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UNITED STATES DISTRICT COURT  
DISTRICT OF NEW HAMPSHIRE

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IN RE: ATRIUM MEDICAL CORP. \*  
 C-QUR MESH PRODUCTS LIABILITY \* No. 16-md-02753-LM  
 LITIGATION \* July 21, 2020  
 \* 10:07 a.m.  
 \*

\* \* \* \* \*

TRANSCRIPT OF STATUS CONFERENCE  
VIA VIDEO CONFERENCE

BEFORE THE HONORABLE LANDYA B. MCCAFFERTY

APPEARANCES:

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

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

Anne W. Schiavone, Esq.  
 Holman Schiavone, LLC

Adam M. Evans, Esq.  
 Brenes Law Group, P.C.

James B. Matthews, III, Esq.  
 Blasingame Burch Garrard & Ashle

For the Defendants: Katherine Armstrong, Esq.  
 Paul A. LaFata, Esq.  
 Dechert LLP

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

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

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

2                   THE CLERK: For the record, this is a status hearing  
3 in the C-Qur Mesh Atrium MDL litigation. It is case number  
4 16-md-2753-LM.

5                   THE COURT: Okay. Let me just have counsel who are on  
6 the screen, I presume lead counsel, go ahead and just identify  
7 yourselves for the record.

8                   MR. HILLIARD: Russ Hilliard from Upton & Hatfield,  
9 liaison counsel for the plaintiffs.

10                  MR. ORENT: Good morning, your Honor. Jonathan Orent  
11 for the plaintiffs.

12                  MR. EVANS: Good morning, your Honor. Adam Evans for  
13 the plaintiffs.

14                                   (Indiscernible)

15                  THE COURT: I'm sorry. I missed -- I think you spoke  
16 at the same time. Go ahead.

17                  MR. MATTHEWS: Jim Matthews, state court liaison.

18                  THE COURT: Attorney Schiavone, you're muted now. I  
19 think you muted yourself to help the other attorney. Go ahead.  
20 Still muted.

21                  MR. HILLIARD: You're still muted, Ann.

22                  THE COURT: Can we help her, Attorney Esposito?

23                  MS. SCHIAVONE: How's this? Can you hear me now,  
24 Judge?

25                  THE COURT: Yes. Perfect.

1 MS. SCHIAVONE: Ann Schiavone for the plaintiffs' EC.

2 THE COURT: Thank you. Okay.

3 MS. SCHIAVONE: I apologize.

4 THE COURT: No problem.

5 And, Attorney Lowry, did you also go?

6 MS. LOWRY: Yes. I wasn't sure if you needed me to  
7 repeat myself. Susan Lowry for the plaintiffs. Good morning,  
8 your Honor.

9 THE COURT: Okay. All right. And let's have defense  
10 counsel.

11 MR. CHEFFO: Good morning, your Honor, Mark Cheffo, to  
12 you and to counsel. It's nice to see everyone.

13 MS. ARMSTRONG: Good morning, your Honor. This is  
14 Katherine Armstrong for the defendants.

15 THE COURT: Excellent. Good to see you both. Go  
16 ahead.

17 MR. LAFATA: Good morning, your Honor. This is Paul  
18 LaFata also for the defendants.

19 THE COURT: Okay. Now, Mr. LaFata, I think you might  
20 be a new name to me, a new face to me. Is that right?

21 MR. LAFATA: Yes, that's correct, your Honor. This is  
22 the first time I have appeared in a status conference.

23 THE COURT: Okay. Well, welcome aboard.

24 MR. LAFATA: Thank you.

25 MR. CHABOT: Your Honor, this Pierre Chabot also for

1 the defendants.

2 THE COURT: Did we get everybody? Okay. I get to  
3 judge the artwork in the background, and, Mr. Orent, you  
4 definitely win.

5 (Indiscernible)

6 MR. ORENT: I'll let her know that she's appreciated.

7 THE COURT: I give that a 10 out of a 10. Okay. I  
8 apologize for mine, but that's the way I'm hiding sort of the  
9 mess behind me, using the American flag.

10 Okay. I know there's one major issue that we need to  
11 discuss that there's agreement on, unless something has  
12 happened that I'm not aware of with respect to the bellwether  
13 trial cases order, one and two. Is that dispute still live, or  
14 have you magically resolved that?

15 MS. ARMSTRONG: Your Honor, it's still alive.

16 THE COURT: Okay. All right. That issue, why don't  
17 we put that one to the side and do some of the easier issues,  
18 if you will, and then we can talk about pending motions,  
19 matters, miscellaneous matters that are of concern to you.

20 One easy one I think I just want to get off my list  
21 and I want to, I think, go ahead and grant some motions to  
22 withdraw, two attorneys have filed motions to withdraw. I'm  
23 going to give you the case names. Sandoval, it's 19-855; and  
24 Barnett, 20-043.

25 Now, it seems possible that the plaintiffs in those

1 two cases may intend to abandon their claims, because they  
2 appear to have stopped communicating with their attorneys.

3 I'm guessing if we all turn off our mics until such  
4 time as you're going to speak that would help do away with some  
5 of the echo. I've become an expert in these video hearings, so  
6 I've been able to troubleshoot some of our problems thus far.  
7 So, it looks like everybody is on mute except for Attorney  
8 LaFata.

9 MR. LAFATA: I'm dialed in on my cell phone, your  
10 Honor, so I am on mute when I'm not speaking.

11 THE COURT: Okay. Excellent. All right. So, I was  
12 just saying the motions to withdraw, these are loose ends for a  
13 judge on my docket. I have got attorneys who are saying, "My  
14 clients aren't communicating with me." It looks as though,  
15 based on those motions, they're probably motions I should go  
16 ahead and grant, but I thought it would make good sense to  
17 alert you, Attorney Orent, and plaintiffs' lead counsel in  
18 general to get your input on how to handle what would end up  
19 being two plaintiffs who are not represented.

20 Now, it could be that before granting the motions I  
21 could seek -- I could notify the plaintiffs and seek their  
22 input, are they aware that they're going to be in this MDL  
23 without counsel, do they intend to proceed pro se.

24 Do you have any thoughts on that, Attorney Orent, or  
25 anyone on the screen?

1 MR. ORENT: Your Honor, based on my experience dealing  
2 with cases like this, where plaintiffs' counsel have done  
3 everything that they can to conduct outreach to the client, the  
4 client becomes unresponsive, what we have done in other  
5 situations, and I'm actually thinking about we have a state  
6 court consolidation of hernia cases in Rhode Island, and what  
7 we do there is essentially put the case on an inactive status  
8 for 90 days and notify -- continue to notify the plaintiff  
9 during that period, and if the plaintiff doesn't come forward  
10 during that period of time, then the counsel is relieved of  
11 further obligations and the case can be dismissed. And we  
12 typically allow for in those situations, should there be an  
13 extreme case where, for example, in this time of COVID let's  
14 say someone was in the hospital treating for that over an  
15 extended period of time. They would simply just have to show  
16 cause to get their case reactivated or refiled without any  
17 penalty, but from an administrative perspective that case could  
18 be removed from the docket.

19 THE COURT: Okay. Is there any reason why the Court  
20 couldn't just attempt to communicate directly with the  
21 plaintiffs in those cases to see if they want to pursue their  
22 cases?

23 MR. ORENT: I see no reason why they couldn't. In  
24 fact, what we can do is have counsel submit to the Court, to  
25 Ms. Esposito, all of the contact information that they

1 currently have for each of those plaintiffs, and that would  
2 certainly be one readily easily available avenue for the Court  
3 to take.

4 THE COURT: Okay. I'd be more comfortable, I think,  
5 with that than just sort of leaving it in this sort of inactive  
6 state for 90 days. The lawyers have done what they've been  
7 required to do I think in their own jurisdictions and by their  
8 own ethical rules. It looks as though leave to withdraw should  
9 be granted in the two cases, but I would like to just find out  
10 from those two plaintiffs if they want to pursue their cases or  
11 not.

12 Okay. Were you aware of these two motions to  
13 withdraw, Attorney Orent?

14 MR. ORENT: I was not, your Honor.

15 THE COURT: All right. And I don't know if those two  
16 cases are cases that plaintiffs' counsel wants to bring in in  
17 terms of the overall MDL. I just don't know what your approach  
18 to that would be. So, in any event, I will wait to hear with  
19 respect to contact info from Attorney Esposito, and then we'll  
20 reach out, if we can, to those plaintiffs and see if we can  
21 find out if they want to pursue and prosecute these cases.

22 Okay. So, that was a rather minor loose end I just  
23 wanted to go over with you for the start. It looks like there  
24 are pending dispositive motions, and in the Hickinbottom case,  
25 and I know that we're going to get to that, the Barron and

1 Hickinbottom cases, but with respect to the pending motions in  
2 Hickinbottom, those now appear as though they may be moot. Is  
3 that correct?

4 MR. ORENT: Your Honor, I understand from case counsel  
5 that they are not opposing entry of judgment and/or have sought  
6 dismissal of the action.

7 MS. ARMSTRONG: Your Honor, this is Katherine  
8 Armstrong. We think that Motion for Summary Judgment should be  
9 granted, since it's not opposed, but that's still within your  
10 Honor's purview, and if the Motion for Summary Judgment is  
11 granted, then I think your Honor is correct, the remaining  
12 motions would be moot.

