opinion is that
12 Dr. Spiegelberg's opinion in this case, which is not
13 really being challenged at this point because the
14 plaintiffs have withdrawn that part of the motion in
15 limine, but his -- his primary opinion in this case is
16 that the resin -- the polymer resin -- poly --
17 polyethylene resin used by Atrium was appropriate for
18 implantation in the body and that it was adequately
19 tested by Atrium. That -- that opinion is his primary
20 opinion and it's directly within his area of expertise
21 and it's not being challenged at this point.

22 That opinion stands in opposition to the
23 statement made by Basell that this should not be
24 implanted in the -- the disclaimer made by Basell that
25 this shouldn't be used in the human body or for medical

1 device implants. His opinion is that the material is,
2 in fact, appropriate for that use.

3 So he's taking a direct opposition position to
4 Basell and should be able to say that and he should be
5 able to say, I don't think Basell's opinion is supported
6 by the publicly available scientific evidence or by the
7 interior -- the internal testing done by Atrium.

8 That falls within his -- his area of expertise
9 and that was acknowledged by the Court in *Tyree*, which
10 was upheld in mesh MDL and that's the case that the
11 plaintiffs rely upon. That court acknowledged that his
12 opinion that the -- what they referred to there as the
13 medical application caution was not added for any
14 scientific reason. That opinion offered by
15 Dr. Spiegelberg could have been based on an analysis
16 present throughout his report. So he -- that court
17 acknowledged that he could rely upon other analysis --
18 not state of mind, but other analysis -- to support that
19 opinion.

20 And just to review the other analysis that he
21 offers for that, he cites -- he cites the long history
22 of polypropylene being safely used as a biomaterial
23 since the 1950s. He talks about the fact that over 150
24 pounds of polypropylene are used in medical devices per
25 year. He talks about that it's been extensively used in

1 hernia repair devices. He talks about that it's
2 extensively been studied for use in medical devices. He
3 describes the physical characteristics that make it
4 suitable as a biomaterial. He describes polypropylene's
5 performance compared to other bio -- other materials.
6 He describes published clinical studies documenting the
7 suitability of polypropylene for medical devices. He
8 describes Atrium's testing -- I know I'm going too fast.

9 He describes Atrium's testing of the material
10 according to FDA and ISO standards. He describes and
11 evaluates the steps taken by Atrium and/or its vendors
12 to prepare the polypropylene for use in its mesh. And
13 he describes -- and -- and I'll stop there.

14 That's a summary of the basis for his opinion.

15 So that goes beyond just saying, well, we
16 don't know whether or not Basell had that as a -- to
17 support this disclaimer or not. He's citing based upon
18 the publically available, what is known about this
19 polymer, is inconsistent with public -- with Basell's
20 disclaimer and he ought to be able to testify to that.

21 The second thing is that he's not testifying
22 to Basell's state of mind. What he is doing is he's
23 describing an industry custom. He's basically saying
24 disclaimers are routinely used within this industry by
25 material suppliers in order to limit their liabilities.

1 The first thing is, number one, I don't think
2 that's exactly going out on a limb. I think everybody
3 in this room knows that manufacturers, not just in this
4 sector, but in all sectors, routinely use disclaimers as
5 a method of liability. And he's not talking about
6 Basell's state of mind. He's talking about an industry
7 custom. And his experience within this industry
8 qualifies him to testify about that industry custom and
9 it is this -- an industry custom is the type of thing
10 that experts do testify about and he should be allowed
11 to testify in this -- in this regard as well.

12 Specifically, plaintiffs are arguing -- are
13 offering this -- these statements by Basell that at
14 least -- on at least one ground is purported notice to
15 Atrium, that Atrium was on notice of these statements
16 from the manufacturer.

17 Now, if that's the case and if they're going
18 to offer it for that purpose, then the industry custom
19 is relevant to how that notice would be received. The
20 question is not necessarily Atrium's state of mind.
21 It's not necessarily Basell's state of mind. It's what
22 is customarily done in the industry and it is why would
23 a reasonable manufacturer use this polymer
24 notwithstanding receiving such a statement from the
25 manufacturer. And in that regard, industry custom is

1 specifically relevant and Dr. Spiegelberg is qualified
2 to testify about industry custom.

3 And I would make another note. You know,
4 Mr. Orent noted that they're going to -- part of the
5 evidence that they're going to offer is that Atrium
6 didn't contact Basell to see if they had any data. I
7 think that that's a question for cross-examination, not
8 a question for exclusion. It was a -- as your Honor
9 noted last week when we were discussing the *Daubert*
10 hearings made by my defendants, but I would also offer a
11 couple of other observations.

12 On its face, the disclaimer makes no mention
13 of data supporting the statement and Basell's not an
14 unsophisticated participant in this sector. If they had
15 data, they know how to publish it. If they have data,
16 they know how to make their customers aware of it.

17 And the other thing is if you actually look at
18 the statement -- and at this point I'm going to read
19 from the letter. This was attached as Exhibit D to
20 the -- to the plaintiffs' motion.

21 It says: Basell's very clear policy as
22 expressed in our product data sheets is that our
23 materials, not -- including, but not limited to Pro-fax
24 6523 are never to be used in -- I'm not going to read
25 the entire statement, but they talk about the policy is

1 that they're not to be used as medical device -- medical
2 implants and their policy applies to all of their
3 materials, not just Pro-fax.

4 The fact that they describe it as a policy --
5 and, again, that language speaks for itself and the jury
6 can draw its inferences from it, but it's not suggestive
7 that this is an issue that is unique to this specific
8 material or that it is somehow data-driven. So in that
9 regard, again, I don't think that Dr. Spiegelberg is
10 going out on any kind of limb when he describes industry
11 custom about disclaiming things for purposes of limiting
12 liability.

13 And if plaintiffs want to use this evidence to
14 suggest that there is or their experts want to use this
15 evidence to suggest that there is some kind of data
16 underlying these statements, that's equally speculative,
17 that's equally state of mind, and Dr. Spiegelberg should
18 be allowed to describe industry custom in order to
19 refute that kind of inference that might otherwise be
20 drawn from it.

21 So I'll conclude there unless your Honor has
22 any questions.

23 THE COURT: So let me just ask. I'm wondering
24 how this opinion on liability concerns -- liability
25 suggests -- or concern about liability suggests there

1 may be a risk of harm for which liability may attach.

