

*NO COPY OF THIS TRANSCRIPT MAY BE MADE PRIOR TO NOVEMBER 9, 2020

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

* * * * *

IN RE: ATRIUM MEDICAL CORP. * 1:16-md-02753-LM
C-QUR MESH PRODUCTS LIABILITY * July 28, 2020
LITIGATION * 11:18 a.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

Adam M. Evans, Esq.
Hollis Law Firm PA

Anne W. Schiavone, Esq.
Holman Schiavone LLC

David Selby, II, Esq.
Bailey & Glasser LLP

For the Defendants:

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

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

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: Good morning, Judge.

I think you're on mute.

THE COURT: Thank you.

THE CLERK: There we go. I can announce the case, Judge.

And we do have some observers in addition to who's on the screen.

We have a court reporter.

For the record, this is a status hearing in the Atrium MDL C-Qur Mesh Litigation. It is 16-md-2753-LM.

THE COURT: All right. So because this is a video proceeding and we -- I give open access to my proceedings, I just want to give the standard warning to anybody watching that they can't record in any way, shape, or form this video hearing.

They can't take a picture of it even with their iPhone and in any way publicize any such picture or photograph or audio recording. That would violate our local court rule and I would need to exercise some sanctions in response and I don't want to do that. So please don't violate that rule.

And I've entered public access findings with respect to this hearing in this case. So I've either

1 entered them before the hearing or I'll enter them
2 shortly thereafter.

3 Okay. So this really is a hearing for me to
4 hear you present which cases you think should go first.
5 And because it is a limited time frame, it's -- right
6 now I have a meeting that I can't miss at 12:30, so what
7 I'd like to do is divide this up giving plaintiffs the
8 first half-hour, defendants the second half-hour, and
9 then give you each five minutes sort of in rebuttal.

10 If we need to continue this for some reason, I
11 certainly am open to that, but that's what I envision to
12 get us started.

13 Anybody have any problem with dividing it up
14 that way?

15 MR. ORENT: Your Honor, Jonathan Orent for the
16 plaintiffs. Good morning.

17 THE COURT: Good morning.

18 MR. ORENT: We've -- as your Honor has become
19 accustomed to, we've had substantial discussions with
20 defendants and have reached certain agreements, your
21 Honor, limiting -- which will have an impact in terms of
22 limiting today's argument.

23 So I'm not sure -- I don't want to speak for
24 defense counsel -- how much time that they need, but I
25 do know for plaintiffs we certainly don't need anywhere

1 near that amount of time.

2 THE COURT: Okay.

3 MR. ORENT: The -- the agreement that we've
4 reached is that the first two cases will be the Barron
5 case and the Luna case and the argument this morning
6 will be limited to the issue of which of those two cases
7 goes first. And that is the sole issue that is I guess
8 being argued today vis-a-vis case selection.

9 We have also agreed to continue to meet and
10 confer. We have certain thoughts on what the third
11 trial should be, but that's not of pressing an interest
12 or need right now.

13 So --

14 THE COURT: Okay. Let me ask counsel this.
15 This might be a little tricky to parse out, but if we're
16 going first, that means that you're going while the
17 pandemic is still raging.

18 Now, in New Hampshire our statistics are
19 decent. They're actually very good, our data, but we
20 are not doing civil trials quite yet. So we're looking
21 at, you know, sometime in the future.

22 So is -- have counsel thought about -- in
23 prioritizing and saying, we're going to do this one
24 first, have you thought about the willingness to include
25 video technology in that first bellwether?

1 MR. CHEFFO: Your Honor, this is Jonathan, do
2 you want to -- can I just --

3 Can I -- first of all, we agree, your Honor,
4 with Mr. Orent's, you know, kind of outline, obviously
5 to the extent it's -- all of this is subject to what you
6 think is best. But we did spend some time trying to
7 work through -- we, frankly, had a bunch of other issues
8 that, you know, are kind of not on the table because we
9 were able to talk about them beforehand.

10 But to answer your question directly, your
11 Honor, I think this is where there's a little bit of a
12 difference of opinion, but I want to answer your
13 question directly.

14 So our view is we took to heart very much what
15 you said last time, but from the defense perspective --
16 and this is where I think there's not complete
17 agreement -- we think the better course, whether you
18 take Luna or Barron, is to basically take it a date
19 after, you know, January 1 that's consistent with your
20 Honor's schedule.

21 And I could, you know, go on a little bit as
22 to those reasons, but mainly -- and I had a litigation
23 case just before Judge Crawford, in -- the chief judge
24 in Vermont, and we had these similar issues where there
25 was a September, October trial date and after kind of a

1 lot of kind of back and forth and he, understandably,
2 wanted to keep the trial date, so did the plaintiffs.
3 But at the end of the day, when we worked through the
4 importance of the case and trying to do everything that
5 needed to be -- he ultimately came to that conclusion.

6 Obviously your Honor will independently decide
7 what you think is best here, but for a number of
8 reasons, we're not precluding whatever because your
9 Honor made some very good points and I think persuasive
10 points on, you know, if we get to a point where we may
11 need to do some -- some what I'll call out-of-court-type
12 issues, but I think for probably three main issues.

13 One is this is the first bellwether, you know,
14 case and we think that it does add some importance and
15 we'd like to have -- you know, I think as the plaintiffs
16 proposed that he saw in our letter brief, even under
17 their proposal would require kind of a trial that would
18 be of certain nonlegal issues. They'd have to amend
19 their complaint, we would have to go through motion
20 process as to that.

21 We also think from a timing perspective,
22 putting the pandemic aside, right, while every judge,
23 including your Honor, certainly likes to keep to
24 schedules, even kind of outside of pandemic world,
25 right, it's not unusual to have a trial move from

1 September, you know, because no one wants to try
2 anything in November with Thanksgiving, or then December
3 to January.

4 So we --

5 THE COURT: All right. But let me just stop
6 you because you're presuming, number one, it has to be
7 Barron or Luna. But is there a case in your list of --
8 I think you have eight. Is there a case that would be a
9 decent case to do first as a video trial, taking into
10 consideration the world we're living in?

11 And if Barron or Luna don't really give you
12 that opportunity and neither one of you really thinks it
13 would be ideal to have a video hearing rather than an
14 in-court jury trial or a video trial, maybe there's
15 another in your list of trial cases that might be
16 suitable for that and where the stakes might be -- I
17 mean, I think you've obviously got your -- your top
18 cases that you're putting forth. You both think
19 Barron -- either Barron or Luna are good bellwethers.
20 Maybe those two aren't the perfect case to try via
21 video.

22 MR. CHEFFO: Well, your Honor, I think to
23 that -- candidly, I think Barron and Luna are probably
24 the best cases to try, right, whether they were video or
25 not, right, because they've been worked up. And I think

1 we've agreed with the strike process that they are the
2 most, you know, kind of representative, if you will, or
3 maybe the least outlier, depending on your perspective.

