UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

IN RE: ATRIUM MEDICAL CORP. C-QUR MESH PRODUCTS LIABILITY LITIGATION	16-md-2753-LM March 8, 2018 2:00 p.m.

REDACTED TRANSCRIPT
TRANSCRIPT OF STATUS CONFERENCE
BEFORE THE HONORABLE LANDYA B. McCAFFERTY

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P R O C E E D I N G S

THE COURT: Counsel, is everybody on the line? This is Judge McCafferty.

Let me begin. Can everybody hear me? Okay. All right, we have a court reporter who is here and I am going to identify the case and docket number by name.

In Re Atrium Medical Corp. C-Qur Mesh Products Liability Litigation, MDL 16-md-02753-LM. And only lead counsel will participate, lead counsel or members of the plaintiffs' team will participate in the call.

I'd like you to please identify yourself. Although I'm quite familiar with voices at this point, the stenographer may not be, so if you could just identify yourself quickly by last name before you begin speaking. And please do not put this call on hold at any point. If you need to do anything at your desk, just put the call on mute as opposed to putting it on hold.

Okay, I don't want to hide the fact from you that even though we have this great technology and it seems as though I may be in the courthouse, I'm actually calling remotely in as you are, because I'm completely snowed in in Portsmouth, New Hampshire. So, let me describe what we're going to do today.

This is an informal discovery process, as

counsel knows, and what will happen is we'll go through the joint agenda which has laid out certain discovery disputes, and we'll go through them in a specific order. I think what I'd like to do is sort of knock out some of the easier more straightforward issues first and then move on to some of the more thorny complex disputes. And as we did this, and we've done this all along, I will give the losing party with respect to these disputes a deadline, I'm going to give you a deadline of Monday, March 12th of next week to decide if you want to pursue formal litigation. Our hope obviously is that we can do this informally and move the case along. But if you decide you need and want to formally litigate the question, then just notify the Court before the close of business on Monday March 12th. And if for some reason you need some extension of that, obviously ask for that. But I'm thinking you could probably make a decision by Monday of next week.

Okay, so, No. 5 on the agenda is obviously just notifying the Court that the parties are in favor still of establishing bellwether guidelines and pretrial and trial dates for those cases and you continue to work together in that effort. That is excellent. So I am checking No. 5 off, and that will be the easiest one of the day.

Now let's go to No. 2, the deposition dates for two 30(b)(6) depositions. So, does anybody want to be heard beyond what I have in front of me in the agenda?

MR. ORENT: Your Honor --

MS. AYTCH: Yeah -- I'm sorry, Jonathan, I will defer to you.

MR. ORENT: Your Honor, we've on a number of these items continued to have discussions with defendants, and just to provide a little bit of background here, it has been plaintiffs' concern all along that we not have the month of April become a dead month where we're not beginning to start and take depositions. We, as the Court is well aware, first noticed these depositions back in December, I think on or about December 10th, although we indicated back in October we were going to seek these depositions.

That being said, and there is a large degree of frustration on plaintiffs' side where we're not getting -- where we did not get dates even though there were issues, logistical issues we still needed to work out in the intervening months, and so I would raise as a sort of separate aside request from the substance of this particular dispute, we would like the Court to guide the parties and provide what I think would be a

fair and reasonable rule which would be that within a week of getting a request for deposition underneath the Court's practice and procedure order, that the opposing party provide dates. We can deal with the substance, and if there is any meet and conferring that needs to be done I think that the parties have shown that we're able to bridge the gap on a large number of those issues. But what I am concerned about, this is a global 10,000 foot item, is the fact that we're now six months past our time where we initially indicated that we wanted depositions, and we're not able to do those depositions in the time prior to April 15th that the Court had -- or April 16th that the Court had set for jurisdictional discovery.

So that's my general background to this. And and now specifically what I do want to say is that defendants came to the plaintiffs and advised us that Mr. Mayer was going to be their 30(b)(6) deponent and that he would not be available in the month of April prior to the 16th, that he would be available and would in fact be in the United States on the 18th and 19th of May, approximately a month after the deadline. Defendants asked plaintiffs whether or not we would take the deposition in or on those dates, and we initially declined to do so fearing that we would lose the month

of April to conduct discovery, and subsequently we talked to the defendants and have reached an agreement in principal, that is that the defendants, recognizing our concern, are willing to provide either additional dates in April or May where the depositions could be conducted, and they have offered April 25 and 26 in Amsterdam, or provide a different 30(b) witness in the month of April for one of the non-jurisdictional issues that we've been asking for dates on. And I think as far as the substance of getting those depositions at this point, we've moved the ball far enough along that I think defense counsel and I can continue to work and we'll ultimately be able to reach an accommodation of the scheduling of these. But, so I think that's relieved the need for immediate court intervention, but I do think that where we are going to be seeking a large number of depositions in the weeks and months to come, we do need a default rule. And so that was an item that we put into our agenda and would like the Court's guidance on that piece. But with regard to the actual depositions, we recognize the scheduling issues and are going to try and work past that.

THE COURT: Okay. So just to be clear, then, you're taking Nos. 2 and 3 off the table and you want instead just a sort of global order that within one week

of notice the other side provides dates and then you work through schedules.

MR. ORENT: That's correct, your Honor. I think we've reached enough progress to this point where I do have a feeling that we'll be able to reach an accommodation, and if we, obviously if we don't we could always come back to the Court, but I think at this point we are far enough along that we're going to be able to move that ball and resolve the immediate issue. But as I said, given the pendency of these notices and the number of issues, I do think that we do need a general rule that goes along with the deposition protocol, that is we get dates within a week or so. I think that just getting us the dates will facilitate the process and would move the meet and confer process along quicker and allow us to move the litigation in whole quicker.

THE COURT: Okay. So two and three are off the table. And let me ask Attorney Aytch how you feel about the global rule within one week of notice the other side provides dates and then you work out the schedule.

MS. AYTCH: We did not agree with that global rule although after I mention a couple things I am willing to make an offer on that point. I think the context of what's been going on with the discovery needs

to be described a bit more.

So, when we received the notices on or about December 10th, although Mr. Orent is correct that initially back in October we were aware of it, the Court then issued a ruling in November that told the plaintiffs not to reserve that discovery. Maybe by error or something else, the December 10th notices were exactly that discovery. So we had to painstakingly go through line-by-line all 13 topics and 63 subtopics to formulate objections in order to meet and confer. Numerous times in writing and verbally we had mentioned to plaintiffs' executive committee that we objected to the scope of the notices, and until we can agree on the scope we were unable to provide dates because we didn't know who or even how many people we would have to put up for those depositions.

I do want to credit the plaintiffs for being so very courteous to me while I was out with my surgery. That did delay meet and confer that we were going to have earlier in February and pushed it until the week that I got back into the office. However, it is not just that the defendants aren't wanting to give dates. We actually need contacts around the deposition notices in order to do that.

So we're perfectly willing to within two weeks

of finalizing what, you know, what the deposition topics are going to be either through a successful meet and confer or through guidance from the Court to give those dates, but to give a date within one week of a severely broad deposition notice we don't believe is merited.