13 THE COURT: Okay. Do you have any objection to going  
14 that route, Attorney Orent?

15 MR. ORENT: I do not, your Honor.

16 THE COURT: Okay. All right.

17 MR. ORENT: And just to clarify, I'm speaking in my  
18 capacity as lead counsel. Case counsel I don't believe is on  
19 the phone today, so this is based on my understanding as to  
20 what their position is.

21 THE COURT: Okay. Will you alert Attorney Esposito if  
22 there's any -- can you find out for the Court and communicate  
23 with counsel in that case for us? Because that is I think my  
24 preferred method of approaching my own docket, and so I would  
25 move on that. How long would you need to get back to us? Do



1 you have regular contact with that lawyer or --

2 MR. ORENT: I do, your Honor, and I have no reason to  
3 think that entry of summary judgment and mooted of the other  
4 motions would be opposed in any way. I think that's consistent  
5 with the message that they've given me.

6 THE COURT: Okay. Then, I will rely on that. Let us  
7 know if, for some reason, you find out information that would  
8 change that. Okay. And that would be true with respect to the  
9 motions to exclude that are pending in Hickinbottom, correct?

10 MR. ORENT: Correct, your Honor.

11 THE COURT: All right. Okay. There is a motion to  
12 strike the affirmative defenses. This is an MDL-wide pending  
13 motion, motion to strike or alternatively for summary  
14 adjudication of the defendant's asserted affirmative defenses,  
15 where the long form pleadings were used. Is that something  
16 that you would like the Court to put anywhere near the top of  
17 its list in terms of helping resolve issues for the parties?

18 MR. ORENT: Your Honor, from the plaintiffs'  
19 perspective there are a number of issues that we raise that I  
20 think would be helpful going into a trial to have clarity on,  
21 particularly issues related to learned intermediary and a  
22 couple of the other issues. That being said, the process,  
23 engaging in the 7.1 meet and confer process, where defendants  
24 affirmatively waived certain other affirmative defenses, I  
25 think has really narrowed the issues into focus. And so what I

1 would say in terms of priority, I think that certainly the  
2 Daubert motions and dispositive motions likely would come  
3 first, and then I would put this following those.

4 THE COURT: Okay. All right. Would you agree,  
5 Attorney Armstrong, that Daubert motion's first?

6 MS. ARMSTRONG: I would agree that Daubert and  
7 dispositive motions first. But I wanted to clarify something,  
8 and maybe Mr. Orent can assist with this, because the way the  
9 motion to strike was filed was somewhat confusing to us,  
10 because they filed it on the master MDL docket, but then in the  
11 text of the actual motion they referred to the long form  
12 complaints in Barron and Hickinbottom, but then they sort of  
13 also went back to the master answer so that they didn't have to  
14 use different numbering so they could use a consistent  
15 numbering when referring to the affirmative defenses. So, I  
16 think the intent was to file it in Barron and Hickinbottom, but  
17 it's procedurally confusing. That said, I agree with Mr. Orent  
18 that the Daubert and the dispositive motions are probably more  
19 mission critical.

20 THE COURT: Okay.

21 MR. ORENT: I'm sorry.

22 THE COURT: Go ahead, Attorney Orent.

23 MR. ORENT: I'm just going to provide additional  
24 clarity. That's correct. We filed it on the master docket  
25 because it dealt with multiple cases, but the intent is

1 particularly on whatever case is tried, and so we specifically  
2 referenced the long-form complaints in the Barron and  
3 Hickinbottom case, and they are most pressing, and obviously on  
4 the Barron case, with Hickinbottom to a large measure, they are  
5 mooted as well.

6 THE COURT: Okay. All right. Now, there are pending  
7 Daubert motions in Barron, and my decisions on the Barron  
8 Daubert motions would be helpful to defendants and plaintiffs;  
9 is that right?

10 MS. ARMSTRONG: Yes, your Honor.

11 THE COURT: Okay. All right. Let me ask are all of  
12 those Daubert motions ripe and ready for ruling? Maybe  
13 Attorney Esposito knows if each of those are ripe. Maybe my  
14 law clerks can signal to me. Do you know are those ripe for  
15 decision? Have they been pending before me?

16 MS. ARMSTRONG: I don't think -- I'm sorry.

17 THE CLERK: I apologize. I was going to say I believe  
18 they're all ripe, Judge. This is Donna. But I defer to  
19 counsel.

20 THE COURT: Okay.

21 MS. ARMSTRONG: Your Honor --

22 THE COURT: Go ahead.

23 MS. ARMSTRONG: -- I don't think we listed it on the  
24 agenda, because it was not ripe at the time, but I think there  
25 are still remaining briefing to be done in the motions to

1 exclude regulatory experts, which both sides have filed. With  
2 the exception of the regulatory Dauberts, which, again, I don't  
3 believe they're listed on the agenda for this reason, I believe  
4 all of the other Daubert motions are ripe for ruling right now,  
5 but if I'm wrong about that Mr. Orent will correct me, I'm  
6 sure.

7 THE COURT: Okay. And would counsel be amenable to me  
8 going through those, obviously, and then scheduling, to the  
9 extent I think it's necessary, a video hearing on the Daubert  
10 motions within the next few weeks?

11 MR. ORENT: Plaintiffs would be amenable to that.

12 MS. ARMSTRONG: Yeah, that's fine with defendants,  
13 your Honor. I don't know the extent to which you want to get  
14 into them substantively today. We did not bring all of the  
15 people that we would need to argue the Daubert motions here  
16 today.

17 THE COURT: No, and I know they're pending. I have  
18 not gotten into the weeds on those motions yet, but I wanted to  
19 wait and find out what you want me to prioritize to help you  
20 move the cases, and so what I think I'll do is start looking  
21 into these Daubert motions and then go ahead and schedule  
22 hearings where I think they're necessary. Do you have enough  
23 info to tell me which you think would require or benefit from  
24 hearings? And if not, that's fine. We can decide that -- I  
25 can also just go through them and look at them. I'm sure

1 you've made clear in your motions whether you thought it would  
2 benefit from a hearing.

3 MS. ARMSTRONG: I don't have an answer to that, your  
4 Honor.

5 THE COURT: Okay. Well, that's the next thing I'll  
6 move on, then, and you'll hear from me about a hearing, if  
7 necessary, on these pending Daubert motions.

8 MR. ORENT: Your Honor, one quick logistical item  
9 relating to the outstanding two Dauberts. There is a high  
10 degree of likelihood that plaintiffs will be filing some sort  
11 of motion *in limine* relating to the law and FDA generally  
12 speaking on where the permissible bounds of testimony is versus  
13 the Court's instruction to the jury, and it may be helpful for  
14 your Honor to have the benefit of briefing on that issue prior  
15 to ultimately determining the individual Dauberts on the two  
16 experts who would be affected by that sort of global issue.  
17 And so, we are in the process of briefing that.

18 There's no currently scheduled deadlines for that, but  
19 perhaps Ms. Armstrong and I could reach agreement after this  
20 call on a scheduling order related to that separate briefing  
21 that would coincide to finish up immediately following the  
22 Daubert on those two outstanding experts, and then with regard  
23 to those three motions your Honor could deal with those  
24 together.

25 THE COURT: Okay. And you can alert me by filing

1 something, assuming you both reach an agreement on that with  
2 respect to timing and sequence.

3 MR. ORENT: Absolutely, your Honor.

4 THE COURT: Okay. How soon could you file that? Do  
5 you think you could file it today, meet and confer today, and  
6 then let me know? I'm happy also, I could just put this on in  
7 a week, and we could revisit the Daubert motions, talk about  
8 them and finalize sort of hearings, if necessary. I don't know  
9 if any of these would -- if any require any sort of evidentiary  
10 testimony or evidentiary hearing.

11 MR. ORENT: From the plaintiffs' perspective, your  
12 Honor, we would only seek an evidentiary hearing to the extent  
13 your Honor had questions or had any concerns, and we would  
14 certainly then want to present a voir dire of the experts to  
15 clarify any items. But we think that the quality of our  
16 experts is such that most of their opinions are fairly, though  
17 complicated, self-explanatory.

18 THE COURT: Okay. All right. If you could confer  
19 with Attorney Armstrong and then file something and let me know  
20 which Daubert motions you're talking about, and we can wait,  
21 then, for whatever briefing you think you need to file that I  
22 would then need to put -- I would need to decide before I get  
23 to the actual substantive Daubert motions.

24 But, Attorney Armstrong, go ahead.

25 MS. ARMSTRONG: I was just going to say that we're

1 happy to work with Mr. Orent and try to work out timing so that  
2 your Honor can deal with the regulatory issues all in one  
3 hearing. But those are somewhat apart, and the regulatory  
4 Daubert briefing for reasons related to the expert disclosures,  
5 there was the -- the plaintiffs were unable to use their  
6 original experts, so those have gotten pushed off quite a bit  
7 from the other Dauberts. The issues are somewhat distinct.  
8 With the other experts there's a lot of overlapping issues but  
9 not so much with the regulatory experts, sort of stands alone.  
10 It would be helpful for the parties to get rulings on the other  
11 Daubert issues.