4 So I don't think that's the issue. It's not
5 like there's a bunch of other cases that would be
6 easier. I think that, you know, there's just some real
7 practical issues. And I just want to take 30 seconds on
8 them.

9 One is as the plaintiffs proposed this, they
10 would basically have to amend their complaint, add
11 causes of action that are not currently in there. We
12 would then have a trial, we'd have a bench trial on
13 those issues.

14 If your Honor is asking, you know, do we think
15 it makes sense to do this full-on jury trial, you know,
16 in the Zoom world, I think our preference right now, in
17 talking to our client, would be because, you know,
18 there's several thousand cases that are pending,
19 depending on what happens in the world, right, obviously
20 your Honor and other courts may come to a point where we
21 need to do that, but we just think that if your Honor
22 was to basically set either Barron or Luna, which we
23 think, frankly, are the most far along -- so there's not
24 like there's a bunch of other cases that could -- I
25 think it would add more complication, right, if we

1 picked case number six that we haven't even agreed on.
2 Then I think it certainly would require a lot more work.

3 So I think what we're saying is that in light
4 of the fact that there would be a relatively modest
5 extension -- and obviously your Honor knows the docket
6 much better than we do -- to do something in the fall, I
7 think if we could agree, as Judge Crawford did, to
8 basically say, I'm going to try and set this, you know,
9 after January 1.

10 At that point, if the world is still such that
11 it's very complicated, you know, we would obviously talk
12 to your Honor, the plaintiffs, and our client and find
13 out, you know, things like -- whether a summary jury
14 trial made some sense, right, maybe doing a two-day --
15 those are types of things that I think we certainly have
16 not ruled out.

17 It just seemed to us that to go through that
18 process with such an important -- because no matter how
19 we frame this, it's going to have -- you know, your
20 Honor knows this as an MDL judge -- it's going to have
21 follow-on potential effects, right?

22 And we just think to -- in order to have a
23 bellwether process and put this much time into it that
24 we'd actually like to shoot for a more traditional
25 format so that it will be more instructive and

1 informative to the Court and, you know, to parties and,
2 frankly, to other plaintiffs' lawyers and our client in
3 this litigation.

4 So that's kind of where we are at the moment,
5 your Honor.

6 THE COURT: Okay. Attorney Orent?

7 MR. ORENT: Your Honor, we -- we see the world
8 very differently from the defendants on this particular
9 regard.

10 First and foremost, both Ms. Barron and
11 Ms. Luna are willing and able to move forward with their
12 trials. We would -- we would prefer to do an all issues
13 trial by Zoom. However, in the absence of that, we --
14 in the absence of a bench trial on all issues, we
15 certainly would be willing to pursue New Hampshire
16 Consumer Protection statute and other equitable cases
17 where --

18 THE COURT: What about a jury trial? I mean,
19 it doesn't have to be a bench trial.

20 MR. ORENT: We're not opposed to that either,
21 your Honor. You know, we really took to heart your
22 suggestion to look at issues. And so what we've looked
23 at and are open to, quite frankly, is either all
24 equitable or total trial by Zoom for either of those two
25 cases.

1 Your Honor also suggested is there a
2 limited-issue trial that could go forward and we would
3 be supportive under the New Hampshire Consumer
4 Protection Act of just trying liability there, where
5 there aren't individual issues of causation and damages.

6 And as your Honor knows, the point of a
7 bellwether process is to allow the parties to get
8 information to move toward settlement. And,
9 unfortunately, we're in a new reality where the world is
10 not going to change.

11 I think we all have come around to realize
12 that this is, quote, unquote, the new normal and that
13 the justice system that we as lawyers -- we owe it to
14 all of our clients, we owe it to the Court, to move
15 these cases as best we can. And my fear, your Honor, is
16 that these 2,200 people that sit in this MDL, their
17 cases will grind to a complete halt unless we get
18 creative.

19 And what we're talking about is not
20 unprecedented territory as far as this country goes.
21 There have already been jury trials via Zoom. There
22 have already been -- there's a -- I believe there's a
23 trial going to kick off in Delaware shortly.

24 So your Honor has -- has indicated that she
25 has thought long and hard about it. The plaintiffs

1 stand ready, willing, and able to provide the Court with
2 a menu of options that will suit the needs of the Court,
3 the plaintiffs, and the defendants to move this along,
4 but we can't just do nothing for the next six months.

5 And, your Honor, that is seriously my concern
6 is that these cases are worked up, pretty much
7 everything is done, the briefing is -- is substantially
8 complete, and we're just waiting for our day in court.
9 And to do nothing, I think, is the worst thing that we
10 can do right now, your Honor.

11 THE COURT: Okay. Well, why don't we get into
12 the merits then at least of Barron versus Luna.

13 And do you want to go first then, Attorney
14 Orent? You indicated you probably could be fairly
15 brief. And then I know defendants have some exhibits
16 and some screen-sharing.

17 So would you like to go first, Attorney Orent?
18 And then you can come back, obviously.

19 MR. ORENT: Absolutely, your Honor. And I'll
20 be very brief.

21 Your Honor, we think that Mrs. Barron should
22 go first for a few reasons, but I want to say at the
23 outset that we agree this time around with the
24 defendants' selection of Ms. Luna as being
25 representative with the issue that we've raised

1 previously. The concern with some of these other cases
2 that were struck or whatever, was that we had concerns
3 about the representative nature of those cases.

4 We don't have that concern here. In fact, I'm
5 sure defense counsel will tell you how remarkably
6 similar the Barron and the Luna cases are. They have
7 the same product, they have very similar injuries, and
8 so from a statistical standpoint, they're very similar
9 cases.

10 So we couldn't complain about another case
11 that we truly feel is not a dead ringer for plaintiffs,
12 but it's not a loser. It is a true triable case, just
13 like Barron is.

14 And so when you look at two substantially
15 similar cases, I think that there are two factors,
16 primarily, three factors, that the Court should focus on
17 for the decider.

18 Number one, fundamental fairness. We went
19 through this process, as your Honor heard argument last
20 time. Ms. Barron originally, she was one of the two
21 original cases surviving. She has an expectation that
22 her case should move forward in one of the -- in the
23 first trial, particularly in light of the defendants'
24 essentially winning the other case through summary
25 judgment. So that's the first point.

1 The second point is that case is actually
2 fully briefed now in terms of summary judgment, motions
3 in limine -- excuse me, Daubert, and so there's no
4 additional briefing on -- on that case that needs to
5 be done as such.

6 And then, finally, when you look at the
7 medicals between these two plaintiffs, they're very
8 similar with one major difference, and that is diabetes.
9 And, unfortunately, we often hear how diabetes can have
10 a negative impact on infections and foreign bodies and
11 things of that nature. And approximately only
12 15 percent or so of the docket does have diabetes and
13 that is a major wild card to throw in.