THE COURT: Okay, how many weeks were you willing did you say?

MS. AYTCH: Within two weeks.

THE COURT: Within two weeks. So you're proposing two weeks to work out scope and dates?

MS. AYTCH: I'm proposing to provide dates within two weeks of working out scope. Hopefully it doesn't tend to take that long to work out scope, but without having the scope nailed down it's really difficult to provide dates.

THE COURT: How would that global rule be worded to your satisfaction, Attorney Aytch?

MS. AYTCH: I apologize, your Honor, for stammering a little bit.

THE COURT: That's okay.

MS. AYTCH: With something along the lines, within two weeks of finalized scope of deposition topics either by a successful meet and confer or guidance or order of the Court, the opposing party shall provide dates of the deponent or deponents.

THE COURT: Okay. All right. Attorney Orent.

MR. ORENT: Well, your Honor, I disagree with -- two weeks, let me start off by saying two weeks is a proposition, I don't know that that's certainly not ideal but it's not undoable. What is concerning, though, is the caveat that it be not after giving them notice of deposition but after agreement or resolution as to the scope. And my concern actually stems from this round of meet and confer and from this process, and I have quite a different view of what's transpired over the last four months or so than the defendants, and my primary concern is is that up until we received the defendants' February letter, we had actually never received written objections to our notice of deposition and the issues were not formally raised with us for several months and we had asked for dates and -- but that unnecessarily delays this process. We can, typically speaking, there's no reason that we need more than 30 days to work out a scope of a deposition and there's quite frankly no reason that on an individual notice of deposition where it's a fact witness there needs to be any discussion as to scope whatsoever.

So going back in time we've noticed these two depositions where we actually negotiated an agreed upon scope back in, I want to say it was

November/December-ish, maybe as far as January, but still have not received dates on those, and we're looking in the May timeframe, and we were never offered dates or given any solidification for those where we actually had met and conferred and reached agreement on the scope.

Then you get to how quickly the defendant responds to us in terms of scope and how quickly we can work together and meet and confer, and sometimes that adds unnecessary amounts of time, especially if there's no imminent deposition coming up where we have to resolve it by.

So, what I think the better rule would be would be for the defendants to give us a date or dates within a week or two. And if at that same time we can set the deposition 30 days out or more, you know, you know, if we're doing a large number of scheduling of depositions and we can work on the scope within that time period, really there's no reason that we should hold up each and every deposition notice every time I send an intention to take a deposition to have to meet and confer on whether or not we can take that deposition and the scope of that individual's deposition. The vast majority of these going forward are going to be fact witnesses. And for example, Reinhard Mayer, the author

of the declaration that was attached as Exhibit B to the defendants' motion previously on jurisdiction, we saw him as a fact witness and still have not received its fact witness dates. So, I understand he's also going to be the 30(b) witness, but those are two different issues.

So I think that the better rule would be is to allow us to schedule deposition. That will put some pressure on the parties to meet and confer quickly, resolve any issues quickly, and move forward as efficiently as possible. And quite frankly, as we're going to be moving forward with a large number of depositions beginning this spring and into the summer and fall, we need to get dates and be able to move quickly on scheduling because dates are going to fill up pretty quickly, and I think the only way to do that efficiently is to place the onus on the parties to be able to do it. We can still take issues to the Court if they're unresolved between the parties, but I think history has shown we're able to work out 99 percent of the issues between the parties.

THE COURT: Okay. All right. Well, anybody want to say anything else? All right, it seems to me that a simple rule that would require parties to provide dates within one week of a notice if there are no

disputes regarding scope, that seems like a fair rule to me. And then secondly, if there are disputes regarding scope, you provide the dates within three weeks of the notice. That gives you time to narrow the scope, define the scope, meet and confer, but you have an outside date by which you have to begin scheduling them. And then this would be a global rule and a global understanding, and my guess is that to the extent there were any extensions necessary you would just meet and confer and agree on those. But I think that is a fair compromise and it's a little simpler than I think what you were proposing, Attorney Orent.

Does that make sense to everybody?

MS. AYTCH: Yes, your Honor.

MR. ORENT: Yes, your Honor.

THE COURT: Okay. All right. So, that actually was not frankly a numbered item on the agenda, but because you both worked out Nos. 2 and 3, you get some credit for that.

So, now let's go to the jurisdictional discovery dispute, No. 1, of which there are several. And what I'd like to do is to start, let's start with the first one which is No. 16 in the agenda. It's 1a, but it's Request for Production No. 16, and -- okay.

On this one, let me give everybody a minute or

two just to study this and get your head into this particular item, and that includes myself, so let's just take a moment and review No. 16 and what we're talking about.

(Pause.)

THE COURT: Okay. Agenda item 1a, Request for Production No. 16, is a request for each and every summary plan description and annual report or any other form of summary documentation however denominated for every employee benefit plan, retirement plan, pension plan or profit-sharing for employees of Atrium Medical Corp. for each of the years 2011 to the present. Okay, and it looks as though defendants basically have two objections. One has to do with my prior court order, and defendants are arguing that I have already held that this is too broad a discovery request. And the second argument seems to be a practical one that the requested documentation will not provide plaintiffs with what it is they're trying to discover which defendants characterize as the payor for the employee benefit plan. Plaintiffs are seeking this discovery and argue that it's relevant to the alter ego analysis. And it's a similar argument, frankly, for Request for Production 35 and 36. Let's deal with 16 first and then we'll move to 35 and 36 because they are so closely related.

So, I'll go ahead and just start with Attorney Orent. I will say that I obviously have read through this and prepared for this conference and I would just note for everybody's benefit that as I see it my order was directed at the original discovery request which sought health insurance plans for employees of every subsidiary or affiliate of Getinge, not just Atrium. And that Atrium -- plaintiffs have significantly narrowed their request at this point.

So I don't see my order as dispositive on this question as much as defense counsel argued that in the letter, so I think focusing on some of the more practical issues, relevance, et cetera, would be more on point.

So let me hear, Attorney Orent, do you have anything to add to your letter?

MR. ORENT: Because our letter dealt just globally with the issues, your Honor, I just want to point out a couple of items.

We think that this goes to, if you're looking at the Bennett versus GAF Corp's eight-point criteria, nine-point criteria, we think it goes certainly to a number of these failure of corporations to deal with each other arm's length, also payment of the debts, salaries and other expenses by the parent company as

well as domination of the subsidiary's daily operations and policies. So we think it goes to at least three, perhaps more, on the factors generally speaking.

Now, in their papers defendants suggest that the documents won't have the information, however we don't know that that's the case, particularly in light of the fact that the defendants hinge everything on Reinhard Mayer's declaration.