12 THE COURT: Okay. Who are the regulatory experts?

13 MS. ARMSTRONG: So, for the plaintiffs it's Dr. Pence,  
14 and for the defendants it's Dr. Ulatowski.

15 THE COURT: Okay. Peggy Pence and Timothy Ulatowski,  
16 correct, the two regulatory --

17 MR. ORENT: Correct.

18 THE COURT: All right. Thank you for that. Then, I  
19 will put those sort of at the bottom in terms of order. That's  
20 helpful. All right.

21 ADR. It looks like you're still planning on using  
22 mediation and using the August 3rd as your deadline. Is that  
23 still the case?

24 MS. ARMSTRONG: It's a court-ordered deadline, so,  
25 yes, that's still our plan.

1           THE COURT: Okay. And do you think mediation could be  
2 fruitful at this stage? I'm going to inform you that the Court  
3 has not issued an order yet extending and continuing civil  
4 trials for September, but the Court is going to issue that  
5 order for reasons that would be obvious to you with respect to  
6 this pandemic. We haven't issued it yet, but that is coming,  
7 and I disclose that to you because, obviously, of the September  
8 trial date, and I wonder if that mediation date should be  
9 changed and adjusted to make it more meaningful for you, and I  
10 certainly would be sensitive to that. Obviously, I want your  
11 mediation to be fruitful. That's something that I'll leave to  
12 counsel, but if counsel decides that you want to bump that a  
13 little bit because the trial is definitely going to be  
14 continued, as are all civil trials in September in our court --  
15 and, again, we haven't issued the order yet; I'm simply  
16 notifying you by way of courtesy that that is likely to happen  
17 in the next couple of days. I just --

18           MR. CHEFFO: Your Honor --

19           THE COURT: Yes.

20           MR. CHEFFO: I'm sorry. I didn't mean to talk over  
21 your Honor.

22           THE COURT: Go ahead. I was just going to tell you  
23 the process in terms of how we do this on our court so you're  
24 aware of it. But go ahead.

25           MR. CHEFFO: No, and that's very helpful, and thank



1 you, and I think that will kind of help us along with the  
2 hearing as well today.

3 So, for my two cents, I will talk to Mr. Orent, so I  
4 don't want him to think we're sandbagging him. We agree that  
5 in all of these cases mediation is always potentially fruitful,  
6 right, before you actually spend a lot of time, effort and  
7 money and the court's resources? But I would have thought that  
8 August is probably a little early, to give us a little more  
9 time. So, I think, in light of your comments about the trial  
10 moving -- and, again, we'll talk to Mr. Orent. Our view is not  
11 that we're saying, no, we don't want to mediate. I think if we  
12 had the benefit of some time to get our clients onboard and,  
13 you know, everything else we need, I think that would be more  
14 fruitful for us, but Mr. Orent may agree or disagree with that.

15 THE COURT: Mr. Orent, what's your reaction to that?

16 MR. ORENT: Well, your Honor, we certainly, while we  
17 are eager to mediate, we certainly appreciate what Mr. Cheffo  
18 is saying, and we would rather have a meaningful mediation  
19 rather than just going through the steps, and so if Mr. Cheffo  
20 requires time to get his client onboard, we certainly would  
21 welcome that to make it meaningful.

22 THE COURT: Okay. All right. And you still have some  
23 depositions yet to take, family member depositions, fact  
24 witnesses; is that correct?

25 MS. ARMSTRONG: Yes, your Honor, and those depositions

1 can be done fairly quickly and easily; they're not usually long  
2 depositions. I don't know the extent to which COVID is going  
3 to affect the ability to do them or the ability to which they  
4 can be done remotely, but we're sort of pushing those to the  
5 end, and we're waiting for the exchange of trial witness lists,  
6 and then, if there are family members who are on trial witness  
7 list -- we're not going to depose family members if they're not  
8 planning on calling them to trial. So, if we see family  
9 members or friends or employers, those type of people on their  
10 trial witness list, the parties have agreed that we can reserve  
11 and do the depositions at that time.

12 THE COURT: Okay. All right. And trial logistics --  
13 and, again, I'm obviously leaving to the end the dispute about  
14 Hickinbottom and how you go about deciding one and two, but let  
15 me ask counsel who are on the screen how many of you have done  
16 an evidentiary hearing via video? Just raise your hand if you  
17 have.

18 Okay. And how many of you are, because of that,  
19 probably pretty hesitant to do something in this case of any  
20 magnitude via video in terms of an evidentiary hearing? Just  
21 raise your hand if that's how you feel.

22 Okay. Plaintiffs are a little less. Attorney Orent,  
23 I didn't see your hand. Attorney Hilliard, I didn't see your  
24 hand. So, I'm going to put this out there. I'm not going to  
25 strong-arm anyone, but I will tell you that I have done a

1 number of evidentiary hearings in civil cases via video, very  
2 highly charged cases with multiple witnesses, witnesses off  
3 location, witnesses detained, witnesses wearing masks,  
4 witnesses who are sequestered, hundreds of exhibits,  
5 impeachment exhibits. One witness was testifying, was saying  
6 things that were -- that the other side thought was inaccurate  
7 and inconsistent with other things that that person had  
8 written, so we took a five-minute break so that the lawyer  
9 could go get those impeachment exhibits and get them to the  
10 person at the court that we had who could post the exhibits so  
11 they could see it while the cross-examination was going on.

12 And because, as luck would have it -- obviously, it's  
13 not necessarily luck -- but by random assignment I ended up  
14 with a major, major civil case in New Hampshire that required  
15 emergency litigation, and so I'm very familiar with video  
16 hearings and evidentiary hearings specifically, and I'm very  
17 comfortable with them. So, you've got a judge who's very  
18 comfortable with video technology as an option. So, I just  
19 want to let you know that I will, as we proceed, I think, be  
20 proposing video hearings to potentially resolve and move cases.

21 I don't know what's going to happen with October and  
22 November with respect to this pandemic and with our civil  
23 docket, but, as you know, in every civil case I have I've  
24 offered bench trials via video on discrete issues. I've asked  
25 attorneys to give me creative solutions. I'm open to summary

1 jury trials via video. I am comfortable, if counsel is  
2 comfortable, picking a jury via video. We're not dealing with  
3 constitutional liberty interests and claims that criminal  
4 defendants have about in-face confrontation clause issues.  
5 We're dealing with a civil case. And so, I would be very  
6 comfortable holding hearings, even trials, via video.

7 I'm putting that out there. I'm not going to  
8 strong-arm anyone today, but I can tell you that I've been  
9 thinking about the possibility of counsel, because you've been  
10 agreeable and you've been able to make proposals, frankly, that  
11 are acceptable to the Court time and time again in terms of  
12 structuring this case and the way it's going to move into  
13 bellwether trials and the way you've picked your discovery pool  
14 cases -- obviously, there are disputes that you can't resolve  
15 and need my help on, but in general you've been very, very  
16 agreeable and professional. So, it's the perfect kind of case  
17 to have a video trial, have a video summary jury trial, have  
18 video evidentiary hearings to help resolve causation issues or  
19 issues that might be generally applicable to all of the MDL  
20 cases or a majority of them, subset issues in subset MDL cases  
21 that you think might be tried via video.

22 I can assure you that this court is well versed. The  
23 New Hampshire Federal District Court might be as good as any  
24 Federal Court in the country right now with respect to video  
25 technology. We've been in the front, we've been in the

1       forefront, we've had hundreds of hearings, and our staff, our  
2       IT staff is fabulous, and our court staff have been assisting  
3       lawyers. And you're thinking to yourself, "Well, how would I  
4       get an exhibit on the screen?" You simply say to the case  
5       manager, "Attorney Esposito, would you please put Exhibit 12A  
6       on the screen."

7               Now, with counsel it may be, too, that I could have my  
8       case manager give you some privileges so that you could  
9       actually control part of the screen yourself. I might do that  
10      in this case, with experienced counsel whom I trust. We have,  
11      obviously, adopted procedures that keep our video technology  
12      locked down so that we can't have people coming on the screen  
13      and suddenly interrupting a court proceeding, and we've had  
14      none of that, zero, because we've got great IT staff who have  
15      told us what settings we need to use and what we should allow  
16      and what we shouldn't allow. But I think I would be  
17      comfortable with counsel in this case, probably just lead  
18      counsel, each having the ability, when you're cross-examining a  
19      witness, to call up your own application, put it on the screen  
20      and show the exhibit.

21              But thus far I have to say the lawyers who have done  
22      the hearings have been very happy with just saying to our --  
23      it's actually been our Chief Deputy Clerk who's been  
24      controlling the screens during my evidentiary hearings, and the  
25      lawyer simply calls up the exhibit, and it appears on the

1 screen, and then the cross-examination starts or the direct  
2 examination, and it's been very smooth.

3 Now, you're probably wondering how do you get those  
4 exhibits to the right people? We've been doing it via email,  
5 so it's been fairly straightforward in that respect, and there  
6 have been hundreds of exhibits in the cases I have had. I have  
7 not talked to a lot of judges who have held these video, these  
8 evidentiary, day-long, multi-day hearings via video, so I think  
9 you may be talking to one of the few judges who's held a number  
10 of these, and it's been very successful.