14 Again, it's not something that we think makes
15 it totally unrepresentative and outside the realm of
16 possibility, but when your Honor looks at two nearly
17 identical cases otherwise, we think that that is the --
18 the fact in light of arguments one and two, that should
19 sway the day.

20 So for those reasons, your Honor, again being
21 very succinct with my arguments, we think that fairness
22 dictates that Ms. Barron should go first.

23 THE COURT: And the other cases, though, would
24 have other sort of comorbidity issues other than
25 diabetes? Is that why Luna is somewhat representative?

1 MR. ORENT: Your Honor, there are -- both
2 cases have comorbidities. You know, comorbidities are
3 these things sort of in the eye of beholder. If you
4 want to look for them and find them, you can find them.
5 We're all different as people. Right?

6 So, you know, it depends how you call someone
7 obese, whether it's a BMI of 28 or 30, you know. Or,
8 you know, it's -- we all have comorbidities to the -- to
9 some degree or other. We're all different people. And
10 by the time anyone reaches, you know, their mid 40s, you
11 know, they've had the whole life of experiences that can
12 come back and be used to try and classify someone in one
13 way, shape, or another.

14 And the reality is that every plaintiff is
15 going to be different. I presume, based on the slides
16 that were shared earlier, that the defendants are going
17 to argue that Ms. Luna has more comorbidities and,
18 therefore, more -- more representative, but I would say
19 they're both equally unique.

20 The diabetes factor, I think, is the more --
21 you know, when we're looking at whether or not the mesh
22 had an impact, diabetes adds an additional complication
23 to the jury's decision-making process that does not
24 represent the overwhelming majority of plaintiffs.

25 But, again, you know, these cases are very,

1 very similar in terms of products. The ages are not
2 hugely far off, I think about ten years between these
3 two individuals. Their courses were fairly similar.

4 So --

5 THE COURT: Okay.

6 MR. ORENT: -- you know -- so, again, just to
7 answer you directly, it really -- we think that how you
8 classify comorbidities is really in the eye of the
9 beholder.

10 THE COURT: Okay. Speaking of the eye of the
11 beholder, I notice that you have one extra piece of
12 artwork behind you. It is much improved. I must say it
13 really is enhancing your atmosphere and we all
14 appreciate that. So kudos to your new artist.

15 MR. ORENT: Thank you.

16 THE COURT: So Attorney Cheffo, Attorney
17 Armstrong.

18 MR. CHEFFO: Ms. Armstrong, your Honor.

19 MS. ARMSTRONG: Yes, your Honor. It'll be me.
20 Before I share my screen, I want to preface it
21 that Mr. Orent had correctly stated our agreement that
22 we're just going to be arguing between Barron and Luna.

23 I have slides on other cases and -- or other
24 cases are referenced in the slides because there wasn't
25 time to change them and meet the 10:00 a.m. deadline.

1 But I'm going to skip over those, fast-forward through
2 those, and I'm not going to reference other cases, but I
3 just wanted to explain why there's other cases in there.

4 So I'm going to attempt to share my screen
5 right now.

6 Just a second. Let me see if I can do this.
7 This worked during practice.

8 Here we go.

9 Oh, no. I'm not sharing it. Okay. So -- let
10 me back up to the front.

11 So this is just an overview and it's not --
12 you know, our perception -- our perception -- our
13 perception of the issues is not that different than what
14 Mr. Orent just explained. Our perception of the
15 individual cases is the same, but, you know, we looked
16 at the device at issue, the injury alleged, the damages
17 claimed, the age at implant.

18 We do think comorbidities are important
19 because those are going to be the things that
20 alternative causation arguments center around. And as
21 I, you know, discussed last week, from the plaintiffs'
22 perspective, they will focus -- they tend to focus less
23 on alternative causation, but it's an important issue
24 for defendants to have tested in front of a jury and
25 a -- or a finder of fact in a bellwether case.

1 I want to make a note that, you know, I'm
2 going to be quoting some statistics; Mr. Orent has
3 quoted some statistics. I think that most of us are
4 relying upon the plaintiff profile forms which are
5 limited information and we have found once we delve into
6 the medical records that sometimes those aren't
7 accurate, but we're working with the information that we
8 have.

9 So starting with Luna, which is -- which is
10 the case that we are proposing, we think in terms of
11 her age -- and I will go through some of these
12 statistics later -- she is of an age that is consistent
13 with what we think the midrange of the -- of the
14 plaintiff pool is, whereas Ms. Barron tends to be a
15 little bit younger.

16 I think they both have the same C-Qur product,
17 as Mr. Orent said, which was the V-patch. Injuries, her
18 injury -- Ms. Luna's injury was infection, which about
19 51 percent of the plaintiffs claim. She also claims an
20 abscess or a fistula, which about 30 percent of the
21 plaintiffs claim.

22 Comorbidities include obesity, which is
23 something we see in a lot of the plaintiffs. It's
24 something that is very common in the hernia population.
25 Diabetes mellitis, diabetes, which is -- may not be as

1 high as in the -- something like obesity, but it is a
2 fairly significant segment of the population.

3 She also has a systemic lupus, I can't say the
4 next word, and diverticulitis.

5 But the main thing that we think is
6 interesting about her or important about her is that she
7 has a constellation of comorbidities and that's what we
8 think is typical.

9 I mean, people with a -- and it's not
10 uncommon. I mean, I say this as an obese person. It's
11 not uncommon for people who are obese to have a variety
12 of health problems, including diabetes and
13 gastrointestinal issues that flow from that, and
14 Ms. Luna is typical in that regard.

15 So because of her age at implant, because of
16 the product, and because of her comorbidities, we
17 consider her to be a very representative plaintiff and
18 we think that her case should go first.

19 The plaintiffs' selection, Ms. Barron, she
20 is -- she's 35 years old. That makes her significantly
21 younger than most of the plaintiff population. And
22 the -- the course of treatment, the injuries, those are
23 fairly typical of the plaintiffs, but in terms of
24 comorbidities, she does have a history of smoking, which
25 is common -- which is -- you know, we do see that among

1 the plaintiff population, but I don't think -- I don't
2 know if she's a current smoker.

3 But the most significant thing is that there
4 is alternative causation in this case as well and we
5 think that the alternative causation is strong. Not
6 wanting to argue the merits, but just telling you our
7 perspective, we do think it's strong alternative
8 causation. But it's very different than the type of
9 comorbidities and alternative causation you're going to
10 see in other cases.

11 Because for Ms. Barron, the main factor that
12 we're going to be pointing to as an alternative
13 causation is that she elected to have hernia repair very
14 shortly after giving birth to her fourth child. And we
15 think that was a significant factor. That's not
16 something that you're going to see in other cases.