Your Honor, at this point, though, before I get more specific I would like to, for the record, make note of paragraph 13 of the stipulated or I guess case management order 3E, the protective order, which is the use of confidential documents or information at a hearing or trial, and it says that we shall -- the parties intending to use a document should alert the Court and the other parties of that. I had by email indicated that I was reserving the right to use the merger document itself at this hearing, and I'm now as, part of this argument, would like to make specific reference to the terms and conditions of the merger itself dated October 2nd, 2011. We don't believe that there's anything that is truly confidential anymore in a six-year-old merger document, but nonetheless we have not yet gone through the formal challenge process and so under paragraph 13 I'm advising that I think it is

relevant and would seek to discuss how exactly the Court would like me to approach references to the merger documents throughout the rest of the items that we're going to cover today, because I do believe that they go directly to the heart of the issues that we're discussing.

THE COURT: Let me ask if we can obviate the issue by getting Attorney Aytch's permission to simply lift any protection from that document. Is that something you'd be prepared to do, Attorney Aytch?

MS. AYTCH: No, your Honor, we do believe that that document is confidential. We're fine with a request to speak freely and, you know, have it redacted, but we do -- we would not concede it is no longer confidential.

THE COURT: All right. Okay. That was worth a try. Let me do this, then. If you would, Attorney Orent, if you would simply tell me now what is in that document, why it's relevant, and then from here out all you have to do is refer to it as the merger document. And if you could -- that way when we redact this transcript it will be limited redactions and you'll obviously look it over and it will be easier for our court reporters because it will be, you know, just a limited section of the transcript if you understand what

I'm saying.

MR. ORENT: I do indeed, your Honor.

THE COURT: Okay.

MR. ORENT: And thank you very much.

THE COURT: Let's do this. Go ahead and discuss the merger document and I'll have to resolve ultimately the issue of whether or not this is under seal at some point, but right now to resolve this discovery dispute we'll presume its confidentiality, and so if you could summarize your arguments with respect to this document, and be specific with respect to any of the confidential language, then I'm going to give Attorney Aytch time to refute those arguments with respect to the documents, and then that portion, I would envision that portion, those pages, that short small portion would be redacted, and then any reference counsel makes to the merger document you can simply refer to it as the merger document. And Attorney Aytch, you may not need to necessarily refute specifics and reveal specifics in the merger document. If that's the case we can just move on and you can reference his arguments, but I'll let you respond as you see fit.

So Attorney Orent, why don't you summarize the merger document for me now, and then I'll give Attorney Aytch an opportunity on that same limited topic to

respond, and then we'll move on to Request for Production No. 16.

MR. ORENT: Thank you very much, your Honor. So, beginning on page 43 of the merger document itself, the document specifies that [redacted]

[redacted]

I'd also reference the Court to the [redacted]

[redacted]

[redacted]

We believe that each of these items goes directly to an issue relative to the specific discovery request.

THE COURT: Okay. [redacted]

[redacted]

THE COURT: Okay. So I think you could just reference the subparts in the future as you're discussing the document without being too specific.

Okay, Attorney Aytch.

MS. AYTCH: Yes, your Honor. I'll just reference the merger agreement sections.

Well, first of all, this section and including the subsection of this particular paragraph does not discuss disregarding corporate formalities but instead is just clarifying that it is not intended to make Atrium's existing employees third party beneficiaries of

the agreement between Atrium and Getinge AB when you read it in context. And we're happy to provide a copy of course to the Court for in camera review. So, this evidence of getting AB's dominion given the entire context is pretty specious.

Additionally this is a typical merger term in acquisition to allow some of the same benefits to the top current employees so that there's not a mass exodus. As noted by many of these sections [redacted] it is not showing that it is still exercising any kind of dominion or control. So they're relying on a term negotiated in an arm's length contract with lawyers on both sides concerning the treatment of Atrium's employees after the merger to show domination, but it actually only shows that these two parties were dealing with each other at arm's length in an arm's length agreement which Atrium sought out as a benefit to keep the employees from doing a mass exodus.

So we still do not believe that this would harm any merger agreement, would have any, get them to try -- to get them to having a probative value with regard to all of the employment benefit plans that are currently in existence, especially when we are providing a 30(b)(6) deponent that can speak to the payees of this, of any plans that are being offered in addition to

-- any plans currently being offered, rather, in addition to providing certain of Atrium's employment handbooks.

MR. ORENT: Your Honor, if I might just clarify a couple points. One is we're not saying that this is totally dispositive of the issue. The discovery standard is a different standard than whether something is on its face dispositive. We believe at the outset, whatever the reading, that this is sufficient to raise questions to allow us to continue discovery process, and that's what this is, this is a discovery dispute at this point. And so probative value is an evidentiary term typically reserved for admission and admissibility of evidence, it's not the discoverability standard. And we think regardless that these terms of the merger document raise the issue and the severity of the issue to warrant discovery.

The second point is that a number of the terms that I've cited, paragraph B, for example, or I also believe paragraph D are specifically -- paragraph E doesn't limit time. [redacted]

So I do think that there will be some argument at a future point when this becomes a dispositive motion as to whether what the true meaning of the language is and what the context of the document is, but I think that for purposes of discovery that we have -- that I will make in my arguments going forward that they're sufficient to warrant us discovery on these issues.

THE COURT: Attorney Aytch, would you like to be heard any further on document No. 16?

MS. AYTCH: Yes, yes, your Honor.

THE COURT: Go ahead.

MS. AYTCH: I'm sorry, again, where this Court only allowed limited discovery in order to determine whether or not to exercise personal jurisdiction, to see every summary plan description for every employment benefit plan, retirement plan, pension plan or profit-sharing plan where it sounds like the plaintiffs are still just trying to determine whether or not Getinge provides for this information for which we are putting up the deponent, it just does not seem that the burden in providing all of these documents is going to be outweighed by the benefit of receiving information that will otherwise be provided in a deposition. It's just simply not proportional on the issue of jurisdiction.

MR. ORENT: Your Honor, I would just add two

points to the item 16, moving away from the document itself.

One is that this document seeks, that this particular request seeks information from Atrium, Atrium which the Court does have jurisdiction of, and relating to Atrium which no one disputes the jurisdiction of.

And two, this -- the passages that I've cited are directly contradictory, and I'll walk the Court through this throughout the course of today's argument, but they're directly contradictory to the affidavit signed by Mr. Mayer. And we, quite frankly, where we have a document that says one thing, an affidavit that says another, I think it's that, that that means we're entitled to find out what the truth is between it and we need documents to be able to probe the veracity of the deposition testimony that's going to be offered particularly in light of the fact that there are documents that specifically dispute certain statements and paragraphs in Mr. Mayer's declaration.

MS. AYTCH: Your Honor, may I respond one more time, please?

THE COURT: Yes, you may. Go ahead.

MS. AYTCH: So this issue is again getting at, you know, Atrium's documents and whether or not Getinge has the power to hire or fire Atrium employees in

another of the 71 requests for production of documents we agreed to provide Atrium's employee handbook to get at this specific information, and we also again agreed to provide information about who the payor is with regard to any employment benefit plan, retirement plan, et cetera. So the idea that they would need the exact plan itself in order to ascertain this information that goes to the jurisdiction, the court's jurisdiction over Getinge with regard to Atrium employees still just does not seem to be outweighed by the burden of producing those documents when there's other ways to get them the information that they desire.

THE COURT: Okay.