11 So, we would hold your hand through the process, we  
12 would absolutely allow you, perhaps, just to watch one of these  
13 video hearings in a different case so you can see how it works.  
14 I don't have one coming up in the near future, but I certainly  
15 would alert counsel, if you're interested in watching it, just  
16 to see how it works. And we would go through with you, if you  
17 wanted as well, practice sessions, just to make sure you're  
18 comfortable with the technology and you've got a sense of how  
19 this is going to work. Because, obviously, you'll have lawyers  
20 in different states trying to communicate with each other, and,  
21 obviously, you can set up your own communication, remote  
22 communication, via whatever chat service you use. But I am  
23 very open to working with a case like this with experienced  
24 counsel and trying to resolve issues that I can resolve via  
25 video during this pandemic.

1           And public access, in my opinion, it's obviously a  
2 partial closure because we're not in a courthouse, it's not an  
3 open door for people just to walk in, but people with COVID,  
4 people who live far away, people who are in isolation, people  
5 who are quarantined, people who can't come into New Hampshire  
6 and have to quarantine for 14 days, witnesses in a case would  
7 have to quarantine for 14 days upon arrival in New Hampshire  
8 before they could come into the courthouse; those complicating  
9 issues are gone, because even someone with COVID can testify  
10 remotely, can watch the proceeding remotely. Same for media.  
11 Media has greater access in many ways with video.

12           I will stop trying to sell you on video technology for  
13 the moment, but I did want to put that out there and tell you  
14 that I'm patient. I am willing to give it a try if counsel is  
15 willing to give this a try. I know some judges in some civil  
16 cases have forced litigants to do trials via video. I'm not  
17 inclined to force you to do anything, but I would like to see  
18 you at least entertain the possibility of resolving some of  
19 these cases, some of these issues, with an evidentiary hearing,  
20 if necessary, via video and perhaps summary jury trials.

21           I don't know how many of you have done a summary jury  
22 trial, but that's another thing we could try. We'll figure out  
23 how we find eight random people to serve as jurors and see if  
24 you can try some of these cases in a summary jury trial fashion  
25 before you get to mediation, before you get to settlement.

1           So, I will stop my sales pitch for video technology,  
2           and I wanted to begin that with respect to trial logistics,  
3           because, obviously, logistical issues are issues you need to  
4           discuss with me with respect to these bellwether trials, and  
5           one of your first questions is going to be, "When are we going  
6           to have a trial, when is that going to happen? And,  
7           unfortunately, I can't really give you any sense of that today.

8           In our court there are three active judges and there  
9           are two senior judges and a magistrate judge, and we sit at the  
10          table, along with our bankruptcy judge as well, and we make all  
11          our decisions week by week. We operate by consensus. I have  
12          the title "Chief." That doesn't mean much, ultimately. We all  
13          make decisions by consensus. We have made decisions with  
14          respect to reopening. I could get into that with you. It's  
15          very interesting.

16          I'm more than just a trial judge by day. I'm a  
17          virologist, an infectious disease specialist, an  
18          epidemiologist. So, my job has expanded, and I've consulted  
19          with experts as I've tried to figure out what to do with our  
20          court and what to do with criminal trials, criminal in-court  
21          hearings where there are constitutional liberty interests at  
22          stake.

23          So, we are making -- the door has been cracked open  
24          very recently in our court for some in-court hearings, for  
25          grand jury, and we may even have a jury trial in a criminal



1 case in August. And so, we're meeting every week and making  
2 decisions about the community transmission in New Hampshire,  
3 and then all the other gating criteria you're probably familiar  
4 with. But with respect to civil jury trials, right now the  
5 criminal cases, obviously, take a priority. We've got  
6 defendants who are in jail awaiting their trial. They have  
7 speedy trial rights, as you can probably imagine.

8 So, right now I can tell you that we're going to  
9 continue our civil cases to October and I just, based on my  
10 understanding of this pandemic and what's going on in the  
11 United States, I'm just not confident that I could tell you  
12 that the trials will start in November and December. I just  
13 can't say anything that would be remotely responsible about  
14 that. So, I don't want to get your hopes up for any sort of  
15 in-court jury trial in the near future, even though we are on  
16 track to do that once we pick the one and two cases. I'm sorry  
17 to tell you that, but I'm sure at some level it's not a big  
18 surprise.

19 So, having said all that, I know that we have this  
20 issue of how we go about deciding number one and number two,  
21 and, obviously, plaintiffs have their pick for number one. It  
22 is Barron. And then there's Hickinbottom, which is apparently  
23 going away here because of a legal question that plaintiffs are  
24 not disputing.

25 So, now that there's more time, frankly, we're not

1 talking about a September trial, does that in any way change  
2 the dynamic with respect to that dispute?

3 MS. ARMSTRONG: Your Honor, this is Katherine  
4 Armstrong. From the defendants' perspective, the timing really  
5 does make a difference. So, that was one question that we had.  
6 We did not have an appreciation for whether it was realistic to  
7 expect a trial to take place in September or not. We  
8 understood that we had a trial date and we were working towards  
9 it, but we also knew what else was going on in the world. So,  
10 from our perspective, there was a process that was agreed to,  
11 and the process was both sides would get a strike, and then  
12 that would allow them to eliminate a case that they considered  
13 to be an outlier from their perspective. I know we were  
14 striving towards something that's representative, but sometimes  
15 representativeness is in the eye of the beholder. So, the  
16 strike process gave everybody, gave both sides a chance to  
17 eliminate something they consider to be an outlier, and then  
18 the pick process gave them to choose something, and this was a  
19 process that was agreed to after the eight cases were picked.  
20 So, the plaintiffs, you knew what the eight cases were when  
21 they agreed to this process, and if they thought some of their  
22 cases weren't viable and couldn't go forward and couldn't be  
23 legitimate bellwether cases, they could have raised that at the  
24 time.

25 So, we participated in this process in good faith, and

1 we struck one of their cases, they struck one of ours, and each  
2 side picked, and now it looks like the case that we picked is  
3 now going to go away. So, given the additional time that we  
4 have, we think that the defendant should be allowed to pick a  
5 replacement pick, which may be one of our picks, but I will  
6 also tell the Court, honestly, there are cases that are among  
7 the plaintiffs' picks that are ranked pretty high in our  
8 selection process, so it could very well be a case that the  
9 plaintiff picked. We think the struck cases should stay  
10 struck. The order was very specific that they were not  
11 eligible to be among the first two cases, and so we think that  
12 they should stay struck.

13 From our perspective, we are looking at what makes a  
14 case representative. We are oftentimes focused on alternative  
15 causation, which is not necessarily something that the  
16 plaintiffs focus on, because, in our experience, if you have a  
17 pool of plaintiffs with complex medical histories, it's very  
18 likely that alternative causation is going to be an important  
19 issue. So, that's always something that we want to test. So,  
20 that's sort of what drives us and that's sort of what we look  
21 for when we're looking for a representative, and that was what  
22 was guiding our decisions.

23 I can discuss our decision-making process more fully;  
24 I don't mind sharing it with the Court. But given the  
25 additional time, we think it makes sense for defendants to pick

1 a case and we do the process of the Dauberts and the  
2 dispositive motions, just like we did with the other pick along  
3 a kind of a similar time frame, and then, again, both sides  
4 will make their arguments to the Court as to which should go  
5 first, but at least your Honor will have two cases to choose  
6 from, one selected by plaintiffs and once selected by  
7 defendants.

8 THE COURT: Okay. And I know Attorney Orent probably  
9 has a response. Let me ask you, though, it looks like  
10 plaintiffs are willing in Barron, at least, which appears,  
11 according to them, ready to go to trial without any undue  
12 delay -- do you agree with that, that Barron would be ready?

13 MS. ARMSTRONG: It is ready to go to trial, and we  
14 appreciate all the information that the Court has just given us  
15 on the technological capabilities of the court. That's very  
16 good information. But I will say that it is important to  
17 defendants -- we're remaining open minded about all of this,  
18 but it is important to defendants at this point to have a jury  
19 trial. There's just something special that happens when you  
20 put six to twelve men and women in a room together and let them  
21 hash out the evidence.

22 THE COURT: I totally get --

23 MS. ARMSTRONG: That process is special, and we're not  
24 quite prepared to give up on that process yet.

25 THE COURT: Okay. And that was my question. I

1 totally get that. In fact, criminal defendants also have a  
2 right to a jury trial, and I've had criminal defendants  
3 actually waive their right to a jury trial and want a bench  
4 trial in front of me, and I spend a lot of time trying to talk  
5 them out of that. Not a good decision. To give up 12  
6 unanimous jurors for one judge is not always a good decision,  
7 and I've always tried to talk them out of that. I have,  
8 however, done a criminal bench trial because I wasn't able to  
9 talk the defendant out of it. Here you could have a jury  
10 trial, you could have it via video, and so I'm not going to  
11 twist your arm on that, I want you to think about it, but your  
12 client would get the magic of a jury trial. It would just be  
13 not in a courthouse, not in a close setting where they're  
14 likely to get COVID.

15 So, I throw that out there because, if Barron is ready  
16 and if your client is willing to consider -- because an  
17 in-person trial at this point, as long as your client is aware,  
18 that could be a long ways off. I'm not going to speak for the  
19 future on that, because there's no way I can, but if I had to  
20 guess I would guess that's a long way off. So, if your clients  
21 are interested in resolving the case and moving things, the  
22 only way to do that I think is going to be by some form of  
23 remote technology, remote jury trial.

24 I'm willing to spend the time, put the time in and  
25 pick a jury via video. That has been done. It's been done

1 successfully. It takes longer, but I'm willing to engage in  
2 that.