17 So because of her age and because of that --
18 because her alternative causation is not going to
19 resemble types of alternative causation that we see
20 among other plaintiffs, we think she's less
21 representative.

22 I'm going to fast-forward through the next
23 slides.

24 So, for example, just looking at age, about --
25 you know, most of the plaintiff population is between 40

1 and 59. And that's where Ms. Luna falls, whereas
2 Ms. Barron is significantly younger than most of the
3 plaintiff population.

4 In terms -- they both -- in terms of the C-Qur
5 devices, most of them either had V-patch or the original
6 C-Qur and both Ms. Luna and Ms. Barron fit that
7 criteria.

8 In terms of the injuries alleged, most common
9 injuries are recurrence, adhesion, infection, and
10 abscess or fistula. And, again, we think that both
11 Ms. Barron and Ms. Luna fit that criteria.

12 In terms of the comorbidities, as I said,
13 obesity is very common. And, like I said, obesity
14 usually leads to a constellation of other issues. They
15 may be different for different plaintiffs. They may
16 be -- for some, it may be diabetes; for others, it may
17 be, you know, gastrointestinal issues such as -- and for
18 others, it may be -- there may be other -- other issues
19 that sort of are related to the issue of obesity.

20 But this sort of constellation of
21 comorbidities that we see in hernia patients, we see
22 them in Ms. Luna, whereas, again, with Ms. Barron, it
23 was something very specific.

24 So -- so that's -- in terms of representative,
25 that's why we think Ms. Luna is more representative.

1 In terms of the other things that Mr. Orent
2 suggested, in terms of fundamental fairness, we -- I'm
3 not going to spend a lot of time on this because we
4 talked about it.

5 I'm going to stop sharing my screen because we
6 don't need that anymore.

7 I'm not going to spend a lot of time on that
8 because we talked about it so much last week. I think
9 just echoing what we said last week, we think that we
10 selected Hickinbottom in good faith and that, you know,
11 and the plaintiffs had a -- could have dismissed it at
12 any time and we could have replaced it earlier had they
13 done so.

14 And, you know -- and that would have taken
15 away, you know, Mr. Orent's arguments about Ms. Barron
16 is farther along. If they had dismissed Hickinbottom
17 when they realized they couldn't get an expert, then
18 that wouldn't be the case. So we don't really think
19 fairness should be a factor here. We think the Court
20 should be focused on representativeness.

21 And in terms of the other factor, in terms of
22 the briefing being done, that sort of -- you know,
23 again, you know, that sort of flows from the fact that
24 they didn't dismiss Hickinbottom earlier.

25 But we also don't agree that there's no

1 brief -- additional briefing to be done in the Barron
2 case. And I don't want to argue the merits of any of
3 our -- of any briefing that we would -- because I don't
4 think it's the time and place for that -- but we think
5 that if they -- their proposal that they add a Consumer
6 Protection Act claim -- and Mr. Orent didn't reference
7 unjust enrichment, so I don't know if that's still on
8 the table -- but if they add these additional claims so
9 that they can have those claims tried to a bench, we
10 think that does require additional briefing.

11 We did a short brief for your Honor in advance
12 of this hearing, but it raises issues about the
13 viability of those cases. We haven't had a chance to
14 make a motion for summary judgment as to them. It
15 raises issues about whether -- the right of a jury trial
16 and whether they can be bifurcated.

17 All of those issues would have to be -- would
18 have to be briefed. That we may need to amend the
19 Daubert motions if there are elements in the causes of
20 -- those causes of action that haven't been spoken to by
21 the experts and we'd have to address those.

22 So we don't necessarily agree that selecting
23 Barron is going to eliminate the need for additional
24 briefing, including dispositive motion briefing.

25 So I will stop there unless the Court has any

1 questions or unless Mr. Cheffo has anything to add.

2 THE COURT: Now, am I clear that there
3 wouldn't need to be further briefing on Barron if, in
4 fact, defense would be ready to go to full trial via
5 video in Barron? In other words, the reason for the
6 equitable claims would be to give the Court something to
7 bifurcate, something to do via video, so that the -- my
8 understanding is so that you have something, something
9 better than nothing.

10 What -- am I correct about that, Attorney
11 Orent, that if we went forward via video with Barron,
12 there wouldn't need to be the equitable setoff claims?

13 MR. ORENT: That's correct, your Honor. I
14 mean, the -- the primary impetus behind this is to give
15 the Court as many options as possible so that we can
16 move this litigation forward.

17 As I've said before, this litigation is almost
18 four years old. We've worked long and hard for these
19 trials and we are on the precipice of a trial in the
20 midst of very unique circumstances and so we wanted to
21 give the Court as many options as possible. And so our
22 request for leave would be predicated on giving the
23 Court additional options to set a trial immediately.

24 THE COURT: Okay. And what -- what still
25 needs to happen in Luna in terms of briefing? Have

1 there been any Daubert filings? Have there been any --
2 I'm just not aware of pending matters in Luna.

3 MR. ORENT: I --

4 MS. ARMSTRONG: We -- I'm sorry. Go ahead,
5 Jon.

6 MR. ORENT: I believe (indiscernible) file as
7 well as case-specific Daubert motions. The general
8 merit or generally applicable Dauberts would presumably
9 be a mere formality. Defendants would presumably file
10 the same motion or a substantially identical motion to
11 what they filed in the other cases.

12 They don't need to. They may change their
13 arguments. But if they were to file the identical
14 argument, we could then file the same general Daubert
15 oppositions. If they choose to file updated or
16 different Dauberts, then, of course, that would require
17 a full round of briefing as well.

18 If I could just add one thing to the -- that I
19 neglected to mention in terms of the difference between
20 Luna and Barron, it's not just diabetes. It's also the
21 lupus with the diabetes that makes it a little bit more
22 unique.

23 Again, I'm not going to sit here and tell the
24 Court that -- that it's not a fine bellwether in the
25 same way that we think Barron is because, you know, we

1 picked it and we think that the general information is
2 out there, but when you are choosing between two decent
3 options, those others factors do come in play.

4 And to have two autoimmune diseases in the
5 presence of an implant, those two coexisting autoimmune
6 conditions, when you're talking about something that the
7 body reacts to, that's going to become a major side of
8 the litigation and, you know, is a divider between the
9 two.

10 THE COURT: Okay. And you're not worried
11 about the causation issue with respect to Barron, the
12 close sequence of events between her fourth child and
13 the hernia surgery?

14 MR. ORENT: We're not, your Honor. The device
15 is not contraindicated for that. People have hernias,
16 and she was outside the healing window and her doctors
17 deemed it to be safe and acceptable.

18 THE COURT: Okay. Anything else anybody wants
19 to say?

20 MS. ARMSTRONG: Your Honor, just to address
21 the question -- I think that Mr. Orent is correct that
22 we would probably not file additional Daubert motions
23 directed at the general causation experts. We would
24 just adopt the same ones for Luna. But we would file
25 case-specific experts and probably make a case-specific

1 summary judgment motion.