MR. ORENT: Your Honor --

THE COURT: How many documents are we talking about in terms of summary plan description and annual reports? We're talking about I guess categories of employees, so those employees under a specific benefit plan, retirement plan, pension plan? You're not talking about every single employee, you're talking about a summary plan description or annual report or summary documentation of categories of plans, right?

MR. ORENT: Correct, your Honor.

THE COURT: Okay.

MR. ORENT: And if I --

THE COURT: All right. I think I've heard enough. This one is -- I think the plaintiffs have the stronger argument here and I am going to order that defendants produce Requests For Production document No. 16.

Let's go to 35 and 36. Those are very closely related. And Request for Production 35 are documents that reveal human resources and management processes of Getinge, Maquet and Atrium. And then there's an including but not limited to employment handbook, standards or forms used in employee review process, et cetera, hiring and firing, and that plaintiffs argue is relevant frankly for the same reasons it's relevant to show Getinge's dominion or control over Atrium, power to hire and fire, responsible for deciding benefits and compensation. It goes to many of the same issues under 16, and for the same reasons I am inclined to grant that request and order production, but I want to obviously give Attorney Aytch an opportunity to tell me what would be different about No. 35 that would warrant me to treat it differently than summary plan descriptions and annual reports from Atrium.

MS. AYTCH: I'm sorry, your Honor, you're asking specifically as to No. 35 to Atrium?

THE COURT: No. 35, yeah. Why should I not

order you to produce 35. And I'm jumping ahead to 35 because 35 and 36 seem so closely related to 16. I've already granted 16. I will tell you that I'm inclined to grant 35 and 36 for the same reasons I see as relevant to plaintiffs' claim and proportional to the needs of the case. It's a limited issue. Jurisdictional discovery. Considering the importance of that issue in the case, considering the amount of controversy, the parties' relevant access to relevant information, the parties' resources, the importance of the discovery in resolving this issue, and then weighing the burden or expense of the discovery, I find that the burden or expense of the proposed discovery is outweighed by its likely benefit.

So, I have made that finding as to No. 16. I'm inclined to make that finding as to 35 and 36. Tell me why I'm wrong on that.

MS. AYTCH: I understand, your Honor. The first thing is that No. 35 and No. 36 don't deal with Atrium specifically but with Getinge. So, we have agreed to give those documents with regard to Atrium.

Simply here the human resources and management process as to Getinge AB globally as a conglomerate company we don't feel necessarily moves the ball any further than giving those documents with regard to

Atrium if they want to see if Getinge is exerting any control. Moreover -- I mean just in terms of how that relates to these benefactors, moreover particularly because these are Getinge AB documents, we run the specific issue with the Swedish privacy laws that we brought up before.

So during the meet and confer we were discussing with plaintiff that in many instances we want to get them the documents, however, under the current Swedish personal data act that implements the EU data protection directive, and as of May 25, 2018, the general data protection regulation has severe sanctions for companies that violate these acts, criminal and civil penalties, so what we were trying to do is be able to get documents that are necessary without having to pull them from your Swedish parent company.

So, here where this would have to come directly from Getinge and the information that it would go to show, to the degree that it would go to show that Getinge is controlling Atrium, would be found in the Atrium documents that we've already agreed to turn over.

THE COURT: Okay. This Swedish privacy act argument is not, I don't think it's anywhere in your documents. I know that it was raised previously. I don't --

MS. AYTCH: Your Honor, you're correct, we did not include that portion in our one-page letter. That was an omission on our part.

THE COURT: Okay. And that seems a rather significant hurdle and maybe one that would require litigation, formal litigation which would thereby, you know, lengthen the time for this jurisdictional discovery to be completed, Attorney Orent. I assume you've already thought through that and you nonetheless are pushing forth on this request for 35 and 36. Both 35 and 36 raise that same issue, Attorney Aytch, with respect to Getinge?

MS. AYTCH: Yes, I believe 35 is documents evidencing human resources and management process of Getinge and then 36 is any and all documents pertaining to the hiring and firing processes of key personnel of executive -- key personnel including executive and officers of Getinge.

THE COURT: Okay. And you're willing, however, to agree to give all of that info under 35 and 36 with respect to Atrium?

MS. AYTCH: Correct. Which I believe was a preceding, it was a separate RPD, I don't have it in front of me, but it was a separate RPD and we agreed to give those documents -- the employee handbook, rather,

for Atrium.

THE COURT: And what about Maquet?

MS. AYTCH: I apologize for the pause, your Honor, I was actually just thinking at our meet and confer when the plaintiffs withdrew their request for 30(b)(6) deponent as to Maquet Cardiovascular when we raised in the prior letter our concerns with jurisdictional discoveries to that entity, so I do not believe, and Mr. Orent can step in and correct me, I do not believe that when we went through the RPDs we were discussing at all that entity thinking that the main jurisdictional issues were around Atrium and Getinge.

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

THE COURT: In your agenda item for 1e and 1f you include Getinge, Maquet and Atrium, all three.

MS. AYTCH: That's correct, your Honor, and -- I'm sorry, and that we were pulling just the literal text of the RPD. After we had the meet and confer is when we narrowed that scope, and our apologies, we just pulled the original language of the RPD.

THE COURT: Okay, so what we're talking about now is just Getinge. And Attorney Orent, the way this is presented to me, to the Court, is the dispute centers around these documents with respect to Getinge, Maquet, Atrium for 35 and 36. And so now what you're both

telling me is that Maquet is out, Atrium is out because defendants are agreeing to provide all of this with respect to Atrium, and so the only thing left is a dispute over Getinge. That would be helpful for the Court if in the future you would just tell me the narrow nature of the scope of what the dispute is because obviously as I'm reading and preparing I'm thinking you're disputing all three of these companies.

So, Attorney Orent, now it shifts to you because clearly Attorney Aytch has the Swedish privacy act as some sort of hurdle and in her mind it's a fairly major hurdle and she is providing everything regarding Atrium, and so the dispute only concerns Getinge. Is there a way that the two of you could meet and confer further on agenda items 1e and f and see if you couldn't come up with some limiting proposal that would resolve these issues in a way that would be satisfactory to both of you, because right now what I'm hearing is if in fact I were to on an informal basis say, okay, I'm inclined to approve 1e and 1f, if I were to say that, it sounds like we'd have formal litigation in our hands with respect to that issue. I could be wrong about that. But I don't want to create formal litigation, I'd rather avoid it if we can. Is there a way that I can send e and f back to you? I was inclined just in the preparing

that I was doing for this hearing, this seemed relevant to me, and having heard the arguments you both made with respect to the sealed merger documents, I was persuaded that there is enough there to at least give Attorney Orent the ability to argue relevance, but I am concerned about this running up against this privacy act and creating litigation and delay. And I suspect, Attorney Orent, that's not something you're interested in either. I'm happy to obviously try to expedite any ruling on this in the future if there is a need for formal litigation, but I don't see why you can't resolve this and perhaps meet and confer knowing that the Court is inclined to see the relevance of this, and I just don't know what kind of hurdle that privacy act represents but, you know, I'm also sympathetic to some limits on the information as to Getinge.