2 MS. ARMSTRONG: I don't think that --

3 THE COURT: So brushing off the concerns as
4 liability-related does not suggest that there are no
5 scientific concerns about the risk of harm. To that
6 extent, the opinion seems unhelpful to the jury, just on
7 a basic level.

8 MS. ARMSTRONG: Well, I think, your Honor -- I
9 think that when he refers to liability, he's referring
10 to the risk of being sued. And all --

11 THE COURT: Right.

12 MS. ARMSTRONG: -- companies -- who likes to
13 be sued. They don't like to be sued either. We think
14 that Atrium's product is perfectly good and we don't
15 believe there are good grounds for this lawsuit and that
16 we're ultimately going to recover at trial.

17 That didn't stop Atrium from getting sued.
18 That doesn't stop Atrium from spending a lot of money
19 defending this lawsuit. Companies don't like to get
20 sued and they may disclaim liability or disclaim -- or
21 include disclaimers such as Lyondell did for purposes
22 of -- as a defense to a lawsuit, to hopefully get out of
23 a lawsuit on a motion to dismiss or not be sued at all
24 and not incur litigation expenses rather than they're
25 just concerned about exposure to liability.

1 So the fact that it is -- that it could be and
2 it's consistent with industry custom that the statement
3 in the -- in the MSDS or in the letter from Basell could
4 be driven by a desire to avoid litigation as opposed to
5 any unique knowledge or data that Basell might have had
6 regarding its product, which the -- the statements don't
7 reflect and are inconsistent with publicly available
8 data, that would be helpful to the jury, I think.

9 Because, otherwise, the inference that the
10 plaintiffs would have the jurors draw is that Basell
11 knows something, that Basell has some data that isn't
12 disclosed, and -- or that Basell -- Basell knows
13 something about its product that's not otherwise known
14 to Atrium or the rest of the industry. And there's no
15 basis for that. There's a lot -- there's -- this --
16 poly --

17 THE COURT: How can you say there's no basis
18 for it, though, when the plaintiffs have experts and
19 papers that talk about the polypropylene degrading in
20 vivo or the likelihood that it would degrade in vivo?

21 MS. ARMSTRONG: Well, again, that's -- that's
22 not -- that's -- I don't have a problem with either
23 expert's -- either side's experts talking about the
24 publicly available information about polypropylene.
25 What I'm saying is that they're -- the suggestion that

1 Lyon -- that Basell had some specific information or
2 some interpretation of their -- of the publicly
3 available information that is relevant, there's no basis
4 for that. That's equally speculative. That's equally
5 state of mind.

6 And if you do not allow the expert to talk
7 about, well, here's all -- here's the reason why that
8 statement is inconsistent with what is known
9 scientifically about the product and here's why -- and
10 here's another explanation for why that statement might
11 be made based upon industry custom, if you don't allow
12 that in, then you're inviting the jury to speculate the
13 way the plaintiffs would suggest that they speculate
14 without the defendants being able to adequately counter
15 it.

16 THE COURT: Okay. I'm just going to be
17 straight with you here. I've read everything before
18 this. I've thought about this argument.

19 This is so different than the argument that
20 you made at the last hearing: Atrium did a study on X,
21 that study reached a conclusion on X and their expert
22 was simply going to say one plus one equals two. The
23 expert was going to say Atrium knew of the conclusion of
24 X.

25 And you said, Judge, keep that out; that

1 expert is opining on Atrium's motives. That's what you
2 argued. And I thought -- and, as you know, I said, I
3 need to hear that in context. But my first instinct was
4 that's one plus one equals two.

5 This is very different from that. This is a
6 warning placed on a product by company Y and the warning
7 states what it states. And you're asking me to allow an
8 expert to opine on the reasons why they put that
9 statement there? That's classic motive and intent.

10 And so, for me, this is a bold argument that
11 you're making in light of what you argued with respect
12 to Langstein and Klinge, I believe were the two
13 witnesses who made that one plus one equals two. But I
14 was willing to -- to say, yeah, there is some way in
15 which they are opining as to what Atrium knew, but
16 ultimately it's such -- it's not a factual leap.

17 This borders on -- and this is not coming in
18 under any circumstances. I can tell you that. And I --
19 I look at *Tyree* and it looks like Spiegelberg's opinion
20 was excluded for the same reason. The Court said that
21 it wasn't grounded on scientific analysis, but rather on
22 his personal belief and experience and because testimony
23 as to the knowledge, motivations, intents, state of mind
24 or purposes of a company and its employees is not a
25 proper subject for expert or even lay testimony.

1 I see him completely as an expert on polymer
2 chemistry. No question he can say that this product is
3 not going to degrade in vivo if he has the ability and
4 the expertise and the data to say that. That's not a
5 stretch.

6 But I'm not going to allow him to opine
7 about -- about the motives of the company that put the
8 very statement on the product. That is not happening in
9 this case. In this -- in this trial, that is not
10 happening. That would be error of -- of huge dimension.
11 I -- I am not going to have a jury sit there and listen
12 to an expert on chemical polymers talk about the motives
13 of a company who puts a warning on its product, a
14 warning that apparently there is expert data and there's
15 science that supports the warning. But you're going to
16 have an expert tell the jury, well, you know, they were
17 motivated to protect themselves from lawsuits like this
18 one. It is not happening in my courtroom. That
19 argument is not occurring.

20 And it is -- to the extent that you wanted to
21 have these two experts, Little and Spiegelberg, testify
22 as to Basell's or industry standards about the motives
23 with respect to liability and preventing lawsuits, that
24 is granted. 100 percent granted. There is no room --
25 no room for argument.

1 I think there's a teeny, teeny bit of wiggle
2 room with respect to Langstein and Klinge, but,
3 honestly, those -- that's night and day in terms of the
4 differences here in terms of motive and intent. And the
5 improper commenting on that here is just -- this is a
6 bold argument, especially in light of the fact that you
7 were challenging the ability of Langstein and Klinge to
8 opine on something that was just, frankly, common sense
9 and obvious, that Atrium would know about its own
10 studies.

11 So that I'm going to give short shrift,
12 because that's what it deserves, that argument, in both
13 Little and Spiegelberg.