2 In terms of the question about the alternative
3 causation and Mr. Orent doesn't view the pregnancy as
4 being an issue in Barron, we disagree with that. But in
5 terms of representative -- representativeness, it's not
6 our point that the alternative causation is stronger or
7 weaker. It's that the issue of a pregnancy close to the
8 hernia surgery as an alternative causation, whether it's
9 strong or weak, is just not going to see -- something
10 you're going to see replicated very often throughout the
11 rest of the class, whereas obesity and the constellation
12 of problems that usually go with obesity are going to be
13 things that you see in the other class and that's why --
14 the rest of the class and that's why we think that --

15 So if Mr. Orent is correct and pregnancy is
16 not an issue with the lack of -- alternative causation
17 would make Ms. Barron even less representative of the
18 class. We disagree with that, but it's a -- but we
19 think it's an alternative causation that's not typical
20 of the class.

21 MR. CHEFFO: Your Honor --

22 THE COURT: How long is Barron and how long is
23 Luna? Are they both basically -- it's probably hard to
24 say with Luna, because you don't -- we haven't done any
25 sort of briefing on experts. But what's your sense of

1 how long Barron would be?

2 MR. ORENT: Your Honor, from the plaintiffs'
3 perspective, both of these trials, we would expect
4 plaintiffs' case to be somewhere between I would say
5 five to eight trial days.

6 We -- you know, the defendants are focused on
7 these notions of alternative causation. We actually
8 think that these are essentially thin skull plaintiff
9 issues. They're issues that every plaintiff has. They
10 don't really play into the causation analysis, in our
11 opinion, and the Court will get more information on
12 briefing.

13 I would also just say that the coexistence of
14 diabetes and lupus is probably even more rare than -- or
15 as rare, you know, sort of a unique event in these kind
16 of cases.

17 So I don't think, again, that that should play
18 any -- any deciding factor. Really, it comes down to,
19 for us, the fairness and the readiness of the case and
20 the client's expectation.

21 MR. CHEFFO: Your Honor, I would agree with
22 Mr. Orent. Just briefly, on the timing.

23 I don't -- you know, haven't studied them
24 exactly, but I don't think that's -- I guess I agree
25 with the point that they're probably going to be similar

1 in terms of timing and I think we can get up to speed on
2 them.

3 I would just make the point, you know, and I
4 do agree with Ms. Armstrong on the fairness point, but
5 that if we look at really where we are, there's two
6 things -- we're all creatures of our experience in this.
7 One is we've now picked, you know, from two of the
8 plaintiffs' picks and as I said last week, you know,
9 these are all plaintiffs' picks, right?

10 But assuming in this process the idea that,
11 you know, the plaintiffs are kind of wanting their --
12 their kind of best of their own picks when we've picked
13 one of their picks, I think, you know, if we get to a
14 point that, you know, we want these cases to be as
15 instructive and representative as possible and to have
16 both sides, frankly, have confidence in a verdict.

17 It's not really a matter of, you know, kind of
18 who wins and who loses -- obviously, that's important to
19 all of our clients, we want that to happen -- but we
20 want to basically have people say, okay, this gives us
21 some -- some information about some of these cases.

22 And to basically pick cases that don't have
23 comorbidities when the vast majority of them are
24 significant I think is kind of a disservice to advancing
25 the MDL.

1 And I also think the same arguments are for
2 doing something when really what we're talking about,
3 you know, going back to the first point, you know, in
4 Zoom trials is something that I disagree, I don't
5 think -- I think I'm more glass half full. I think
6 there will be more optionality in a few months and we'll
7 have a lot more learning on, you know, whether we can do
8 a hybrid or whether we could actually figure out ways of
9 having some type of jury trial that's live that we
10 probably can't do if we're kind of forced to do it over
11 Zoom in the next, you know, two, three, or four months,
12 on top of the fact that we have holidays.

13 So I think when you look at, you know, really
14 what the goal usually of having a bellwether process is
15 to try and get information. You know, picking a case
16 like Luna, which is, again, their case, is -- really
17 does have a more representative in terms of the
18 presentation, age, comorbidities, all of the other
19 issues, is really what I think -- it's unusual, frankly.
20 I think that we actually have cases like this that are
21 representative.

22 Many of the bellwethers, I think Mr. Orent
23 would agree, and others, sometimes you have these
24 incredibly disparate cases that really have no relation
25 to the universe of cases.

1 So here we have the luxury of having cases. I
2 think Luna is most representative of most of the cases,
3 your Honor.

4 MR. ORENT: Your Honor, if I could just
5 address that because Mr. Cheffo just emphasized a really
6 important thing. And maybe he did it intentionally,
7 maybe unintentionally.

8 But the fact that the plaintiffs selected
9 these cases originally really -- and the defendants
10 picked it now as being more representative than the
11 other defense picks and that these two cases are so
12 similar tells the Court something that should be
13 underscored.

14 Number one, the plaintiffs did an excellent
15 job actually taking the Court's instructions seriously
16 when we originally underwent this bellwether process.
17 We took it extremely seriously to the point that the
18 defendants' slides that they showed you showed the --
19 showed the two cases that are the finalists and two
20 other plaintiff-picked cases, Shumaker and Newell, as
21 being fairly representative of the entire -- of the
22 entire universe for this MDL.

23 So I think that that goes to the -- these
24 aren't plaintiff picks as such, these are representative
25 cases, and the defendants had an equal opportunity to

1 put them forward.

2 Also, the defendants should have done their
3 homework before picking Hickinbottom and they would have
4 seen by these same metrics -- the whole presentation
5 that your Honor just saw today we could have seen with
6 Hickinbottom instead of having Hickinbottom come out
7 where I pointed out to the Court in our original filing,
8 all of the variances in that case and all the unique
9 facets of that case, there's no reason -- if the Luna
10 case was so representative, why didn't the defendants
11 pick it first.

12 And so, again, I think that this goes back to
13 the process. The plaintiffs did an excellent job and a
14 truthful job, truly following what the Court's mandate
15 was, to pick the most representative cases it could.
16 And I think that we -- as demonstrated by the Barron
17 case, we exemplified that and that we should get the
18 benefit of following the Court's instructions throughout
19 this entire process.

20 Thank you, your Honor.

21 MR. CHEFFO: We disagree, your Honor, but I'll
22 leave it at that. I don't think there's a need to throw
23 stones at this point.

24 THE COURT: Okay. Well, I have a choice here
25 between Barron and Luna and it looks like plaintiffs

1 would have about five to eight days total for their
2 case.