So Attorney Orent, are you able to help us move the ball forward?

MR. ORENT: I hope so, your Honor.

THE COURT: Go ahead.

MR. ORENT: You know, one of the things during the meet and confer process that I had offered and have offered for a number of issues is to engage in stipulations, your Honor. You know, for the purposes of this process for us, you know, with regard to Getinge

AB's policies and procedures, there is a benefit to understanding whether or not those policies and procedures were then brought to Atrium and that there is a parody and that the sets of policies and procedures are in fact identical. So, to the extent the defendant is willing to stipulate that they are in fact identical, if they are in fact identical, that is an issue that could avoid litigating this any further in totality.

That being said, I am not as convinced as defense counsel that either the EU blocking statutes or the Swedish statutes hold any degree of authority over this Court. I believe, and we cited this case law, your Honor, in our reply brief, I believe it's beginning at around page ten or eleven of our reply brief on the jurisdictional issues, we go through several major MDL cases that actually allow for discovery and find that the court should not be bound by, blindly bound by the Swedish, or in that case I think it was a German protection statute, but nonetheless the case law that we cite is on point, that an American federal court is not bound by the privacy laws of another country. And quite frankly, it's not clear to me how a policy manual or a procedure guide would in fact implicate the privacy of any individual. I'm not quite seeing that. But nonetheless, I think that the simplest way to get from

point A to point B would be for the defendants to simply take an inventory and identify as a preliminary step whether or not they are identical. And if they are identical policies, then we could enter a simple stipulation to that fact, and I think that that would move the ball practically forward without having to get into legal briefing as to what the impact of the Swedish statute is.

Alternatively, I would be open to understanding --

THE COURT: Let's stop there. Let's stop there. Attorney Aytch, would you be okay with that?

MS. AYTCH: I guess I would need to pose a question back. Are we doing the stipulation -- so if they are in fact not identical, and I can't imagine that they are where certain U.S. laws are here that are not in Europe, so would the stipulation be that if they're not identical and then plaintiff would relinquish their request for those documents?

THE COURT: I think what he meant was if there's a stipulation that they are identical. What do you do, Attorney Orent, if they are not identical?

MR. ORENT: Well, I think if they're not identical, I think that the next step would be for the defendants to redact all personal information that is

somehow implicating of the Swedish act. Again, as I said before, it's not clear how policy manuals would be, would fall under a privacy protection act, but to the extent that the defendants believe that, I think the second step would be for defendants to redact and produce that material nonetheless.

I think as a third and final step we could, ultimately, if we can't get around this in that order, then the Court could resolve whether the Swedish privacy law is binding upon it. But as I said, I think that we've already briefed that issue, but the Court has not ultimately needed to decide it previously.

THE COURT: Okay. Are you all right with using this as a way forward for resolving agenda items 1e and f, Attorney Aytch, and that is as I understand it, by stipulation and agreement that if policies and procedures are identical between Getinge and Atrium, then there would be a stipulation to that effect. And if they're not identical, then redact whatever information that you can disclose, redact information that cannot be disclosed due to the privacy act, and then to the extent there are any remaining disputes, you would bring those to me.

MS. AYTCH: Your Honor, I really hate to be difficult here. So, in terms of reviewing them, to let

opposing counsel know whether or not they're identical or not, we're fine to let them know. I have to be quite honest that I don't know that I can let opposing counsel or the Court know by Wednesday, but we'll endeavor to do that. However, if they are different, as I presume that they are, I would ask the Court's indulgence to speak with leaders counsel because it's not just the production of the information, it is also the processing of information. So, before I confirm to the Court that a mere redaction would absolve the corporation from any penalties I want to get that from a more authoritative source. And again, your Honor, I really hate to do this, but if that is not the case, we would be seeking formal briefing on this issue.

THE COURT: Okay. All right. Well, I think you're not being unreasonable at all. And what I would suggest, then, is let's take e and f sort of off the table or off the agenda at this point. I'm not going to give you even an informal ruling at this point, and that way you don't need to request some sort of extension to litigate formally.

What I would ask you both to do is to try to work within the confines of this proposal from Attorney Orent to try to reach stipulations with respect to these policies and procedures. And if you can get counsel to

agree to disclosure with redactions where, you know, where you can't stipulate that they are identical and provide these, you know, in a timely manner to plaintiff, to Attorney Orent, then it seems to me hopefully that would take e and f off the agenda and hopefully with meet and confer processes the two of you can resolve those two issues. If you cannot resolve them and they remain, it seems to me these are issues that, for the reasons you just said, if they involve me deciding the applicability of some sort of international or other non-U.S. statutes, then that may require some litigation. And I understand Attorney Orent is not going to want to have formal litigation delay this jurisdictional discovery. So I think both counsel will be motivated hopefully to resolve e and f so that the Court does not have to resolve a dispute and then perhaps engage in formal litigation with counsel.

So let's do that. Let's take e and f off the agenda for now. I'm going to kick both of those back to counsel and see if you can't work out a resolution of the two of them along the lines we just discussed.

Okay, so let's move now to agenda item 1b which is No. 24. Let me just look at those for a moment so I can remember what they are.

(Pause.)

THE COURT: Okay, I think I've got my head back into Request for Production No. 24, and let me just see if I am correct about where the dispute remains. So counsel, if you just let me see if I'm able to summarize this.

No. 24 deals with minutes of every meeting of managers, members, shareholders and/or board of directors of Getinge for each of the years 2009 to present. Okay. It looks as though with respect to 2009 through 2011 there really isn't any disagreement. You have agreed, I think, the way I'm reading your letter, to give those meeting notes with redactions, so what it would contain would be the meeting date, the attendees and then any info regarding Atrium C-Qur, everything else would be redacted. That's one pile of material.

And then there's another pile over which there is a dispute, and that would be meeting minutes from 2011 to the present. And what plaintiffs would like would be for the same thing you've agreed to with respect to 2009 to the present which is meeting dates, attendees and then just redact anything that is not mentioning Atrium or C-Qur. And my understanding is the defendants are saying we don't want to present meetings, dates and attendees for every single subsidiary of Getinge because there are over 200 of them, and I think

what you're saying is that plaintiffs do not need the meeting dates and attendees where there is no mention of Atrium or C-Qur.

Have I summarized that correctly?

MR. ORENT: Somewhat, your Honor, for the plaintiffs.

THE COURT: Okay. So tell me where I'm off.

MR. ORENT: There's a couple things. We are seeking, first of all, the board of director meeting minutes for Getinge AB, just that single entity which is the parent company of, as the defendants have pointed out, 200 subsidiaries, but we're only seeking the board of director minutes for that one entity.

Now, with respect to we are primarily interested in things that discuss specifically Atrium or C-Qur, however, as I indicated to defendants there are also a category of documents -- excuse me, a category of decisions and discussions that will relate to generically all subsidiaries. So, for example, if Getinge AB says we're going to replace all of the health insurance plans throughout all of our companies with Blue Cross/Blue Shield, for example, I'm just making an up a hypothetical, but they don't specifically address Atrium, well, in that particular instance the defendants wouldn't produce that document, those meeting minutes

because it doesn't specifically mention Atrium, yet it would go to the test of whether the corporate parent, Getinge AB, is exercising dominion and control by making the decision over what health care policy is provided to the subsidiary.