14 So with respect to document number 88, that is
15 granted.

16 Plaintiffs have withdrawn the motion to the
17 extent it argues that Spiegelberg's opinion that
18 polypropylene does not degrade as unreliable and
19 speculative.

20 Plaintiffs have additionally withdrawn the
21 motion to the extent it argues that Spiegelberg lacks
22 qualifications to opine as to Atrium's compliance with
23 FDA guidance for development of medical devices.

24 But with respect to his offering the opinion
25 that the manufacturer of the polypropylene Atrium uses

1 to make its surgical mesh product lacked any scientific
2 reason for warning that its product should not be used
3 in implantable medical devices and that the manufacturer
4 included that warning in its material safety data sheets
5 solely due to unspecified liability concerns, to the
6 extent plaintiff seeks to prevent Spiegelberg from
7 providing that opinion testimony, the motion is granted
8 for the following reasons, some of which I've already
9 stated.

10 Under Federal Rule of Evidence 702, a
11 qualified expert may testify in the form of an opinion
12 if the testimony is based on sufficient facts or data.

13 Spiegelberg's opinion that the manufacturer
14 lacked a valid scientific reason for providing its
15 warning is not based in his own scientific analysis or
16 expertise, but rather on his acquaintance with
17 representatives of unspecified polymer suppliers. This
18 is an inadequate factual basis for the proffered
19 opinion.

20 To the limited extent Spiegelberg may intend
21 to base his opinion on his assertion -- and you didn't
22 talk about this specifically in the argument, but it's
23 in your briefing -- that polypropylene has the same NFPA
24 hazard rating as ultra high molecular weight
25 polyethylene, which is used for hip and knee permanent

1 implants, the Court finds his opinion inadmissible as
2 well.

3 Nothing in the Court's record suggest that the
4 National Fire Protection Association hazard rating
5 system is intended to provide information relevant to
6 implantation of medical devices.

7 Courts to have considered the question
8 generally found that opinion as to the intentions or
9 motivations of corporations is outside the proper scope
10 of expert opinion, particularly where such opinion lacks
11 an adequate basis in fact.

12 And I would cite to *Doe vs. Pike* and *In Re:*
13 *Rezulin Products Liability Litigation*. *Doe vs. Pike*, a
14 Massachusetts, District of Mass. 2019; *In Re: Rezulin* is
15 a Southern District of New York 2004.

16 The motion is, therefore, granted as to
17 Spiegelberg's proffered opinion regarding the
18 polypropylene manufacturer's purported motives for
19 warning against the use of its product in medical
20 devices. All such opinion testimony will be excluded.

21 And what I'd like to do is just simply say the
22 same ruling applies to Little, but to the extent there
23 are differences or there's something I need to clarify
24 with the record, let me know. But I would grant the
25 motion with respect to Mr. -- Dr. Little opining in the

1 same way. I would grant that in full.

2 Anything else to say with regard to the
3 pending motions? Because I know we want to talk about
4 the -- talk about online questionnaire and voir dire.

5 MR. ORENT: Nothing from the plaintiffs, your
6 Honor.

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

9 THE COURT: Okay. All right.

10 I have invited our court's -- the chief deputy
11 clerk of our court who, frankly, knows all things --
12 COVID protocols and knows all things jury-related and
13 has helped me with -- in every case with online
14 questionnaires and the process. It would be different
15 if we do an in-person or a hybrid in-person trial versus
16 if we do a video entirely trial.

17 So, Tracy -- I'm going to have Tracy here to
18 take your questions. Her last name is Uhrin. And she
19 would be helping us during a video trial or training the
20 people who would be helping us during a video trial.

21 And so let's -- let's -- let's talk about the
22 online questionnaire process and the questions you may
23 have.

24 I'll let Tracy just summarize for you how we
25 do it generally and then we'll -- we'll follow up with

1 some questions and we'll develop maybe a timetable.

2 DEPUTY CLERK UHRIN: So -- so in the past, in
3 trials we've had so far, we issue a questionnaire to the
4 jurors that are -- like a subset of jurors that are kind
5 of designated for your case and we ask kind of general
6 voir dire questions. Now, in a civil case, it's a
7 little bit tricky because most of the general voir dire
8 questions kind of relate back to the topics that are
9 involved in the case.

10 So -- but in the -- for prior trials we have
11 not identified the case that the jurors are being -- or
12 asking -- being asked questions about. So we kind of
13 keep that a mystery, but we ask general voir dire
14 questions.

15 I think the trade-offs are -- for you to
16 consider is if you disclose the name of the case,
17 obviously that can give jurors an opportunity to
18 research the case in advance. But, again, with the
19 standard civil voir dire, it can be tricky to ask
20 questions to get at juror bias without disclosing
21 something about the case. So -- but we can ask whatever
22 questions you'd like.

23 I think we also always ask the question about
24 the schedule so that we can make sure that jurors who
25 won't be available for the trial can be vetted in

1 advance.

2 And we also ask some questions about COVID,
3 which, again, those questions may or may not apply,
4 depending on the structure of your trial and your jury
5 selection.

6 Generally the schedule is -- Judge, is this
7 scheduled for jury selection the 20th?

8 THE COURT: Yes.

9 DEPUTY CLERK UHRIN: Okay. So I was looking
10 at a calendar earlier and generally we would issue maybe
11 those questions to the jurors, say, you know, give or
12 take January 4th, give the jurors about four days to
13 respond, provide the first set of responses of people
14 who do it by the deadline to counsel the next day and
15 then we'll send you a couple updates with stragglers.

16 And then we usually set a deadline maybe the
17 following week, on the -- let's see, like the following
18 Wednesday or so for counsel to meet and confer and
19 notify the Court of which jurors they agree to strike
20 for cause. And so we might start with, say -- I mean,
21 we might start with 150 jurors who get this
22 questionnaire and then we just kind of whittle it down.

23 So there might be jurors that you agree to
24 strike for cause. We get down to a smaller subset that
25 then participate in the additional steps of jury

1 selection. And, again, depending on the structure of
2 your jury selection will kind of depend on how that
3 goes.