3 How about the defendants? Do you have a sense
4 of that? Same, five days?

5 MR. CHEFFO: I think -- I think in the five to
6 eight days. It depends, right, on how -- you know,
7 who's -- I mean, look, honestly, with Zoom, you know, if
8 you had asked me in a normal, right, personal injury
9 case like this, I think my kind of stock answer, almost
10 not knowing anything about the cases, would be that
11 types of trials are usually closer to three weeks;
12 sometimes you can do it in two if judges work. You
13 know, so I think probably assuming three weeks.

14 I would have to say -- I know your Honor has
15 looked at this -- that we're probably talking -- you
16 know, I'd have to say it would probably be a month
17 trial. No matter how well we try to do this, if we did,
18 I just think that the complications in getting documents
19 and all the things that your Honor's worked hard to
20 address, but are still going to be there.

21 So I would think we're looking at probably a
22 month trial.

23 THE COURT: Okay. But the advantage of doing
24 that is obviously moving forward on a case that looks to
25 be ready to go. And obviously plaintiffs would prefer

1 to have an in-person trial and get their, you know, jury
2 trial right vindicated and have the jury study their --
3 you know, their client in person. And they seem willing
4 to at least give that up so that they can have justice
5 sooner.

6 And obviously Ms. Barron would testify via
7 video, which they might feel is perhaps less effective
8 for the same reasons that your clients might feel video
9 is less effective, but it seems plaintiffs are willing
10 to go forward so they can keep, you know, the wheels of
11 justice moving here.

12 So I have to say, you know my -- my desire to
13 move the case and my familiarity and comfort level with
14 Zoom. Not all judges are comfortable with Zoom. I
15 don't know what Judge Crawford's comfort level is with
16 his video technology or her video technology, but I
17 think I'm pretty comfortable with what we can do via
18 video.

19 So as you can see, that -- that leaves only
20 really one choice, because Barron is fully briefed and
21 ready to go. Obviously there are issues pending that
22 need to be decided before the trial, but meanwhile, Luna
23 could be briefed and ready to go next if we can get
24 Barron in the pipeline.

25 I fear that if we wait till January, we get to

1 January and, you know, there isn't this vaccine ready
2 for everybody so that we can be right back in court, I
3 fear that we'll be really in the same spot we are now,
4 but perhaps defendants having waited six months are just
5 a little bit more willing to go forward.

6 I say why not go forward now. The technology
7 is here. The trial is ready. It obviously would be a
8 huge time -- demand on my time in terms of a video trial
9 like this, but ultimately we get Barron done, then we
10 move right to Luna and then counsel are able to take
11 what they've learned from that experience into
12 settlement discussions and perhaps be able to move the
13 case forward.

14 And, meanwhile, the pandemic is still ongoing
15 and we're accomplishing, you know, settlement,
16 potentially, as opposed to waiting around twiddling our
17 thumbs waiting for people to get comfortable with video
18 technology because they've waited, you know, five,
19 six months and decided, hmm, that's looking a little bit
20 better now.

21 But that doesn't make a lot of sense to me. I
22 don't find that persuasive.

23 So in light of the fact that Barron and Luna
24 are both -- it looks to be both good bellwether cases,
25 Barron is ready to go. Plaintiffs are ready to try it.

1 They don't need to do any sort of equitable briefing
2 adding equity claims if the -- if we can go forward on
3 the issues that are joined and before the Court. And
4 I've got excellent counsel here. So this is a case that
5 could be tried via video.

6 So I think what I'd like to do is go forward
7 with that. I obviously want to give you a chance to
8 argue the process, the timing of that, but my
9 inclination is to go forward with Barron, have a case
10 conference with you in a week or two and figure out what
11 trial date makes the most sense. It will be by video,
12 so we don't have to incur travel and, you know, block
13 off the time.

14 I do think you're right, Attorney Cheffo;
15 it'll be longer. Everything is longer via video than in
16 person. But in some ways, counsel gets used to that
17 process and learns to solve problems offline, at least
18 in my experience, and solve evidentiary issues because
19 they want to move the case forward. And so in many
20 ways, I've experienced a lot of efficiency goes on
21 behind the scenes with a video hearing.

22 And my experience with this counsel is no
23 different. My guess is that you'd be able to resolve
24 many issues, evidentiary issues, and I would certainly
25 be willing to set up multiple evidentiary hearings via

1 Zoom so we can get issues decided before we call in a
2 jury and ask them to spend time hearing the case.

3 So that's -- that's where -- where my head is.
4 I'm being utterly transparent and telling you exactly
5 what I'm thinking. These look like two good cases to
6 go. Luna's not ready. Barron is ready. We could do
7 Luna, however, after we finish Barron and then move into
8 either the third bellwether or, you know, settlement
9 discussions would be more fruitful at that point.

10 But I don't buy the argument that somehow the
11 video experience is going to just not be as worthwhile
12 in terms of the bellwether process. I just am not
13 persuaded by that.

14 So what I'd like to do is put this on for a
15 case conference so we can discuss the questions about
16 Barron and sort of how this would work and hear specific
17 objections you might have to the process, ideas you
18 might have, creative suggestions.

19 You wanted, I think, to extend your mediation
20 date, settlement date, so just -- just talk about that
21 offline and let me know what your new sort of date is,
22 target date. This -- this may change that in terms of,
23 you know, Barron going to trial via video sooner than
24 you might have thought.

25 So that's -- that's my leaning. And so I

1 would suggest that Barron go first, Luna go second, we
2 try to keep these on a schedule and when January comes
3 along, you won't be talking about thinking about going
4 to video technology; you'll actually be far along in
5 your cases.

6 And maybe we'll start to do Shumaker and the
7 fourth case that you've chosen and we'll keep moving
8 through them so that -- you know, so that you can
9 actually figure out what the money value is for these
10 variety of different -- different cases that are in
11 front of this particular MDL. Otherwise, we're just
12 going to sit here and delay and delay and delay for a
13 reason that's not persuasive to me.

14 MR. CHEFFO: Your Honor, obviously if you've
15 ruled, I'm not going to -- you know, I've learned enough
16 that your Honor is thoughtful.

17 And I would just -- if you -- if you were
18 going to give us an opportunity -- I mean, it's not just
19 the video. I mean, there are a number of other concerns
20 that we have about a video trial.

21 I mean, we have -- you know, even -- I mean,
22 as you can probably see, I'm in upstate New York in a
23 sunroom, right? You know, Katherine is in New York
24 City. You know, in order to actually do a trial like
25 this, you know, even to make -- we can try and do it

1 from our backyards and houses and things like that.

2 So I'm not saying it's impossible and
3 obviously if you tell us to do it, we will do it. But
4 in order to have what would be a normal trial, we would
5 have a trial team together on both sides and have
6 experts and being able to talk to them and deal with
7 those issues and that's just what I fear in this, is
8 that we can -- we can go and do anything, but I -- just
9 as a real concrete example, if ultimately we do this and
10 there's a defense verdict, right, and clients may say,
11 okay -- you know, and then the plaintiffs will say,
12 well, that didn't really give us a good -- or if there's
13 a plaintiffs' verdict that's a large plaintiffs'
14 verdict, right, it will then get people hardened in
15 positions.