3 And the technology we use allows for breakout rooms  
4 for, if you will, confidential conversations between client and  
5 lawyer at any point in time. You just go into a breakout room  
6 and you have your conversation, you come back on the screen.  
7 There are ways to sequester people so they can't hear what's  
8 happening. So, the sidebars, if you will, would happen on the  
9 screen, but everybody else would not be privy to it.

10 There are ways to do a video jury selection that in my  
11 mind just remove completely the dangers associated with  
12 anything that would happen in court. So, I noted that you  
13 didn't consent to the bench trial, although, plaintiffs are  
14 willing to go forward even with a bench trial in Barron, it  
15 looks like. I may be wrong about that. So, my question was  
16 going to be would you consider the possibility of keeping the  
17 jury trial but just doing it via video? And I will throw that  
18 out there.

19 I'm not asking you to answer, Attorney Armstrong,  
20 right now, because you haven't even talked to your client yet,  
21 clients, but it's something that the Court would certainly  
22 entertain. And I'd do my best, obviously, to get everybody  
23 coached up and very comfortable with this before we would even  
24 begin that process. And it's a long way off, anyway. I've got  
25 to decide some pretrial issues, in any event. So, it's not

1 like we're talking about tomorrow.

2 MS. ARMSTRONG: Can I just say a couple of things in  
3 response?

4 THE COURT: Of course.

5 MS. ARMSTRONG: Again, all good information, and we're  
6 trying to remain open-minded, but, as your Honor says, this is  
7 very new. It's somewhat maybe charted territory for your  
8 Honor, but it's uncharted territory for us, and we do need to  
9 discuss it with our client.

10 But the other issue is the process that the parties  
11 had envisioned was, after we chose two cases both sides -- if  
12 we couldn't reach agreement on which case would go first, both  
13 sides would make their pitch to your Honor, and your Honor  
14 would choose which would be the best case to be first.

15 And if there's going to be a delay in the process now  
16 and there may be time for us to pick a replacement case and  
17 have that process still play out, we think that was an  
18 important part of the process that had been contemplated. And  
19 like I said, we're considering a replacement case that's one of  
20 the plaintiffs' picks. And if that's what we ultimately  
21 choose, that might be the best case to be the first case since  
22 it was on the plaintiffs' list and we picked it, it might  
23 actually be the one that best -- again, it's representative in  
24 some sense from both sides' perspectives, although, as I said,  
25 it's sometimes in the eye of the beholder.

1           So, we think there's a reason for letting the process  
2 play out and have two cases to choose from for the first trial  
3 beyond just the issues of logistics and that type of thing, and  
4 those issues are not small issues, and we do have to discuss  
5 that with our client. So, that's all I'm going to say on that  
6 at this time. That really invited full-blown argument on it,  
7 but I wanted to give you a little bit of a taste of my  
8 thinking.

9           THE COURT: I appreciate it.

10          Attorney Orent.

11          MR. ORENT: Your Honor, I want to start off with the  
12 proposition that justice delayed is justice denied, and that  
13 for Ms. Barron and for all of the 2,000 plaintiffs this MDL  
14 runs the risk of stalling completely and going nowhere fast if  
15 we don't move to a trial phase, and for that reason Ms. Barron  
16 is willing to waive her jury rights, she's willing to proceed  
17 with equitable claims only, which a defendant does not have a  
18 jury right to, and we think that the Zoom bench trial option  
19 that your Honor suggested is the only sensible way to move  
20 forward at this point.

21          Your Honor oversees about 2,200 individuals who are in  
22 line behind Ms. Barron and will not get their day until  
23 sometime in the near future, and we don't know when, quite  
24 frankly, that's going to be. But what we do know is that we do  
25 have a case that is ready to go to trial now, and that we can



1 do it safely, and I feel that we all owe it to Ms. Barron and  
2 the 2,200 other women and men that have injuries to move their  
3 cases as quickly as we can. And in this particular instance,  
4 as your Honor has pointed out, there aren't sacrifices being  
5 made as to the rights of the parties, there are ways to do  
6 things, and we think that what your Honor has suggested makes  
7 eminent sense, and so we urge the Court not just to -- or to  
8 take a strong stance and to move these cases forward.

9 I will say that I find the defendants' argument,  
10 probably not surprisingly, unpersuasive relating to the  
11 Hickinbottom case. As your Honor knows, we had a discussion  
12 almost a year ago during the August hearing of 2019, related to  
13 substitution, defendants' substitution of bellwether cases.  
14 The hearing was 8/8 of '19. And previously, when the plaintiff  
15 dismissed cases voluntarily, the defendant sought to replace  
16 them, and now the plaintiff doesn't put up an opposition to a  
17 motion that the defendants did not need to file, okay? And by  
18 winning the motion, the defendants now say they want another  
19 pick. So, it puts the plaintiffs in a weird position where we  
20 can't dismiss and we can't let it be dismissed on us because  
21 the defendants always get a replacement case. They get  
22 rewarded by picking cases that aren't triable.

23 And if we look at the facts specific to the  
24 Hickinbottom case, we see that after fact discovery was done  
25 back in September of 2019, the defendants knew that the

1 plaintiffs didn't have a causation expert. They knew it. In  
2 their Motion for Summary Judgment they say that that is a fatal  
3 flaw. So, on one hand, the defendant claims that they were  
4 totally surprised that we're not opposing summary judgment,  
5 yet, on the other hand, they're saying it's a fatal flaw, so  
6 why would you pick a case with a fatal flaw? And if we get  
7 into the facts, your Honor, we see that this is a particular  
8 product, the Mosaic product, which is a very tiny portion of  
9 the overall docket, and the injuries claimed were even smaller,  
10 infinitesimally smaller I think we say in our brief. If you  
11 look at the plaintiffs' cases, the Barron case, as of the  
12 filing of -- excuse me -- as of the time that the bellwether  
13 process was selected, it was the single largest type of case in  
14 the MDL. It has the most typified types of injuries in the  
15 MDL, and it's ready to go. Your Honor, simply, it's not fair  
16 to Ms. Barron to put her behind some other pick.

17 Now, your Honor may ask what should we do next? Well,  
18 your Honor, I would submit to the Court that the Court should  
19 select the next case, quite frankly, out of the remaining  
20 cases. I think that the finger pointing of this side did that  
21 and this side did this creates too much of a sideshow, to be  
22 honest with your Honor, and takes away from the need to try a  
23 case that has truly triable issues. I will tell you that there  
24 are, in our calculation, that there are two cases. The  
25 Peterson case, for example, is another case that was a defense

1 pick that your Honor had at time of Motion to Dismiss  
2 eliminated most of the claims. By defendants' same logic, if  
3 we had withdrawn that previously they would have replaced it  
4 with something else.

5 So, this is a time where the defendants are seeking an  
6 additional bite at the apple, they're seeking to re-select work  
7 that's already been done without bearing any of the  
8 consequences of their own choosing, and, not only did they  
9 choose this case, they chose to file a Motion for Summary  
10 Judgment. No one forced them to do it. And, your Honor, no  
11 one forced them to wait until the deadline to file it. If the  
12 defendants knew that there was this fatal flaw, they could have  
13 and should have filed it back in September. There was nothing  
14 preventing them from doing that. So, I just don't believe that  
15 one could argue that there was any kind of surprise.

16 I think that it makes sense, your Honor, for your  
17 Honor to decide what the next case is. I certainly have  
18 thoughts. I think it should probably be either the Hicks case  
19 or the Shumaker case. The Hicks case, interestingly, was  
20 selected by both parties as a bellwether on their original  
21 lists. It has typified injuries, and, different than the  
22 Barron case, there's actually pathology in that case, and like  
23 a lot of cases out there with pathology, that brings a lot of  
24 additional information to bear, where the Barron case doesn't  
25 have pathology.

1           Another case would be the Shumaker case that was  
2 selected originally by the plaintiffs, and defendants put it  
3 onto their short list.

4           So, I think that it makes sense for the parties to  
5 articulate the specific reasons that that second trial should  
6 be selected, and that your Honor should determine the value,  
7 the relative value of that selection, because I think that,  
8 once your Honor sees that the selections that the plaintiffs  
9 would put forward make up the largest number of products in the  
10 case, they go to the theories, they go to the injuries, both  
11 the scientific and factual issues, I think your Honor will be  
12 persuaded that on a full airing that those are the right types  
13 of cases to put forward in a bellwether scenario.

14           Now, I will just reiterate what I said back last year,  
15 which is the plaintiffs intentionally did not select the best  
16 cases out of all of the filed cases for the plaintiffs. There  
17 are lots of cases where plaintiffs had more than one surgical  
18 procedure to fix that plaintiff's injuries, and we didn't pick  
19 any of those cases. We picked run-of-the-mill, standard cases.  
20 We have the numbers, your Honor, and I will tell you that out  
21 of the 2,000 cases, approximately, that are in the MDL right  
22 now there are approximately 1,400 or so of those 2,000 have a  
23 single surgery. The additional cases have more than one  
24 surgery. Ms. Barron only has one. So, by definition, we  
25 intentionally took a case that adhered to the spirit of the

1 bellwether process by picking someone with the typical nature  
2 of injuries, typical product, and not more severe than the  
3 balance.