4 So --

5 THE COURT: We would come together -- we would
6 come together, we would agree on the online
7 questionnaire.

8 DEPUTY CLERK UHRIN: Right.

9 THE COURT: It's going to be my standard civil
10 voir dire questions, which you've heard in every civil
11 case you've ever done. Then I will have gone through
12 your proposed voir dire and I will have looked at that
13 for standard-type questions that I completely think are
14 fine.

15 I usually allow questions. Generally I
16 rewrite them typically because they're usually too wordy
17 and they're just a little hard to understand. I will
18 simplify them, but I generally give lawyers the
19 questions they're asking for unless they're like
20 unreasonable, which is rare.

21 And so we would agree on an online
22 questionnaire. We have to strategize depending upon,
23 you know -- I guess we could tell them -- they'd have to
24 know the name of the parties because they'd have to know
25 that for any sort of conflicts. And then we would ask

1 them, you know, questions specific to the case and we
2 would just have to decide do we want to do that as part
3 of the online process and the culling process before we
4 do the either in-person voir dire or the equivalent via
5 video.

6 Is that right, Tracy?

7 DEPUTY CLERK UHRIN: Right. And what I would
8 add is what -- what we'd include in the online
9 questionnaire may be somewhat determined by what type of
10 jury selection we do.

11 So if there is still going to be an in-person
12 jury selection at the courthouse, then we would have a
13 little more flexibility on which questions actually get
14 into the online questionnaire and we can be selective
15 about what information we provide to the jurors in
16 advance for the purposes of culling them and which
17 questions just only get asked at the courthouse.

18 If we're doing an on -- if there's an online
19 selection where the jurors are being examined by Zoom,
20 say, then it's more important that they get the complete
21 set of voir dire questions in advance, including the
22 case information, attorney information, all the issues
23 in the case, so the complete set of voir dire that would
24 have been asked at the courthouse.

25 THE COURT: If it's in person, what we do is

1 we bring in whatever number -- let's say there's 70
2 after you have gone through and agreed on for-cause
3 strikes and we've whittled it down. There may be 70
4 left, probably less in a civil case, although this one
5 is an unusual civil case because it's going to require a
6 month of their time. So maybe we would want to have a
7 bigger group.

8 So we would bring approximately 70 to the
9 courthouse, we put them ten in separate courtrooms or
10 thereabouts -- 10 to 12, Tracy? -- in separate
11 courtrooms.

12 And we have multiple courtrooms and we have a
13 ceremonial courtroom which is very large and the air
14 flow is good and there's a way to space everybody and
15 still maintain, you know, a six- to ten-foot distance
16 between jurors. And that's the room where you exercise
17 your peremptories and you actually fill the jury box.

18 But they are coming in for their individual
19 voir dire in groups of -- well, they come in one by one,
20 but they come in in groups of ten and Tracy and her crew
21 are staging it so that they're keeping their distance
22 and they're walking in one at a time.

23 We have headphone systems that are very, very
24 good, very sensitive, so that you lawyers have them on,
25 the judge has them on, the prospective juror is wearing

1 them, and you're whispering and you can hear them. You
2 can hear them perfectly. In fact, if they talk with the
3 voice level I'm speaking at, it will blow people's ears
4 because it's so sensitive.

5 And so you engage with the juror with the
6 individual voir dire as you would at sidebar, but you
7 engage with them with their headphones on, the judge is
8 listening, the lawyers are listening, and the juror is
9 answering questions.

10 Then we move the juror away, we discuss -- we
11 discuss what -- what we're going to do with the juror,
12 and then I make a ruling on whether they're excused or
13 qualified.

14 And then, Tracy, if they're excused, they're
15 out of the building, they're gone for the day?

16 DEPUTY CLERK UHRIN: (Nods head.)

17 THE COURT: And if they're qualified, they go
18 into a separate courtroom and they wait and we limit
19 the numbers in that courtroom and keep them socially
20 distanced and we're monitoring this the whole time until
21 we get down to that number that we need for you to
22 exercise your peremptories, and that happens in the
23 ceremonial courtroom, and then we have a jury.

24 And it's been successful each time that we've
25 done it. It was masterminded by the person on the

1 screen here, Tracy Uhrin. And so I'm very confident in
2 that procedure.

3 If our numbers do start to head down again,
4 which I'm really hoping for -- in New Hampshire right
5 now they're headed straight up. But if they can go back
6 down, if they can dip back down, I know that I'm very
7 confident in our -- in our jury trial COVID procedures
8 and I'm confident in our courthouse. It's just that
9 there are a lot of moving parts with this particular
10 trial because there's so many out-of-state people, so
11 many out-of-state witnesses, that if we're doing it in
12 person during COVID, it -- it could be very challenging,
13 just because you're coming into New Hampshire and
14 New Hampshire has the required 14-day quarantine.

15 Now, you can do that, you can quarantine in
16 your home state, but you've got to drive into
17 New Hampshire. You can't be flying or taking public
18 transportation into New Hampshire. If you do that,
19 you've got a 14-day quarantine when you get to
20 New Hampshire.

21 So it's very complicated because of the number
22 of people involved that are out of state for an
23 in-person jury trial. However, as you know, I've
24 thought about a hybrid possibility and, you know,
25 obviously we can talk about that as well.

1 But that's how the jury selection process goes
2 for an in-person jury and then obviously we would adjust
3 it for a video selection.

4 For people who don't have Internet, we will
5 offer a laptop in a courtroom in our courthouse and they
6 will be able to have Internet. We will have tech --
7 tech service available for them and they'll be able to
8 participate using a laptop in our courthouse. And we
9 would set that up -- we have multiple courtrooms, we
10 have a jury assembly room, we would have places to put
11 people who would need the Internet and need a computer
12 in order to do this via video.

13 So that's -- so that's an issue that we've
14 thought about and we're prepared to -- to deal with.

15 With respect to a trial, once we get our trial
16 and we get our jury, we can think about how we take care
17 of people who don't have -- who don't have a laptop.
18 Maybe they have Internet access, but they wouldn't have
19 the ability to have a laptop. Maybe the court could
20 supply an iPad. We'll cross that bridge when we get
21 there, but these are things that the court is thinking
22 about.

23 What questions did you all have? I'm glad
24 you're thinking about this ahead of trial. The sooner
25 we can make these decisions and we can get our ducks in

1 a row in terms of voir dire and in terms of the process,
2 the better off we are.