16 So I'm not suggesting never. I just think
17 that the difference, frankly, between trying to do this
18 in the next, you know, two months, when all of us are
19 kind of -- you know, our family, our friends, people
20 don't even have an opportunity to get together with
21 ourselves, our experts.

22 So, to me, I think there's really two issues.
23 It's not that we can never do a trial if we need to by
24 Zoom. I think doing something like this, you know,
25 being essentially one of the first in the country, when

1 all of us haven't had a chance to really digest this, we
2 have trial teams probably from California.

3 So, again, I -- I start with the point at the
4 end of the day, right, no matter -- you are the judge.
5 If you order us to do this, obviously we will be there
6 and do it. I would just urge your Honor to -- the issue
7 of expedience, nothing will change.

8 I really don't think anything will change, if
9 you were to set even a Zoom trial for January to give us
10 time to try to work through all these issues with our
11 experts, prepare them. There's just not enough time.
12 None of us have ever done anything like this. And to,
13 you know, essentially force a trial of this magnitude in
14 a way that I think will be, at best, disjointed and new
15 and novel, it's not the way we typically try cases,
16 right, you have your guys walk in.

17 So that's all I would say is just urging your
18 Honor, it's not a matter of delay. If you decided that
19 you wanted to have a Zoom trial or, alternatively, a
20 live trial and set it for January, I think that that
21 would be something that obviously would be more -- more
22 palatable.

23 I just think I'm more reacting to the hurdles
24 of trying to do something when we can't even talk to
25 each other, much less see each other or see video or

1 demonstratives or -- this is going to be a very medical
2 intensive case -- and records.

3 The way we're going to have to approach this
4 is going to be very different if we have to look at a
5 screen than it is if we were in court. So that's all.

6 THE COURT: Right. In court we've got
7 Plexiglass everywhere in our courtrooms. You'll be
8 covered in masks. Maybe you'll have a face shield as
9 well. And there are all kinds of issues with that in
10 terms of witnesses and credibility and face-to-face
11 cross-examination.

12 But with a video, yes, you are showing your --
13 your children's artwork in the background and you're
14 showing, obviously, your home. And I'm not on the
15 bench. Obviously that's different. But I'm not wearing
16 a mask, and there's no Plexiglass, and we are
17 100 percent safe. That is a fact.

18 And, Attorney Esposito, would you do me a
19 favor and put the defense counsel into a breakout room
20 so they can see how easy it is for themselves to
21 actually confer and talk confidentially, privately,
22 without anybody listening in. Let them be there for,
23 you know, one minute. I'll turn my mic off so there
24 won't be any *ex parte* conversations with my plaintiffs'
25 counsel, who will still be on the screen.

1 Can you do that for me, Attorney Esposito?

2 THE CLERK: Yes, Judge. Yes. I'm putting
3 them in a room right now and I will --

4 THE COURT: And that way you can discuss sort
5 of the issues and come back out and tell me why I
6 shouldn't go forward with this video -- with this video
7 trial. But I am going to show you that you can meet
8 with your experts --

9 MR. CHEFFO: I feel like we're going to
10 timeout, your Honor.

11 THE COURT: It's a timeout, exactly.

12 So go ahead, Attorney Esposito.

13 It works in all my criminal hearings. My
14 criminal defendant this morning wanted to speak to his
15 lawyer and he got to speak to his lawyer completely
16 confidentially.

17 So I'm going to let you guys talk about what
18 you need to say to persuade me to get off this track of
19 a video trial.

20 THE CLERK: Judge, I'm putting Attorneys
21 Armstrong, Cheffo, LaFata, and Chabot in a room. Did I
22 miss anybody, I don't think so, for defendants.

23 THE COURT: Go ahead.

24 THE CLERK: Okay.

25 THE COURT: And I promise we will not confer,

1 myself and plaintiffs. I'll turn off my -- I'm going to
2 turn off my microphone.

3 (Defense counsel conferring in breakout room.)

4 THE COURT: Although I should let you have a
5 breakout room, too.

6 THE CLERK: Do you want me to put plaintiffs'
7 counsel in a room, your Honor, or --

8 THE COURT: Yes --

9 THE CLERK: Okay.

10 THE COURT: -- that would be great. Give them
11 a breakout room so they can see it as well.

12 THE CLERK: Okay. One moment here.

13 Sorry, Judge. I'm just having an issue with
14 the -- give me one moment.

15 THE COURT: I've gone and taught in classes in
16 May, before schools let out, and did it via video, of
17 course, and so I appeared with students. And I'm very
18 familiar with these breakout rooms. You'll know when
19 you're in a breakout room.

20 MR. HILLIARD: Oh, yeah. I've done it a
21 number of times in different settings and it works
22 extremely well.

23 THE CLERK: Yeah, I apologize. I don't know
24 what my -- what is -- it's not seeming to let me do it.
25 So I'm just --

1 THE COURT: Well, we won't say anything.

2 THE CLERK: Okay. I don't know what the --

3 THE COURT: This is why we -- our tech guys
4 will help for a trial, but --

5 THE CLERK: Yeah. Stephen, are you on? I
6 don't know if Stephen Bradley was on.

7 MR. BRADLEY: Yeah, I'm still here.

8 THE CLERK: Can you help me with a second
9 breakout room? I don't know why -- I made you a
10 co-host.

11 MR. BRADLEY: I can't. As a co-host, I
12 can't --

13 THE COURT: It looks like our defendants are
14 back.

15 THE CLERK: Are back? Okay. I'll work on it.
16 I apologize.

17 THE COURT: Okay. Is that everybody?

18 Okay. So you experienced a breakout room.

19 MS. ARMSTRONG: So do -- I don't know if we
20 have everybody.

21 Ms. Esposito, do we have everybody?

22 THE CLERK: We -- Attorney LaFata I don't
23 think started his video.

24 MS. ARMSTRONG: Okay. I don't think he --
25 yeah.

1 THE CLERK: There he is.

2 THE COURT: Okay. All right.

3 We were trying to ship the plaintiffs off
4 screen to a breakout room, but right as that was about
5 to happen, you guys jumped back on.

6 So, in all candor, there was a little bit of a
7 technical difficulty getting plaintiffs into their room.
8 However, my IT staff is not here today to help us do
9 that and they have what I would call magic dust with
10 respect to technology.

11 So, in any event, so you were all together and
12 I'm sure they gave you some new arguments to make to
13 argue against a video hearing: Halt, halt, don't do
14 this, Judge. What are the new arguments?