So, what we are disagreeing about is whether or not essentially a concept that is exercising dominion or control where the words Atrium or C-Qur are not used, we believe that we're entitled to all of the relevant board meeting minutes where that is the case, where there is discussion, whether it mentions Atrium or C-Qur specifically, we think we're entitled to the content of those that bear on the issues that we're talking about.

The second point, your Honor, is that we believe that we need the identities of the individuals who are present at the meetings and the dates of those meetings for that one board. It is not an overly onerous task to redact or just the board of directors for Getinge AB. There is information beyond the -- there is information that can be gleaned from that that will allow us to make decisions about whether or not we need to in fact go further and seek additional documents or have the redactions removed. For example, we know for example that there's a significant overlap of the boards between the two groups. However what we don't

know is what if an individual with involvement in product development comes to the Getinge AB and that he later on spends a month at Atrium company exercising dominion on behalf of them, well, there are bits of information that we can glean from the record if we know who a person is, what his job title is, and seeing that an Atrium employee is at the board of director meeting minutes for Getinge and we haven't been provided the content of that, that will allow us to assure ourselves particularly when we're not asking for all of the board of director meeting minutes, we're allowing for the redaction of them, that will give us the assurance that whatever TAQC is done is capturing the relevant information as it relates to Atrium and sales of C-Qur and dominion over Atrium in the United States without making the defendants produce every single document to us and allowing us to really get what we need to make decisions about whether or not the discussions were involving exercising dominion because that, quite frankly, the board of directors is where ultimately those decisions would be made or might be made, the level of exercise and dominion that does occur over each of the subsidiaries.

So really the first thing is that the stipulation or whatever agreement to produce can't be

limited to the names Atrium and C-Qur, but it needs to conceptually go beyond that to areas where all subsidiaries are also affected.

And secondarily, the mechanism of protection is just these dates and identities of attendees.

THE COURT: Okay, well, I will confess that because of the way this is presented your argument is essentially summarizing a sentence in your letter, Attorney Orent, and what I have from the defendants is essentially those two piles of material with redactions, and my understanding of the dispute is limited frankly to the detail that is present in the defendants' letter. So, forgive me for not really being clear on what it is you're really looking for here and what it is you actually already agreed to between the two of you.

So, you're not seeking meetings for over 200 subsidiaries then, you're not looking for minutes for those --

MR. ORENT: That's correct, your Honor, we're solely --

THE COURT: Okay, let me stop there. Stop there for a minute. Okay. So that removes what seems to be a fairly big concern of the defendants because that seems to be your major argument, this idea that you get unfettered production of all Getinge AB minutes and

all those 200 subsidiaries, where now they're just asking for minutes for board meetings, et cetera, for Getinge AB, and what they want are meeting dates, attendees, you know, any mentions of C-Qur and anything else that might bear on Atrium. Sorry? Hello? Is everybody there? Can you hear me?

MS. AYTCH: Yes, I'm still here.

MR. ORENT: We can hear you, judge.

THE COURT: Okay, all right. So I'm sorry, I think that I'm going to need some help from Attorney Aytch telling me, I was a little confused here, why can't you produce what he has just described?

MS. AYTCH: So, your Honor, what we were saying is that the unfettered production of all Getinge AB minutes which is an entity with over 200 subsidiaries, so not all 200 subsidiaries' minutes but the fact just Getinge's minutes is going to address a whole lot of information that's not at all relevant to the entities at issue in this case is what we were stating there.

But again, this is something that we did not put in the position paper, but what this still gets at is getting them the information that they needed without running afoul of the privacy law. And I do have to make a correction that we just confirmed this morning. The

offer that we were making in order to limit the production of Getinge's minutes with regard to Atrium or C-Qur Mesh, so that would include anything that would be, you know, conglomerate wide because it would affect Atrium, but any minutes that affected Atrium we were previously under the impression would be stateside, so that's something that would be here on the stateside and we could produce that. I have just gotten confirmation today that that is not the case, while communication about the minutes, the minutes themselves, are not held here. So, this is still another thing that would hit the privacy laws including, which is why we were not originally receptive to just, you know, the redacting of everything except names and dates, including the identities of these people from the Getinge AB side.

So, our concern was one, it seems that it is a fishing expedition just to try to compare topics and minutes, because any of that information would be revealed in a number of other documents if there is dominion and control that we are agreeing to produce within the 71 requests for documents and I think we got an additional 30 today where this is supposed to be limited discovery. And additionally, the minutes that we were offering, which would be anything that regards Atrium, would suffice for that proffer. We are

definitely going to endeavor to get that because we're going to have to go back to Swedish counsel per your request with the last two and figure out how to come around it, but the issue still is with regard to all of Getinge's minutes is the data privacy act as well as just simply the fishing expedition to get all of Getinge AB's minutes even when it has nothing to do with the running of the organization as a whole or Atrium and C-Qur Mesh specifically.

THE COURT: Okay. All right. Well, I just do not have enough information to decide this in a way that makes me feel comfortable. I think the way it's been presented to me is confusing at best. And what I would say to you is, and again, you know, I'm going to ask you to meet and confer on b as well as e and f because you're going to have to resubmit this to me in a way that I can actually help you, because at this point I prepared for something that looked fairly narrow in scope and I'm not clear at all until I get to this conference as to what really is in dispute here, and I don't know quite how to fix that, but I do think making more of an effort in writing to give me the scope of your remaining disputes in a way that is helpful so that I can actually rule on it, at least informally, give you my informal ruling, it would be so much more productive

if you spent I think more time on these informal discovery letters, brief letters.

I think agenda item 1b, my inclination would be to grant this type of discovery. It seems relevant to me. It seems fairly limited. And it seems as though, you know, associates at your firm could go through these minutes and certainly redact anything that did not deal with Atrium, C-Qur or, you know, every single entity or company that it was a subsidiary to Getinge which might include Atrium, that seems like a limited request and it seems relevant to the question of dominion and control. So, that's my just, I'm just giving you my general sense of agenda item 1b. I think you can take these back, meet and confer, and then at this point if it involves some sort of decision I'm going to need to make on the applicability of some Swedish or EU statutes, then I think you should presume that you should be briefing that. That seems complicated enough that I'm not that comfortable just trying to do some sort of informal resolution. I think that just further delays things.

So, I'm going to send item 1b back to the two of you understanding that frankly with respect to item 1b, e and f, I'm inclined, essentially inclined to as a general matter order that kind of discovery for

plaintiff. So, that's as informal as it gets. Let's put it that way. I'm giving you just a sense of things.

But I think we need to move to items 1c and d, and I've got to say, I am not going to trust my understanding of what the issue is at this point, so I'm just going to throw it out to both of you. As I understand item 1c, we're talking about Request for Production No. 26 which is cash and non-cash assets, and I couldn't tell from your letter if in fact that issue was off the table or not, and when I say your letter I'm talking to defendants.