4 And so, we would ask your Honor engage in a process  
5 where we make presentations to the Court as to what that second  
6 trial ought to be, that the parties show the Court and  
7 demonstrate and that your Honor select where the Court thinks  
8 that the most value will be before going through another round  
9 of briefing that may or may not lead to a trial case.

10 What I would truly hate is for another case to go out  
11 on summary judgment or for something else to happen where the  
12 Court ultimately ends up without a second case that is truly  
13 worthy and typical of these cases that need to be tried.

14 THE COURT: Just for clarification --

15 MS. ARMSTRONG: Your Honor --

16 THE COURT: -- I'm supposed to pick the number one  
17 case, and right now it would be between Barron and whatever the  
18 replacement would be for Hickinbottom. And so, you've skipped  
19 that and said, "Judge, you really should do Barron as number  
20 one." Am I right about that? I thought the process was that,  
21 ultimately, we would decide on -- between two we would decide  
22 -- I would pick number one. Right now you've bypassed that and  
23 said, "Judge, Barron's clearly number one, so now let's pick  
24 number two."

25 What I'm wondering is what if in a week we come back

1 and I hear arguments on what should be the two first choices;  
2 defense counsel tells me what theirs is, you tell me what yours  
3 is. Ultimately, I may agree with you. Barron does sound like  
4 it would be a good, exemplar bellwether trial, based on what  
5 you're saying. So, ultimately I may agree with that.

6 I also like that you're willing to pursue this in the  
7 world that we're living in right now, which is realistic, which  
8 is, obviously, maximizing the utility of video technology, and,  
9 as you know, as I've made clear, I am very open to that  
10 process. So, that, ultimately, is a consideration that would  
11 be important to the Court in terms of where the parties are  
12 with respect to their willingness to actually engage in a  
13 process that will resolve cases as opposed to just kick this  
14 can down the road for months and months because we won't hear  
15 the case with a normal in-court civil jury trial.

16 There was good news about vaccinations yesterday. I'm  
17 very hopeful about that, but that's still looking into the  
18 future, you know, January, February, March, at best.

19 So, my concern is just I don't want to veer too far  
20 off the rails in terms of the process agreed upon. I think  
21 Attorney Armstrong is saying, "Judge, we'd like to actually put  
22 a case other than Hickinbottom in front of you as an  
23 alternative to Barron in terms of the number one case." And,  
24 in light of the fact that there's going to be some delay here,  
25 in any event, I'm inclined to simply give counsel a week,

1 reconvene for argument on that question, and then I'll make a  
2 decision after I hear argument from both of you.

3 I hear what you're saying, Attorney Orent, and I am  
4 very sympathetic to what you're saying. I am very interested  
5 in getting these cases moving, but I don't think it would be  
6 unfair per se, especially if Attorney Armstrong ends up picking  
7 a case she wants to argue should go in front of Barron that's a  
8 case that you've already decided is in your pick of triable  
9 cases. So, if I can give counsel a week and come right back  
10 here, I'd be willing to hear argument on number one, number  
11 two. Obviously, you can tell I'm inclined to allow defense  
12 counsel to make a pick. It sounds like you've got very strong  
13 arguments for Barron, so it may be that in a week you just  
14 persuade me that Barron should be number one. But if there's  
15 another case and defense counsel has an opportunity to argue to  
16 me why that should go in front of Barron, I'd like to hear it,  
17 I think.

18 MR. ORENT: Your Honor, I guess my concern here is  
19 that the defendants did pick a case, and that adhering to the  
20 process that case is going to get dismissed on summary  
21 judgment. Nobody forced the defendants to pick that case and  
22 nobody forced them to file summary judgment. The defendants  
23 chose to do that, and now they're getting a second bite at the  
24 apple. By filing summary judgment and getting judgment  
25 entered, they are getting a win, quote, unquote. The purpose

1 was to have a trial in a triable case. They forfeited their  
2 right to replace this case when they picked a case without an  
3 expert.

4 What your Honor would be doing by allowing them to  
5 select the next case, even if it's ultimately your Honor  
6 chooses Barron and this other case goes after it, it rewards  
7 the choice of a case without an expert. It rewards the  
8 defendants for filing summary judgment on a case that they knew  
9 couldn't make it past summary judgment. If the defendants are  
10 so high on this other case, they should have picked it first,  
11 but they didn't. Mrs. Barron, who lives in South Carolina, was  
12 told several months ago, back in May, that her case would be  
13 either number one or number two, and last week I told Mrs.  
14 Barron that her case was most likely going to be number one  
15 because the case behind her was likely to be dismissed by the  
16 Court. Now, I'm not gaming the system. These are simple  
17 facts, that the defendants chose the case, and the defendants  
18 chose to file summary judgment. That is the process. It's not  
19 fair to Mrs. Barron to say, well, now we're going to select  
20 another case because the defendants won their case, so now the  
21 defendants get to pick another case that may jump you in the  
22 line.

23 And so, what I'm suggesting to you, your Honor, is  
24 that Mrs. Barron has earned that right to go first, and that  
25 the defendants and the plaintiffs should both make a submission



1 as to what they think jointly that second case should be, and  
2 if the defendants have a better argument as to why a second  
3 case is more representative than the plaintiffs,' well, then  
4 their case will be second. But if we can suggest a separate  
5 case that the Court thinks in its due reason that there are  
6 triable issues, that it's more typical and will advance the  
7 ball further, then our case should go first. But it shouldn't  
8 affect Mrs. Barron, who is out there fully briefed, waiting for  
9 her day in court and hoping, desperately hoping that she's  
10 going to hear at the end of today that there's a bench trial  
11 going forward, and she was hoping and praying that this hearing  
12 would hold the trial date. And I understand the reasons that  
13 it's not going to, but I have to make that call to her after  
14 this, and ultimately at the end of the day I don't want to be  
15 in a position where I have to tell Mrs. Barron that she has  
16 been jumped because the defendants won their case.

17 MR. CHEFFO: Your Honor, could I just -- I was just  
18 going to add, your Honor, I think what you said earlier in  
19 terms of coming back in a week is, necessarily, we think that's  
20 the most sensible approach.

21 And I would just say one or two things to Mr. Orent,  
22 and I don't know if this is exactly the time. I know he feels  
23 heartfelt about this, and it's not a matter of Mrs. Barron, but  
24 we actually see it from a much different equitable perspective,  
25 right? Because the reality is, when we talk about plaintiffs'

1 picks or defendants' picks, I think it's important to remember  
2 that every single case before your Honor is a plaintiff pick,  
3 right? They filed all the cases. And the idea that somehow  
4 the defendants gamed the system when there was a fully  
5 agreed-upon process, right, if any of these folks, even till  
6 today -- and this is what we've been saying. I mean, if people  
7 are not viable, they don't have experts and they shouldn't  
8 proceed, I mean, putting aside just Rule 11 or kind of the  
9 sanction-type issues, but those cases should be dismissed,  
10 right? It shouldn't be that somehow we pick a case -- we don't  
11 know everything about the cases before we pick them. We have  
12 to move forward. We don't know what the expert reports are.  
13 Your Honor has to pick them. And then the plaintiffs wait, and  
14 they don't actually dismiss the cases. I mean, if they had  
15 said to us a year ago, as they have with some other cases, "By  
16 the way, you know what? We've looked at this case, and this is  
17 just not a viable case. You're right. We'll dismiss it," we  
18 could have then repopulated. But what we're seeing is trying  
19 to turn this on its head and saying, because we followed the  
20 rules, we picked the case, they didn't say it was not viable,  
21 Mrs. Hickinbottom or the plaintiff didn't dismiss the case, we  
22 then followed the rules and filed a summary judgment motion,  
23 and I think what we're hearing is somehow we shouldn't file  
24 summary judgment motions, we should have potentially taken that  
25 case to trial so your Honor in the middle of trial would say,

1 "Why is this case here? Move for directed verdict if there was  
2 no expert." So, obviously, that doesn't make any sense.

3 This was a process. We've all been through many, many  
4 of these issues, and usually what happens is, when you have a  
5 strike process, you follow those. It's what's agreed. And the  
6 consequence of a case that when someone picks it gets  
7 repopulated in order to even set, because if what you're  
8 hearing is that this case was so kind of wildly outside, and we  
9 don't think it was, frankly, then the time that the plaintiff  
10 should have told us that, if it was so obvious -- you know,  
11 we're not presumptuous. We don't know exactly what's going to  
12 happen on cases or do we think it was very representative.

13 So, I think what you heard from Ms. Armstrong, and  
14 I'll just stop on this, is to say we heard you on the issue of  
15 technology. That was actually very instructive, and, just to  
16 be clear, I have actually done hearings on Zoom. The trial is  
17 a different issue, but we're going to be open minded and think  
18 about that. But I think under any scenario, whether it's a  
19 bench trial or anything else, I think what's important to  
20 everybody and your Honor as well is that, yes, there's a matter  
21 of maybe a few months, it may be three months, it may be four  
22 months, but it's important that we all kind of get this right,  
23 and that, if we're going to have a trial, it will also give us  
24 time to talk to the plaintiffs about some resolution, you know,  
25 abilities. But if we're going to have a trial, it shouldn't be

1 something that is kind of forced or rushed, because,  
2 ultimately, if the defendants win and the defendants don't feel  
3 like it was a representative trial for a bellwether, then  
4 that's going to impact future cases, or if we win and they say,  
5 "Well, that's because you only had this type of trial or that  
6 type of trial," it's not going to be instructive. So, what I  
7 think is what your Honor said, is that we have time, we should  
8 use it appropriately. We're not talking about five years.  
9 Your Honor still has to rule on Daubert motions in these cases,  
10 right, so it's not like it's fully framed? There's all kinds  
11 of pretrial issues that need to be addressed. Mr. Orent talked  
12 about a number of other motions that he wants to make that are  
13 pretrial. And I think we should do that in an orderly process.  
14 I think your Honor should have the benefit of two cases that  
15 are actually before the Court and the one can be fully worked  
16 up and can be ready for the next trial, and I think that what,  
17 frankly, Mr. Orent is talking about, what we talked about a  
18 year ago, that's exactly what we contemplated from the get-go,  
19 your Honor.