15 MR. CHEFFO: Not really, your Honor, because
16 I -- so let me just say like two things.

17 One is -- and, candidly, we weren't really --
18 I didn't know that this was exactly what we were going
19 to do, as you might imagine. There's probably a client
20 issue. I think my -- so I think I'd ask two things.

21 One is if your Honor really is inclined to do
22 this or at least wants to maybe give us a week just to
23 submit something short as to some of the concerns. Some
24 of them may be things that you can address and then some
25 of them may be issues that we have. But I don't want to

1 hide the ball either.

2 I think, you know, just candidly, we're not so
3 much really -- it's not a technological issue. So, as I
4 said, I don't want to repeat. I think there's a timing
5 issue to prepare to get people's heads wrapped around
6 it. Right? This is now kind of like August and people
7 are not really focused on it.

8 I do think that from a technology perspective,
9 your Honor's thought a lot about this. We have huge
10 confidence in you. I loved that room. It was great.

11 You know, I think we would just have to figure
12 out, and maybe some of these we'll talk about, as your
13 Honor knows from a jury trial, there's a lot more,
14 right, than just the technical; you know, how jurors
15 react; you know, are there kind of constitutional
16 issues; and, really, you know, how -- you know, from the
17 cross-examination perspective.

18 So maybe if we could just have a short period
19 of time to talk to our client, maybe raise some of these
20 issues, and I would just say that -- I really will end
21 at this point -- is I have to say that to the extent
22 that your Honor is really inclined to do this and is
23 going to order whether we object or not, I really would
24 just ask that from a fairness perspective, I -- I
25 know it would -- in the grand scheme of life, you heard

1 this has been going on four years. That's true. I've
2 been involved in a lot of MDLs and, like I said, I can't
3 ever remember an MDL where the first trial date we
4 actually went. Right?

5 So, you know, even if we were to decide,
6 right, to do a Zoom trial and schedule it, I guess my
7 pitch has been for January not really just to delay, but
8 because if we were to prepare for this, I think our
9 client and we and our experts and the lawyers and
10 Katherine, who, you know, will need time, we want her to
11 participate, right, you know, in this, we'll have time
12 to kind of wrap our heads around this in a way that I
13 think if you said we're going to trial, you know, in
14 November or something or October, whatever date your
15 Honor picks, is going to make this, you know, a lot more
16 challenging.

17 So I can commit probably five or seven days,
18 if you'll give us that, to submit something.

19 THE COURT: I will give you that. I will give
20 you that.

21 So -- that's my phone. Hold on one second.
22 Let me just --

23 All right. I will give you a week. Why don't
24 we just continue this and we'll come back and we'll talk
25 about this in a week. Just be prepared, you know, for

1 me to be in a mode of asking you, all right, when could
2 you be ready, what are we looking at in terms of a video
3 trial in terms of scheduling.

4 I've still got Daubert motions, I've got all
5 kinds of pleadings I've got to issue rulings on. There
6 may be hearings involved in those.

7 So we're not looking at September. You know,
8 we're looking at something more like October, November,
9 I would think.

10 I'm not hearing from plaintiffs' counsel
11 though, Judge, we've really got to slow down, we're not
12 ready. I'm hearing we're ready; we're ready to go.

13 So I'm only hearing from -- from you, Attorney
14 Cheffo, that you're not ready.

15 Now, Attorney Armstrong is a critical
16 component. That would be something that would be
17 persuasive to me. If she for some reason cannot be
18 available at a certain time, yes, that's -- that will
19 be a persuasive argument to me because I see her as
20 critical to this whole process.

21 So why don't we reconvene in a week and lay
22 this out for me. I'd like to talk to you about the
23 possibility of planning this, putting it on the
24 schedule.

25 I'd like to hear do you have objections, are

1 there ways we could address those objections, are there,
2 you know, things we could do that would in some ways
3 ameliorate some of your concerns.

4 I also am willing to do sort of divide and
5 conquer in terms of issues if there are creative
6 solutions counsel can come up.

7 I am very open to moving this docket along and
8 helping counsel, you know, try to figure out a way to
9 put some money value on these cases and try to settle
10 this case, this entire MDL. It's not going to happen if
11 we don't start hearing from some witnesses and deciding
12 some of these legal questions. And I'm inclined to go
13 ahead and move forward.

14 I agree, technology and video is not -- it's
15 subpar. Right now, in-court hearings are subpar. Let
16 me just tell you, we're doing a jury trial in a criminal
17 case. Everything we do has to be mapped out. Every
18 step that's taken has to be mapped out ahead of time.

19 It is really complicated. And -- and
20 attorneys will be in masks and some face shields as
21 well, all the judges in masks, separated. The jury will
22 be separated. It is -- it is a real challenge to keep
23 people safe in that setting.

24 But there are serious confrontation, due
25 process, liberty interests at stake, constitutional

1 issues that don't exist in a civil case. And where the
2 goal here really is for you to learn from these trials,
3 I'm just not persuaded that a video trial would not be
4 effective.

5 And I'm not saying it's perfect. I am
6 definitely not saying we won't run up against delays, we
7 won't run up against technological snags. We will. But
8 I will be patient throughout. I can assure you of that.
9 We'll all be patient with each other. That'll be the
10 rule of the proceeding.

11 So I think it can be done. I think it can be
12 done effectively. And I think, when you look back on
13 it, you're going to -- you're going to ultimately say,
14 yup, that -- that actually worked; it was much better
15 than I thought it was going to be.

16 That's what everybody has said thus far who's
17 done one of these more extensive evidentiary hearings.
18 I've done them even with witnesses with masks. I doubt
19 we'll have that situation in this case. Everybody will
20 be able to testify without any sort of facecloth.

21 So, in any event, I'm going to give you a week
22 to process this and come back. And let's talk about
23 Barron and how -- how soon we can put that on for trial.
24 And, again, I'm not looking at September here. I don't
25 think September is probably realistic.

1 So I will let Attorney Esposito work out
2 another continuation hearing and we'll slot it down for
3 an hour. And I'll definitely hear -- you know, hear
4 from you.

5 If you want to file something, too -- you
6 obviously need to think about this and regroup. If you
7 want to file something in advance of that, that's --
8 that's fine as well. I just want to give you time to do
9 that. If you want to do it in two weeks so you can
10 think about it even longer, that's fine with me as well.

11 So I think two weeks would be the outer --
12 outer limit in terms of figuring out what -- where we're
13 going to go from here.

14 MR. CHEFFO: Okay. Thank you.

15 THE COURT: All right?

16 MR. CHEFFO: Thank you, your Honor.

17 THE COURT: All right.

18 MS. ARMSTRONG: Thank you, your Honor.

19 THE COURT: Thank you. Court's adjourned.

20 MR. HILLIARD: Thank you, your Honor.

21 MR. ORENT: Thank you, your Honor.

22 (Proceedings concluded at 12:24 p.m.)
23
24
25

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: 8/10/2020

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