3 MR. ORENT: Judge, this is --

4 MR. LAFATA: Go ahead.

5 THE COURT: No, no, you go ahead. Oh, it was
6 Attorney Orent. I'm sorry.

7 MR. LAFATA: Yes.

8 MR. ORENT: Your Honor, from the plaintiffs'
9 perspective, we had a number of questions about the
10 process, but one of the big questions is hardship.

11 As we are looking at, you know, COVID, I know
12 that the court has some standard conditions on hardship,
13 but one of the issues that's -- that's occurred to me is
14 that there may be folks who -- if we go to a situation
15 where the New Hampshire school system shuts down and we
16 don't want a certain population of people, that is,
17 parents, to not be able to participate because of that.

18 And so I guess what I'm asking is if we get
19 into a situation like that and we're doing a remote
20 trial -- sort of two parts: Number one, would they have
21 the ability to come into the courthouse to watch the
22 trial in a -- in a secured area if we're doing a full
23 remote trial such that there wouldn't be the
24 distractions of home or whatnot if that's an issue; and
25 then the second part of that is would we consider

1 adjusting the length of our day so if parents need to do
2 some assistance with school, they can still be on a
3 jury, if need be.

4 And I'm not necessarily suggesting that that
5 is something we need to do, but, really, just throwing
6 that out there for thought and discussion. Those are
7 the primary two questions that I had, your Honor.

8 THE COURT: I think those are questions that
9 we can cross the bridge when we get there. I think the
10 hardship issue probably will come up. It's probably
11 good to discuss it and come up with options to offer
12 individuals and maybe come up with an agreed procedure
13 that we'll use.

14 And with regard to a fully remote situation, I
15 think we would have the capability to offer a room for a
16 juror who needs that at any point during the trial.

17 And what we're doing is we are having some
18 in-court hearings and we are having jury trials. This
19 trial -- if this was fully remote, my -- I wouldn't want
20 to be getting in the way of judges having jury trials,
21 in-person criminal jury trials. So we would probably
22 still have those, but we could safely use one or two and
23 we could find other rooms, too, where I think there's
24 good air filtration, ventilation, that are safe. So I
25 think we could cross the hardship bridge and come up

1 with solutions to that.

2 With regard to the shorter day, I think,
3 again, we've had three criminal jury trials. They've
4 been a week -- they've been a week in length, each one
5 of them, and some of them longer. And the judges have
6 gone generally from 9:00 to 5:00, 9:30 to 5:00, 9:00 to
7 4:00.

8 In Massachusetts, I know that Judge Saris just
9 did a jury trial, criminal trial, and I think she -- she
10 was thinking about a shorter day. And I know in
11 Massachusetts they generally use a shorter, more
12 truncated jury trial day. But it's going to depend on
13 how things are going. I think you're talking about
14 being on video for -- for eight hours is just going to
15 be too much for people.

16 MR. ORENT: I think a combination of that, but
17 also my concern, quite frankly, is, you know, having
18 lived through the fall with two kids of school age, I
19 know that even though online learning is supposed to be
20 an individualized effort, very often the parents are
21 involved in doing a lot for their kids. And so, you
22 know, we wouldn't want to prohibit any of those folks
23 from, you know, participating in the jury.

24 And so if it needs be, and I'm not saying that
25 this is something that we're pushing for, but, in fact,

1 I'm hoping that we can avoid any hardship, but I would
2 just hate to lose any large fraction of the jury due to
3 that. And so I'm sort of throwing it out as an issue
4 that we should think about and if it becomes a problem,
5 address it, but, yeah, that was one of the things that
6 came to my mind.

7 THE COURT: Okay. Tracy, do you have any
8 ideas with respect to that?

9 DEPUTY CLERK UHRIN: So -- and this is -- in
10 the situation where we have -- where the jury -- it's
11 not the hybrid model, where the jurors are in the
12 building, but the -- a situation where the majority of
13 the jurors or the -- or the presumption is that the
14 jurors are at home and participating by Zoom? Is that
15 correct?

16 MR. ORENT: Yes.

17 DEPUTY CLERK UHRIN: Then, I mean, I think we
18 do have some places in the courthouse. We certainly
19 have laptops that the jurors could use in our building.
20 It would just be an issue of, you know, how many that
21 winds up being.

22 And, also, some respects whether the jurors
23 also need to individually be separated. So I can see a
24 question about whether, you know, if there's four jurors
25 who are at the courthouse together and then the rest of

1 the jurors are at home separately, I don't know whether
2 that's an issue for anyone, but we need to keep those
3 jurors separate, the ones that are at the courthouse,
4 and that would just be another logistical question.

5 But I don't have any concerns about our
6 ability to do that. It would just be questions like
7 that, like what is the expectation of counsel and the
8 judge when the jurors are at the courthouse.

9 MR. CHEFFO: Your Honor, I mean, I -- to take
10 the point, I think we all would like to make this as
11 accommodating for anyone, so that's, you know, not an
12 issue. I think it's -- you're kind of suggesting that
13 we probably need to think about this and have protocol
14 and things that we could, frankly, just -- just,
15 practically, if somebody has a small child, even if we
16 were to do it four or five hours a day, they still have
17 to drive to the courthouse.

18 And, I mean, so some of these things may not
19 really make that much of a difference, or they may, but
20 I think it's probably something we need to kind of think
21 about and then probably, you know, get the Court's
22 guidance about what it's going to look like in terms of,
23 you know, the -- the kind of venire.

24 MR. ORENT: Your Honor, one other question
25 that we had was -- and Mr. LaFata and I have been

1 working on a supplemental juror questionnaire, you know,
2 the sort of questions that could be published online,
3 and we have exchanged drafts. I don't think we're too
4 far apart at this point.

5 But I guess the most pressing question is when
6 would the Court like that by to start looking through
7 and deciding, you know, whether or not our questions are
8 acceptable and what's that lead time that you need so
9 that everything from a technological standpoint can go
10 smoothly?

11 THE COURT: I think that you get that to me
12 sooner rather than later and I'll try to get it ruled on
13 and we can have another -- to the extent we need to
14 hammer anything out, we can have another quick meeting
15 via Zoom and finalize that online questionnaire.

16 And then Tracy would just need it a certain
17 number of days before technically our jury selection,
18 right? When would you send that out to the venire?