20 MS. ARMSTRONG: Your Honor --

21 THE COURT: Attorney Armstrong.

22 MS. ARMSTRONG: -- I just want to add something.

23 You've heard a lot on this already. I'm happy to answer any  
24 questions you have, but I just want to add something that I  
25 think is somewhat concrete and may be helpful. The first is

1 that Mr. Orent suggested that the two cases that your Honor  
2 should -- he wants you to pick instead of the defendants' pick  
3 as the replacement case to be Hicks or Shumaker. Hicks is the  
4 case we struck, right? We don't think it's representative. I  
5 can get into that, but the order is very clear that the struck  
6 cases should not be one of the first two cases to be tried, and  
7 that's something that both sides agreed to.

8 Shumaker is something we would consider as a  
9 replacement case, and if that's a way to shorten this process  
10 or quicken this process -- you know, I can't make a  
11 representation on this call today, but it's certainly something  
12 we would seriously consider. We'd also consider the Luna case,  
13 which is something -- the plaintiffs' pick; it's on their short  
14 list. So, we would be able to pick a replacement case very  
15 quickly, and based upon what Mr. Orent has said, I don't think  
16 he would have a legitimate basis for objecting to our  
17 replacement pick.

18 The other thing that I just wanted to add was, you  
19 know, we moved for summary judgment in Hickinbottom. We think  
20 all of these cases have fatal flaws. We moved for summary  
21 judgment in Barron as well. We may move for summary judgment  
22 in the replacement case. But whether or not we win summary  
23 judgment, that's a whole other question. But we always move  
24 for summary judgment prior to trial. We just didn't expect the  
25 plaintiffs not to oppose our Motion for Summary Judgment in

1 Hickinbottom, since it had been one of the first 16. It was  
2 one of the eight when we selected this process. So, we assumed  
3 that they believed it was a viable case, and so we picked it.  
4 We didn't pick Peterson. Peterson only has express warranty  
5 claims left. We didn't pick that. The one we were going to  
6 pick was Vollmar, which, based upon the criteria that Mr. Orent  
7 has articulated, you know, it's a V-Patch case, it's adhesion,  
8 which is a common injury, she didn't have an explant, but she  
9 had a revision surgery, meets what his criteria are for  
10 representativeness, but they struck that one.

11 So, you know, again, I don't want to do finger  
12 pointing. I felt like I was the target or we were the target  
13 of a lot of finger pointing just now. I don't want to do that.  
14 There was a process, the parties agreed to the process, we  
15 abided by the process. Again, we think we would pick a case as  
16 a replacement case that Mr. Orent could not have any dispute  
17 with, so we think what your Honor proposed about having a  
18 hearing in a week about which case should go first, that makes  
19 sense to us.

20 THE COURT: Attorney Orent.

21 MR. ORENT: Well, again, what's interesting, your  
22 Honor, is -- and I hear what Ms. Armstrong just said about that  
23 they always file summary judgment, and that's true, except for  
24 it's highly unusual that the plaintiffs not put forward an  
25 expert and have such a glaring hole in a case, and there was

1 nothing precluding the defendants from picking another case and  
2 filing summary judgment when they knew that there were no  
3 experts. That's what should have been done here.

4           Mr. Cheffo goes on to talk about this as though it's a  
5 binary choice. You can always file summary judgment in a case.  
6 There's no reason that the defendants couldn't have filed  
7 summary judgment when they knew that the quote, unquote, fatal  
8 flaw, that language was used in the summary judgment. They  
9 should have filed summary judgment on that case or sought  
10 through a conversation with plaintiffs to dismiss it, knowing  
11 that I talked about this issue and my concern about our  
12 voluntary dismissals back in August of last year. So, a month  
13 later we have expert disclosures. We're not able to get an  
14 expert on that case. They don't disclose anything. The  
15 defendants should have talked to plaintiffs or filed summary  
16 judgment or done something else, but to put your head in the  
17 sand is not the same thing as saying you didn't know.

18           The second point, your Honor, is that I hear this  
19 language about ordinary course and all these words that  
20 Mr. Cheffo used. Really what he's talking about is delay,  
21 taking away from the certainty of knowing that we have a trial  
22 case. We each were given one case to pick. We picked one. We  
23 think we're going to survive summary judgment. They picked one  
24 they knew wasn't going to survive summary judgment. It  
25 couldn't, based on the law, survive summary judgment, which is

1 why counsel didn't oppose it. There was no genuine issue of  
2 material fact. And so, what we would be telling the defendants  
3 is that you get a pass for not filing summary judgment and  
4 picking a case that should be a triable case and taking that  
5 option.

6 And so, your Honor, again, I think that the Barron  
7 case, it was picked as one of the two cases that were picked.  
8 We can't ignore that Hicks was picked in this process and that  
9 both parties should -- maybe we can meet and confer and even  
10 agree on what that replacement case would be for the second  
11 trial -- it sounds like we have a universe of two or three  
12 cases that's not very far off -- and at least then present it  
13 to the Court. But as far as the first case goes, we think  
14 fairness dictates that it has to be Barron. Thank you, your  
15 Honor.

16 MS. ARMSTRONG: Your Honor, really quick, really  
17 quick --

18 THE COURT: Yeah.

19 MS. ARMSTRONG: -- because we didn't file summary  
20 judgment motions until after the first two cases were picked.  
21 There was a reason for that when we were discussing the  
22 deadlines. Mr. Orent and I agreed that the deadline for  
23 picking the cases would come before the deadline for filing  
24 Daubert and dispositive motions, because otherwise your Honor  
25 would have gotten Daubert and dispositive motions in eight



1 cases, and we didn't want to inundate the Court's docket with  
2 that many filings; and, frankly, we didn't want to do the work  
3 in that many cases if there were only going to be two cases up  
4 for trial. So, we did that as a matter of efficiency. That's  
5 why we waited to file our Motion for Summary Judgment in  
6 Hickinbottom. But they knew -- and I also want to clarify we  
7 keep talking about them not having an expert. Our motion is  
8 based upon them not having an expert on specific causation.  
9 They have generic causation experts. Again, we didn't know  
10 what they would say in response to our motion. They didn't  
11 respond to our motion. We don't make any assumptions that  
12 motions for summary judgment are going to be successful. Some  
13 are stronger than others, that's true, but we don't make any  
14 assumptions about how the Court's going to rule.

15 MR. ORENT: Your Honor, I'll just add one thing, which  
16 is a deadline by definition is the last day to file something.  
17 The defendants could have filed and there was still nothing  
18 preventing them from reaching out to the plaintiffs back in  
19 September or October or November, knowing that we had  
20 highlighted this issue last summer. Thank you, your Honor.

21 THE COURT: Which issue that you highlighted?

22 MR. ORENT: Two, and our concern that every time we  
23 dismissed a case that it would be replaced, and so during that  
24 hearing on August 8th of last year I talked about the  
25 possibility, and if your Honor reviews that transcript at page

1 14 and 15, you'll see that I raised the exact concern which we  
2 have here, which is a scenario where, if we voluntarily  
3 dismiss, the defendants get a replacement, but now it appears  
4 on the other side, when we don't voluntarily dismiss the  
5 defendants get a replacement.

6 MR. CHEFFO: Your Honor, can I -- I'm sorry. If  
7 you've heard enough, you'll stop us, your Honor, but I'm just  
8 struggling with the concept -- I know Mr. Orent is a very good  
9 advocate, as always, and a fair advocate but doesn't represent  
10 this particular person, and what we're hearing is essentially  
11 it was so obvious to us that there was no material facts of  
12 law, right? And I suspect if we had counsel for the actual  
13 plaintiff here he or she would not say, "I've known for a year  
14 that this was essentially a frivolous, nonviable case which  
15 could never survive summary judgment," right? Because if he or  
16 she did that, presumably your Honor would say, "Well, why is it  
17 that you continued to prosecute it, and why didn't you just  
18 dismiss it? Why didn't you just do it at some point, because  
19 you have an ethical obligation not to prosecute cases that are  
20 absolutely frivolous and can't pass a summary judgment motion?"