MS. AYTCH: I'm sorry, your Honor, to interrupt you, but before -- you're looking like you're definitely moving on and I wanted to see if we could back up to Request for Production No. 24. If I could get clarification. I know that you want us to take it back, but you were generally giving your inclination, and as I jotted it down, and I want to be clear, that your inclination would be to grant this discovery but redact anything that wasn't relevant to Atrium or, you know, all of the entities as a whole.

THE COURT: Correct.

MS. AYTCH: Okay. So, that was the defendants' offer before. True enough we still have to deal with the privacy part and not just every single

Getinge minute without reference to Atrium, but okay, I just wanted to make sure on that.

THE COURT: And that's very informal. I frankly -- what I'd like to have the two of you do or all of you do is just meet and confer on b, e and f before giving you something even, even more definitive, okay? Item 1c.

MR. ORENT: Your Honor --

THE COURT: We really need to move on because at this point I think we spent a lot of time just trying to figure out what the dispute is and clarifying for me what the scope of the dispute is. So, go ahead, Attorney Orent. I am understanding you to be seeking cash and non-cash assets held by Getinge AB, 2011 to the present, including real estate, real property but not limited to that. And you're saying that's relevant to show intermingling of assets and failing to observe, you know, if there was failure to observe any corporate formalities. And the defendants' letter on that, it's not clear to me where the scope of the dispute is. So --

MR. ORENT: Well, your Honor, we had continued to meet and confer yesterday and today and we reached actually an agreement on this item provided we --

THE COURT: Good.

MR. ORENT: -- put it on the record. And that is that defendants had agreed to produce this material as related to any transfers of cash and non-cash assets worldwide between the two entities as well as any assets within the United States, and I just want to make sure that defendants agree that I have represented that correctly to the Court.

MS. AYTCH: Correct. Which we believe are request Nos. 8 and 9, and then also the land, the addresses and things like that I believe we also discussed.

MR. ORENT: Okay.

THE COURT: Got everything on the record you need there, both of you?

MR. ORENT: Yes, your Honor.

MS. AYTCH: Yes.

THE COURT: Okay. All right. So our last discovery dispute other than the privilege log issue is No. 27, the question of co-branding. So, go ahead, I'm not going to articulate what I understand this dispute to be, I'm going to let you guys tell me what the issue is. Attorney Orent, go ahead.

MR. ORENT: Your Honor, Getinge we believe exercises dominion and control over its subsidiaries through what Getinge has trademarked the Getinge Group,

and currently the Atrium C-Qur devices are sold and marketed under the Getinge name. Defendants have taken the position that that is Getinge Group, not Getinge AB, and we believe that all of the decisions were made to co-brand and co-market and portray all of the products as well as the physical property located in New Hampshire as Getinge through a joint marketing campaign where Getinge AB made all of the decisions. And so what we had done is we have requested the decisionmaking to market Getinge and its Atrium subsidiary as one company together. Defendants in their brief cite the Enterprise Rent-A-Car case for the proposition that Enterprise Rent-A-Car is portrayed as a single brand for the public, but this evidence does not demonstrate the necessary control by the defendant over -- excuse me, defendant parent over the subsidiaries.

And, your Honor, we believe that we're entitled to this. It goes to a number of the subparts of the text that I referenced earlier and that this case is actually unrelated. The Enterprise Rent-A-Car case, your Honor, is a Fair Labor Standards Act case that doesn't bear on discovery and certainly doesn't bear on the elements as described here in terms of whether something is discoverable or not. The issue here as in this Enterprise case was simply whether or not joint

marketing was dispositive of an employment, who the employer was for purposes of the FLSA.

So, we don't believe that there's any application to this particular case. We think that it goes to the heart of the test that the Court will be applying in this particular case for alter ego and it is the single most important item that we are seeking in discovery.

THE COURT: Attorney Aytch.

MS. AYTCH: Well, hopefully this does come very close to our position paper so any inferences that the Court would have drawn from that will be accurate.

So, we have kind of two major objections here. First, the any and all part is not at all a limitation in itself, it is just overbroad, especially the way that you would probably try to interpret what any and all documents describing this decision to co-brand would mean. But moreover to the substance at point, as our briefing shows and as this Enterprise Rent-A-Car case shows is the decision to brand as a single brand to the public does not bear on further control that a parent would have over a subsidiary beyond just the co-branding. So just the decision itself to co-brand is all that is necessary for this determination, not what led up to that decision, because co-branding in and of

itself is not a way that a company would exert dominion or control. So, trying to get at all -- any and all documents which is already overbroad that deal with the decision to co-brand -- hello?

THE COURT: Go ahead.

MS. AYTCH: I'm sorry. That deal with this decision to co-brand would have come from a larger level, so again, hitting the privacy law. It is just not, it's not proportional to the needs of jurisdictional discovery where the decision itself does not have any bearing on whether or not there is dominion and control exercised over the subsidiaries.

THE COURT: Okay. Let me just ask you. Wouldn't it be relevant how a parent company or how any company would deliberate about co-branding, in other words, how the decision is made and how it's directed and how they are communicating, whether they are at arm's length as they make this decision or whether it's dictated from, for instance, Getinge AB or -- why isn't that relevant? Why wouldn't that indicate or potentially have indicia of control or dominion?

MS. AYTCH: Because the decision to co-brand and just have the goodwill of one unifying household name isn't the dominion and control over the daily activities of any subsidiary which is what the case law

is looking to. So it is not like a larger scheme that we're putting in place, but it's the dominion and control over daily activities. So the idea to co-brand just simply isn't one of the factors that gets us that dispositive issue.

THE COURT: Okay. I'm not clear on why, you know, emails or other documents that would explain the decision to co-brand, why that communication wouldn't be relevant or potentially relevant?

MS. AYTCH: Again, your Honor, it's just the fact that -- so even if they were all making the decision to co-brand and the decision came from the top to have all of its subsidiaries co-brand under Getinge, it doesn't go to any control over the daily activity. So how they got to the decision to co-brand so that they can increase the goodwill of the name simply just doesn't go to whether or not there is sufficient contact by a foreign entity in the U.S., especially where that decision is made at a global level but does not touch that U.S. entity's daily operations and activities. And so just the burden of producing all of that information is just not proportional to proving this particular issue as it goes to jurisdictional discovery, because the decision to co-brand does not show the requisite control which is what the Enterprise case and all of the

other cases in our briefing is showing.

THE COURT: Well, the fact that co-branding perhaps, but how they got to the decision and how they deliberated about why they would do this, why they would co-brand and where the decision is coming from, what's motivating it, who's directing it, why isn't that a relevant area for plaintiffs to pursue? I understand what you're saying about just the co-branding, the fact that there is co-branding does not necessarily answer the question, but in terms of documents, emails and communications between, you know, between the heads of companies and executives at Getinge AB and perhaps Getinge Group and, you know, perhaps others that would indicate how they deliberated about this decision, that's what I'm wondering.