19 DEPUTY CLERK UHRIN: So, you know, the latest
20 I'd want to send it out is January 4th. I maybe would
21 want to send it out sooner except then we're getting
22 into the holidays and I'm worried that people might
23 miss -- people -- we might have fewer people who miss
24 it, but -- who don't get it. But maybe we could send it
25 out the week before and then send a reminder on the 4th.

1 Because of the length of this trial, it's not
2 so much that I think we need time to process it or the
3 jurors need time to answer the questions, but we -- if
4 the -- probably the more advanced notice we give a jury
5 panel that they may be -- that they've been kind of
6 selected for a trial that could last three to
7 four weeks, maybe the longer -- maybe the more likely it
8 is that the jurors can kind of rearrange -- make
9 arrangements to be available. If we tell them that for
10 the first time on January 4th, even that might not be a
11 lot of notice.

12 So I've kind of been thinking as -- about this
13 as you've been talking and I originally had thought we
14 would publish it on January 4th, that would be our
15 normal schedule, but I wonder if it makes sense to
16 actually publish it sooner so that jurors can start
17 thinking about making arrangements.

18 I'm also vastly increasing the numbers of
19 jurors we should send this to in my head because I do
20 think we're going to get -- I think you're going to get
21 a -- I think the bulk of the discussion that you have in
22 advance of selection about people who should be struck
23 for cause are going to be those people who say there's
24 no way I can do three to four weeks.

25 MR. ORENT: Okay.

1 THE COURT: I will let you know, and Tracy can
2 give you the anecdotal evidence, but our jurors have
3 been, thus far, very eager to serve. We've been
4 somewhat surprised but in awe of these New Hampshire
5 prospective jurors. And once they're done serving,
6 they've been very grateful that they had the opportunity
7 and they felt very safe. That's the feedback we've been
8 getting after our -- our COVID jury trials.

9 We have paused jury trials for the month of
10 December. Our court decides this on a month-to-month
11 basis with respect to jury trials and we have done a
12 very -- I'm very proud of our court in terms of how
13 we've handled COVID.

14 We did jury trials -- we were one of the first
15 courts to really start doing jury trials and we have a
16 process with respect to picking those -- prioritizing
17 our criminal cases and then allowing more recently some
18 civil cases to have a sort of rolling priority.

19 But we -- we decided to pause jury trials for
20 the month of December just the other day, I mean very
21 recently, which I think is also a smart decision. We're
22 not pausing anything else; we're still doing our
23 in-court hearings, grand jury is still happening, we're
24 doing sentencing hearings, change of plea, because they
25 involve smaller numbers coming to the courthouse, but

1 the numbers in New Hampshire are exponentially
2 increasing, as they are everywhere, but here they really
3 are going up very, very quickly. And the governor
4 anticipates 500 to a thousand people, new positives,
5 every day by the end of November. So we -- we are
6 pausing jury trials in December and we will make a
7 decision on January jury in-person trials in -- probably
8 end of December.

9 I'm not hopeful about -- I'm not hopeful about
10 the numbers in January, but that's just me telling you
11 and being transparent because I've been watching this so
12 carefully since mid-March. I'm not that hopeful about
13 January, but I am hopeful and I'm confident that if we
14 do a video trial in this case that it will be done well
15 and that we'll have good protocols.

16 And my -- my experience -- and I know I'm a
17 broken record, you've heard me try to sell you on video
18 trials already -- but our experience with them so far in
19 terms of evidentiary hearings -- we have not had a trial
20 yet, but evidentiary hearings that have lasted multiple
21 days -- it has been a successful experience from
22 everybody's standpoint and viewpoint. So I'm confident
23 that -- that we have the technology and we have the
24 ability to pull it off if it ends up that we can't do an
25 in-person jury trial.

1 I also really like the idea that I came up
2 with at one of our conferences of doing a hybrid, where
3 I would oversee a jury and then we could deal with some
4 of those more difficult issues because I would be with
5 the jury and we could spread out in a courtroom and be
6 safe even -- even if the numbers get -- get very bad. I
7 think we could still do that fairly safely.

8 The problem is that I would be -- I would be
9 monopolizing a courtroom for a month and with a -- a
10 jury and so we'd have to figure out exactly how we
11 handle that. Tracy would figure it out, I have no
12 doubt, but we'd have to --

13 DEPUTY CLERK UHRIN: I'm sure we could --

14 THE COURT: -- figure out how we would -- but
15 I'm confident in our protocols. Our infectious disease
16 expert really loves our protocols. He thinks they are
17 outstanding. And so it may be that we could pull off
18 some sort of hybrid jury trial, even if it's -- even if
19 it remains rather dark and bleak.

20 So --

21 MR. ORENT: Your Honor, could we start raising
22 with the Court in terms of getting our technology set?
23 I know that we at least behind the scenes on the
24 plaintiffs' side and I presume Mr. LaFata and Mr. Cheffo
25 and their team, Ms. Armstrong, are doing the same, but

1 in terms of -- there's a certain element of this trial
2 that's definitely going to be a video trial and so I'm
3 wondering if -- just to make sure that we're ready to go
4 from a mechanics standpoint, the -- you know,
5 understanding all the technological details that need to
6 be done, I think from -- at least from our perspective,
7 the sooner that we can start working and collaborating
8 to find the solutions and protocols, the easier it'll be
9 for everyone in the long run. So we're open to that, I
10 guess is what I'm saying.

11 THE COURT: Okay. Excellent. I -- I'm happy,
12 too, to come up with maybe a procedural order that sets
13 out a timeline by which we should have certain things
14 lined up, like the voir dire and the online
15 questionnaire.

16 Perhaps -- perhaps we make that the next thing
17 that we do together and you just let me know -- would
18 ten days be enough for you to finalize your voir dire,
19 your online questionnaire?

20 MR. LAFATA: Your Honor, I think so. And as
21 Attorney Orent had mentioned, we have been working very
22 closely on a number of exchanges, exhibit lists,
23 deposition designation, witness lists. We've actually
24 gone down those roads together.

25 We've also been working together on an online

1 questionnaire. I think a ten-day -- from my
2 perspective, a ten-day proposal sounds reasonable.