21 So, it can't be that that's the case, because I'm  
22 giving that counsel the credit that he or she deserves, is that  
23 they probably believed that there was something viable. Now,  
24 it may have come at some later point they made a strategic  
25 decision, but, again, this idea that somehow it's the

1 defendants' obligation to ferret out and figure out which case  
2 is absolutely not viable or a frivolous case that can't proceed  
3 and then not move on that one and then leave that -- that's not  
4 the way the process is supposed to work. The way the process  
5 is supposed to work is, first of all, before selection  
6 everybody in the pool should talk to their clients and say,  
7 "You know what? Your case can be picked, and if you don't want  
8 to proceed, then you should dismiss it, and then after it's  
9 picked, if someone knows the case is not viable, and I'll use  
10 that word as kind of non-pejorative, then it should be  
11 dismissed early. But if you proceed in the process and have  
12 general causation experts and have depositions and then someone  
13 makes a summary judgment motion, you can't really blame the  
14 defendant for having picked that case.

15 MR. ORENT: Your Honor, Mr. Cheffo ignores the  
16 timeline of events here. Fact discovery is the time where you  
17 learn about your case. Things break during fact discovery that  
18 inform experts, and so really this is the first motion  
19 addressing that case where there would be any opportunity to  
20 even oppose a summary judgment or oppose something and stand on  
21 the merits of the case. This was after the completion of fact  
22 discovery that expert discovery occurred and there was no  
23 specific causation expert.

24 But this gets into -- this analysis is not the point.  
25 The point is that the defendants picked a case, rightly or

1 wrongly, they picked a case that is being dismissed on summary  
2 judgment. That's the point, and the point is that there's one  
3 case that wasn't dismissed on summary judgment. That is the  
4 process. We have both agreed to partake in the process. The  
5 process isn't -- it's not a hurdle competition, where whoever  
6 hits the first hurdle gets to replace that runner with another  
7 runner in the hope that that runner can clear the hurdles.  
8 When you run a hurdle race, if you win, you win. The other  
9 side, if they run into the hurdle they're done, and in this  
10 case whatever happened for whatever reason summary judgment has  
11 been granted in one of the two cases. It hasn't in the other.  
12 That's it. This is the process that was contemplated. We're  
13 now faced with picking another case. That other case, that  
14 replacement, should either be by agreement or by blessing of  
15 the Court. Thank you, your Honor.

16 THE COURT: Okay. I think I've heard enough on this.  
17 I think what I'd like to do is in one week -- and I don't want  
18 to cancel a hearing in one week. I think we could probably go  
19 forward with fewer counsel, if necessary. I'd like, obviously,  
20 Attorney Armstrong and Cheffo and Attorney Orent and Hilliard  
21 and lead counsel to be available, but I think in one week what  
22 I'd like to hear -- and, obviously, this is a tweak to the  
23 protocols with respect to what order the cases should go in  
24 because of what's happened in this situation with respect to  
25 Hickinbottom -- I think what I'd like to hear is argument from

1 counsel. Obviously, Attorney Orent is probably going to still  
2 argue that Barron should go first, and I'm going to allow  
3 Attorney Armstrong and Cheffo to propose a hearing that they  
4 think should go first. But I'd also like to give Attorney  
5 Orent the opportunity to tell me another possible hearing that  
6 should go -- perhaps get priority and let the Court listen to  
7 how counsel is prioritizing these cases and whether or not they  
8 truly are really exemplar bellwethers and cases that are ready  
9 to go to trial.

10 I don't think it hurts for me to hear one further  
11 example from Attorney Orent with respect to a case that he  
12 thinks is really ripe and ready to go. Obviously, I'll decide  
13 on which should go first. We will train our focus on that  
14 case. I'll make that decision in one week. I'll allow  
15 Attorney Armstrong and Attorney Cheffo to propose a case they  
16 think better than Barron to go first. I'll listen to that  
17 argument. But I'd also like Attorney Orent to give me a  
18 possible third case and tell me why that case is perhaps even a  
19 better exemplar bellwether than what the defense counsel is  
20 suggesting for the first case. That way I can weigh what these  
21 cases really present; I'll have a better sense of the three  
22 cases. And, obviously, Attorney Orent gets the benefit of  
23 adding one to my consideration. I'd like to weigh what he says  
24 about a second case as it compares to what defense counsel  
25 thinks should be the first case.

1           So, that's what I'm going to do in one week, and I  
2 will make that decision, I think I'll probably make the  
3 decision from the bench, as you see it, this bench, and give  
4 you a decision on that fairly quickly.

5           And, ultimately, if you decide by meet and confer that  
6 you've agreed on number one and number two in the meantime, or  
7 you've agreed on you think Attorney Armstrong's proposal for  
8 number two or for number one is one that you would pick and  
9 agree with, Attorney Orent, then I'll just hear both of you  
10 argue those two cases. But if you do not think that the pick  
11 that defendants make and propose as number one is really  
12 appropriate, I'll let you tell me about a third option. I'd  
13 just like to hear that.

14           I know that's different than the protocol, but,  
15 obviously, we're in a different context here in terms of what's  
16 happened. We're also in the unique situation of this pandemic,  
17 and I'm eager to move some cases.

18           So, that's how I think I'm going to resolve this. So,  
19 we will get on this same proceeding in a week, and I'll hear  
20 argument on that. I may be able to give you a sense with  
21 respect to Daubert motions and whether or not I think we might  
22 need some hearings on those. We can tie up loose ends.

23           I don't think I need briefing in advance of this  
24 hearing; I think I know enough about the case. I mean, to the  
25 extent counsel wants to file something to give me sort of a

1 summary, I'm open to that, but I want to do the hearing in a  
2 week, so it would have to be filed in short order, and I think  
3 I can live without papering this particular issue.

4 So, a hearing in one week, obviously, seven days,  
5 thereabouts, eight, nine days, if we can put it on for a  
6 hearing on that one issue.

7 Attorney Matthews, I know you had something you wanted  
8 to bring to the Court's attention with respect to the state  
9 cases.

10 MR. MATTHEWS: Yes, your Honor. Since I'm state court  
11 liaison, we wanted to advise the Court that all the cases in  
12 state court have been resolved. They are being dismissed per  
13 an agreement with the defendants. The state court clerk's  
14 office is involved with the timing of filing of some of the  
15 dismissals where bankruptcies are involved. There's a handful  
16 of those. We anticipate that all dismissals will be filed in  
17 August, and the terms are confidential. And since there are  
18 currently no pending state court cases, I would request to be  
19 relieved as state court liaison counsel, and if you would like  
20 me to file a motion making that request, I'd be glad to do so.

21 THE COURT: Any objection to that request?

22 MR. CHEFFO: Not here, your Honor.

23 THE COURT: Okay. If you would just file that  
24 indicating it's assented to, I'll try to grant that shortly  
25 thereafter.

1 MR. MATTHEWS: Thank you, your Honor.

2 MS. ARMSTRONG: Jim, would you let us review it before  
3 it gets filed?

4 MR. MATTHEWS: Of course.

5 MR. CHEFFO: We'll miss counsel, and it's been very  
6 nice working with you.

7 THE COURT: Excellent. Thank you. Anything else  
8 before we get off? I'm sure counsel can consult with Attorney  
9 Esposito to pick a time that works for folks for this next  
10 video hearing.

11 MR. HILLIARD: Your Honor, if it is a week from today,  
12 from a personal perspective the morning would be much better  
13 for me than the afternoon.

14 THE COURT: I'm sure I will be open to whatever works  
15 for everybody. So, let's try to see if we can't accommodate  
16 everybody. Is everybody looking at their calendars? Is the  
17 morning, a week from now in the morning, same time, does that  
18 work? I'm not even -- I should be more responsive and look at  
19 the Court's calendar as well, although, I know Attorney  
20 Esposito is probably frantically looking to see if I already  
21 have something. No. I could do it the 28th of July at  
22 10:00 a.m.

23 MR. ORENT: That works, your Honor.

24 MR. HILLIARD: That would be wonderful for me, your  
25 Honor.



1 THE COURT: Attorney Armstrong?

2 MS. ARMSTRONG: Your Honor, I am free that week.  
3 Right now I have some medical procedures that will be scheduled  
4 in advance of surgery, which is the week of August 6th, and  
5 they will be scheduled. They may call me and consult me about  
6 scheduling them, they may not call me and consult me about  
7 scheduling them, but I will have to get them done. So, that's  
8 the only thing that could impact my schedule, is if they call  
9 me and tell me I need to show up at the hospital for a test on  
10 "X" day.

11 THE COURT: Okay. That's the one exception that the  
12 Court will make in terms of rescheduling this. If there is  
13 some procedure that Attorney Armstrong finds out about, we'll  
14 move this hearing a day or two to accommodate that schedule.  
15 All right?

16 MR. HILLIARD: Thank you very much.

17 THE COURT: Excellent. All right. Thanks to  
18 everybody, and I'll see you next week.

19 MR. ORENT: Thank you, your Honor.

20 MS. ARMSTRONG: Thank you, your Honor.

21 MR. CHEFFO: Thank you, your Honor.

22 MR. HILLIARD: Thank you, your Honor.

23 (WHEREUPON, the proceedings adjourned 11:35 a.m.)  
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C E R T I F I C A T E

I, Brenda K. Hancock, RMR, CRR and Official Court Reporter of the United States District Court, do hereby certify that the foregoing transcript constitutes, to the best of my skill and ability, a true and accurate transcription. Of my stenotype notes taken in the matter of In Re: Atrium Medical Corp. C-Qur Mesh Products Liability Litigation, No. 16-md-02753-LM.

Date: 7/27/20

/s/ Brenda Hancock  
Brenda Hancock, CRR, RMR  
Official Court Reporter