3 And the parties have made some very good
4 progress on taking care of as much as we can in advance.
5 So bringing Ms. Uhrin together with -- in this
6 discussion is very helpful for us because Attorney Orent
7 and I can talk a lot, but we can only go so far until we
8 find out what the Court's preferences are and the online
9 questionnaire and that sort of thing.

10 So I think that's a reasonable proposal. Many
11 of the other things the Court may have had in mind could
12 be complete already. I know the parties have been
13 exchanging a lot of pretrial information so far.

14 THE COURT: Well, I'm trying to get you
15 rulings on things swiftly so that that will also help
16 you figure out your exhibits, help you figure out how
17 the trial will go, and I'm going to continue. There are
18 still pending motions obviously that I'm going to rule
19 on for you. So I'm working on those.

20 And what we could do is let's schedule our
21 next hearing ten days out and I'll have Donna
22 communicate with counsel to pick a time and a date that
23 works and we will finalize that online questionnaire,
24 which will make Tracy very happy and then she can decide
25 when to distribute that. She'll distribute it and then

1 we'll get the jurors' answers and then you'll have
2 copies of those.

3 And, frankly, you will be working on it
4 without my knowledge or awareness. You'll just be
5 working on it and deciding which jurors you're striking
6 for cause by agreement and culling the jury pool. And
7 then at that point we'll have our prospective juror
8 venire and we'll figure out how we go from there.

9 It does make a difference if they're in person
10 versus video, so that's one decision we're going to have
11 to -- have to figure out.

12 MR. ORENT: Right.

13 MR. CHEFFO: And, your Honor, you may have
14 said it. That was going to be my final question, is --
15 is, you know, I mean, not arguing the merits, but I
16 think, you know, at least one of the issues, the main
17 concerns we've always had, right, is having just
18 folks -- whether it's six hours, eight hours, ourselves,
19 you know, in our house somewhere watching a screen. So
20 you know our view has been if -- you know, live or at
21 least some type of hybrid.

22 But to the more process issue, do you have a
23 sense -- is that something you think you will need to
24 kind of wait until the end of December or is that
25 something that you can -- you can tell us it will either

1 be full-on live or it will be a hybrid live with maybe
2 the one attorney, you said, or have the jury in the
3 courtroom; is that -- not to press you, your Honor, but
4 that will help us --

5 THE COURT: No, no, no. I'm -- I think you
6 know that I'm transparent. I'm going to tell you what I
7 think.

8 And as I sit here right now, I think the most
9 likely thing would be a hybrid of some sort. That's
10 because I don't -- I don't see the numbers taking a big
11 downturn in January. I hope they do. I don't see that
12 happening. I see post-Christmas -- I see them going up.

13 However, I really am comfortable with the idea
14 of having myself and a small number of jurors. That's
15 a -- that's a catch, too, because this is a month-long
16 trial. The thought of having a small number of jurors
17 is a bit risky because we're going to have people who
18 get exposed to COVID or family members get exposed and
19 they're thereby quarantined and, therefore, off the
20 jury. So we're going to have to account for that in the
21 number of our jurors, which then limits me in terms of
22 my comfort level for being in the courtroom with that
23 number of jurors.

24 What do you think would be a fair number of
25 jurors? A jury of eight and then how many alternates?

1 My civil juries are juries of eight generally. And
2 in -- according to Federal Rules of Civil Procedure,
3 alternates deliberate. They stay and deliberate with
4 the jury.

5 So we would be picking alternates with it in
6 mind that some people are going to be exposed in some
7 way to COVID and have to quarantine.

8 MR. LAFATA: We've been contemplating the
9 need, your Honor, to have additional jurors in a number
10 of these phases, not only in the original pool that
11 you'd narrow down because of an increased likelihood of
12 COVID-related hardships or other hardships, but also
13 because of the duration of the trial.

14 We've also been contemplating the likelihood
15 of the need of a few more alternates than may be
16 typical. I think that we have proposed in the
17 neighborhood of four alternates as opposed to -- which
18 is, you know, more than I think would be typical, but
19 we're just trying to think of many of the things the
20 Court has said, what will happen if jurors have issues
21 come up that we can't foresee and we don't want to have
22 something unavoidable happen in the middle of trial.

23 MR. ORENT: Your Honor, from the plaintiffs'
24 perspective, we, of course, recognize that the Court's
25 preference is eight jurors and that there is no

1 distinction between alternates and jurors under the
2 federal process. We also have the burden of proof.
3 And, you know, quite frankly, the more jurors we add,
4 that does impact our case potentially.

5 And so we -- I think our preference would be
6 to stick with eight and if that required us to move to a
7 more remote situation to account for that, that people
8 will need to quarantine and this way they can quarantine
9 and watch the trial, that would be our preference, quite
10 frankly, your Honor.

11 THE COURT: Okay. Well, I think I would be
12 inclined to have at least four alternates, so I think
13 I'd be inclined to have 12 sitting there in the jury
14 box. And I think that is probably the lowest I would go
15 because I can just foresee four of them are going to be
16 gone. Let's just say it. Four people are going to be
17 exposed to COVID somehow, some way, or some family
18 member is going to be exposed, unless the numbers go
19 way, way, way down.

20 So I think you'd end up with a jury of eight
21 or six, if we're lucky. And if it goes below six --

22 MR. ORENT: Right.

23 THE COURT: So ultimately I think you do want
24 to have a verdict in the trial and so I think we've got
25 to have a jury of at least 12.

1 What do you think, Tracy --

2 DEPUTY CLERK UHRIN: Yeah.

3 THE COURT: -- for a jury of a month long?

4 DEPUTY CLERK UHRIN: Yeah. I mean, in our
5 criminal trials, we selected four alternates for all of
6 our -- all three of our jury -- criminal jury trials
7 we've had so far. The longest was about a week. And we
8 used alternates in every case, some of them even before
9 the trial started, between selection and -- and so --
10 and that was when the numbers in New Hampshire, the
11 COVID numbers, were much, much lower.

12 And so I think what we're seeing now in
13 New Hampshire is that it's very, very common for people
14 to have to quarantine because of exposure to a positive
15 case. And so that can keep me up at night, having
16 fewer.

17 MR. ORENT: Well, your Honor, as I indicated I
18 think previously, our preference is to move this trial
19 along as quickly as we can and I am very understanding
20 as to what the Court is saying and what the Court's
21 experience has been and we certainly won't be an
22 obstacle to that.

23 THE COURT: And I can tell you that I think
24 I'm most comfortable with a hybrid solution and maybe
25 allowing one lawyer from each side to be there in person

1 and I just need to figure that out in terms of spacing
2 and numbers.

3 But I think -- I think that's what -- that's
4 where I'm leaning as I sit here right now. And I will
5 tell you and update you every time we meet via Zoom,
6 which I think will be frequent as we plan the details
7 for this. I'll tell you exactly what I'm thinking as we
8 go and we'll -- we'll figure it out. And I'll listen to
9 your suggestions and your thoughts and we'll figure this
10 out together.

11 MR. LAFATA: Thanks, your Honor.

12 THE COURT: All right. So ten days out,
13 some -- somewhere in there, Donna Esposito will schedule
14 us a Zoom to iron out any sort of issues on the online
15 questionnaire and then we will talk about the next thing
16 that we should plan for, which might be to begin to plan
17 for some of the protocols. Right now I'm thinking a
18 hybrid, so protocols for witnesses to testify via video,
19 exhibits to be presented via video, protocols for that.

20 I think we might need protocols for jury
21 selection via video because I'm not sure how comfortable
22 in late January I'll be bringing in, you know, 70
23 people, having 70 citizens walk into our courthouse.

24 Part of the issue is that we are -- the judges
25 are very educated on the risk and the things that we can

1 do to mitigate the risk. And we are comfortable with
2 our infectious disease expert, we are comfortable with
3 our protocols. We know that if we are having a jury
4 trial and we are keeping our jurors separate, separated
5 by six feet, and we keep Level 3 surgical masks on them
6 at all times and we keep them apart and we monitor that,
7 because the air filtration in our courthouse is good, we
8 know that if a juror comes down with COVID in the middle
9 of the trial, we remove the juror and we continue with
10 the trial because our protocols are so good that there's
11 no need under state guidance and under CDC guidance, and
12 we've consulted the experts on this, there is no need to
13 stop the trial.

14 But jurors -- to keep asking citizens to come
15 into your courthouse and accept a level of risk that
16 they don't necessarily understand, especially with this
17 exponential growth in numbers, that's something that's
18 hard to make people do. And so that's another practical
19 reason the Court is just pausing at this time as people
20 are looking around and thinking, oh, my God, everybody I
21 know is being exposed to COVID. That's just another
22 practical reason we're concerned about inviting, you
23 know, citizens into the courthouse at a time like this
24 where, you know, if you don't have all the knowledge,
25 all the expertise, I think I'd step in and say, no, I

1 wouldn't want my family member going to serve on a jury
2 in a courthouse where I'm not familiar with protocols,
3 I'm not familiar with the building.

4 So I think come January 20th, if it's still
5 really bad, I think we would need to come up with
6 protocols to pick our jury via video so that we can do
7 that and eliminate -- eliminate the risk.

8 DEPUTY CLERK UHRIN: And one thing I'll add
9 is that, you know, when we're thinking about how we want
10 to -- what questions we want to issue in the online
11 questionnaire, obviously if we include the complete set
12 of voir dire when we send out the questionnaire, that
13 gives us the maximum flexibility later on to decide how
14 we want to do jury selection.

15 So we could -- if there's a comfort level with
16 just issuing a complete questionnaire, the complete voir
17 dire and -- in an online questionnaire to the jurors, we
18 can do that and then we can decide later, okay, well, we
19 want to do selection by video or we're okay doing it at
20 the courthouse.

21 So that may buy us some time in how and when
22 we make that decision, where if we -- if we only do a
23 limited subset of the questions online, then that kind
24 of ties our hands as far as doing a completely online
25 jury selection.

1 MR. LAFATA: In a -- in a completely online
2 jury selection, I understand from the Court's rules that
3 it's open-minded to attorneys asking follow-up questions
4 from what comes in from the questionnaire. I don't --
5 would that be possible then, if -- if there's a
6 questionnaire that's got -- that has voir dire questions
7 that the parties submitted and the parties have a
8 follow-up question with juror number 18 about their
9 question, is that -- would that be possible in that
10 setting?

11 DEPUTY CLERK UHRIN: What we've --

12 THE COURT: Yes.

13 DEPUTY CLERK UHRIN: -- contemplated is that
14 we would have -- we would run the selection list in
15 advance -- we do this regardless of whether it's in
16 person or online.

17 A few days -- a day before, a few days before,
18 we run the selection list so we ask our jury management
19 system to issue a randomized list of the jurors that are
20 available for selection. That's the order that they
21 come out of the box virtually. And then those jurors
22 would be assigned hour-long blocks to join via Zoom or
23 appear at the courthouse to use the court's equipment to
24 join via Zoom and then the jurors would be brought into
25 the Zoom meeting one by one and you would be able to

1 introduce yourselves and ask -- you would have that
2 juror's questionnaire in front of you and their
3 responses and then you would kind of prompt them and ask
4 them questions to follow up on their answers, yes
5 answers that they gave to the questions is how we
6 contemplated doing that.

7 And then at the end, the jurors would all be
8 directed to -- once the juror is done, they're done.
9 They are directed to call back into the court later that
10 day to find out whether or not they've been seated on
11 the jury.

12 THE COURT: And then if they are seated,
13 obviously I give them some initial instructions which
14 would include, obviously, the classic instructions with
15 respect to researching the case, social media,
16 et cetera.

17 So thank you very much, Tracy, for joining us.
18 I know that the lawyers appreciate that. She is very
19 busy and for you to take the time to come in and advise
20 them on this process, I know they appreciate it. I
21 appreciate it. So thank you, Tracy.

22 DEPUTY CLERK UHRIN: Thank you.

23 THE COURT: And thanks to counsel. And I'll
24 see you in about ten days and we'll -- we'll hammer out
25 the online questionnaire.

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

MR. ORENT: Thank you, your Honor.

MR. LAFATA: Thank you, your Honor.

MS. LOWRY: Thank you, your Honor.

THE COURT: Court's adjourned.

(Proceedings concluded at 2:21 p.m.)

C E R T I F I C A T E

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

Submitted: 11/30/2020

/s/ Liza W. Dubois
LIZA W. DUBOIS, RMR, CRR