MS. AYTCH: I understand, your Honor. Let me see if I can answer this in a better way. Because even conceding that the -- even if we were to concede for argument that that came from the top, so if there are top executives discussing that and making that decision, that decision to co-brand, and so identify through these facts of co-branding does not show domination of the subsidiary's daily operations and policies by the parent company and that's really what I'm getting at. It's not the dominion of just, you know, how we're going to be

branded. That decision can be made at the top. It is whether or not the parent is controlling the daily operation, and so however the parent decided to get to the decision to co-brand isn't that issue the way the defendant reads the case law, your Honor. I hope that was a little bit more pointed to your question.

THE COURT: Okay. Attorney Orent.

MR. ORENT: Your Honor, I think your Honor understands our point so I'm not going to belabor it. I would just point out one thing. In that the fifth part of the test, actually, also is the mere fact of representing to the public that the corporations are a single entity, and this is why there was a distinction with the Enterprise case where in the Enterprise case the mere fact of the joint marketing for fair labor standards was not a dispositive item. Here with the Bennett case versus GAF Corp., not only is it dispositive or a factor that the Court considers that it's representing to the public that the corporations are a single entity, i.e. the joint marketing campaign, but also the decisionmaking goes to it, so both of those are directly on point here and so we believe that this is a stronger case and in fact we believe that these are essential documents both to understand the extent to which Atrium had any decision whatsoever in the

determination to joint market as well as how that was ultimately executed because they are now holding themselves out, we believe, to be a single company.

THE COURT: Okay. This seems like, and you've described this, Attorney Orent, as the single most important discovery request, at least in this universe of disputes for this status conference?

MR. ORENT: Your Honor, we believe that this is perhaps more than even a lot of other items in discovery, that this goes to the core of who these companies are.

THE COURT: Okay. Okay, well, then, I do not have enough to rule on this, so I'm going to have -- I only have essentially one case that you've given me. So what I'm going to do is ask you to brief Request for Production No. 27, and if you could file your briefing to compel, motion to compel No. 27 within seven days, would that be sufficient time, Attorney Orent?

MR. ORENT: It is, your Honor.

THE COURT: Okay. And then seven days for a response, Attorney Aytch?

MS. AYTCH: Yes, your Honor.

THE COURT: And then I'll at least have time to more carefully review this. I don't think what I have is sufficient, so I'm not totally comfortable

giving you even an informal decision on this. I think -- I think any and all documents are too broad just informally. I think, Attorney Orent, if you could come -- if you could limit that in some way, then perhaps Attorney Aytch and you could work through some sort of agreement on this. I don't have enough to give you even a strong leaning on No. 27 based on everything that I've heard and everything that I've read. So we'll brief agenda item 1d. And Attorney Orent, if you could file your brief within seven days, and then within seven days thereafter, Attorney Aytch, you can file your response. And I'm hoping for no reply or surreply briefing. That will get it to me and I can try to get you a decision fairly quickly.

Okay, so that leaves only one dispute remaining, the privilege log dispute. And this one I think you both have presented an issue at least in a way that I think I understand it, and hopefully I can give you at least an informal resolution to this. And let me just start by making sure I understand what it is defendants are proposing.

I think you're proposing that you essentially just categorically in a paragraph indicate that you're withholding all documents that are post-litigation which I believe is 2011 is your -- I'm sorry?

MS. AYTCH: May 2012, your Honor.

THE COURT: May 2012. Thank you. That anything after that date that is a communication with inhouse or outside counsel and anybody else within the defendants' companies, you would be withholding those documents, all of them, on the basis of a presumptive privilege. Is that right?

MS. AYTCH: Correct, for those documents, your Honor.

THE COURT: Okay. All right. And your rationale for this is essentially that it is too burdensome and you do cite case law that supports this rationale that where you're talking about huge numbers of documents, that some courts have approved this presumptive privilege. Let me ask you, though, plaintiffs say that it's very clear from what they received in discovery that your, the companies' already categorized this kind of data and it would not be particularly burdensome because it's really frankly already been logged.

So, can you respond to that just threshold question of whether or not this is something that is already information that you would be able to log.

MS. AYTCH: No, your Honor. We have not already item-by-item logged all of this kind of

information. My understanding is that in this category we have over a hundred thousand documents, closer to, sorry, over a 150,000 documents that would need to be reviewed in a log in this way, just between, you know, outside counsel and the client with regard to this litigation that's gone on for nearly 12 years, all of this has not been logged. With regard to like the larger production, if there is anything that's been mentioned, I'm sorry, excuse me, six years, but if there's anything that's been mentioned in like smaller production, so we're talking about the larger production, no, that has not been undertaken and that would be a huge task.

THE COURT: All right. Well, what I guess I mean is that plaintiff seems to suggest that based on computer programs that it looks as though this type of metadata is metadata that is in the system and could be produced.

MS. AYTCH: The metadata in terms of just a file name and then maybe a to affirmative CC, but my understanding of an appropriate log is also to provide a reasoned act to, you know, what this is about, and still, to do that for over approximately 160,000 documents in this large production, even if it spit it out in a metadata kind of way, we're going to have to go

back and make sense of that. In doing the prior production I have an idea -- I mean in prior logs I have an idea of what plaintiffs may be referencing, but no, it does not come out in any kind of discernible way, that still would not be onerous where there's a presumptive privilege to all of these documents.

THE COURT: And are you -- you reference outside counsel. How many outside counsel are there? Your firm and are there many other firms?

MS. AYTCH: Our firm and essentially local counsel.

THE COURT: Okay. So essentially two outside counsel firms.

MS. AYTCH: No, I apologize, that would just be the litigation in New Hampshire. I am just trying to run through a list on the top of my head. So let's say maybe 15 or so total.

THE COURT: Fifteen firms?

MS. AYTCH: Yes, yes, your Honor.

THE COURT: Okay. All right. And obviously there's inhouse counsel as well. You are also including inhouse counsel or are you just talking about outside counsel?

MS. AYTCH: I'm talking about communications that travel between, you know, outside counsel and the

client. I'm sorry, I'm not sure if I'm exactly answering your question, your Honor.

THE COURT: No, I think you are. So, outside counsel, we can describe outside counsel as those attorneys or firms representing the defendants in the C-Qur litigation?

MS. AYTCH: Correct.

THE COURT: Or is that -- okay, all right.

MS. AYTCH: Well, I'm sorry, by C-Qur litigation, so we have this MDL but we have all the C-Qur litigation that has occurred because we've been counsel with local counsel, so I'm not limiting it to the MDL when you say C-Qur, clearly, I'm sorry, because we said May 2012.

THE COURT: All right, okay. All right. So, let me ask you this. What about if a third party is on the communication. Obviously if a third party is on the communication, that wouldn't be entitled to a presumption of privilege. Is that something that you could exclude?

MS. AYTCH: Of course, your Honor.

THE COURT: Okay. Okay. All right, and so you're saying communications between inhouse counsel, those communications we would provide a privilege log on, we're just talking about outside counsel involving

Mesh litigation.

So, let me ask Attorney Orent. With respect to inhouse counsel there would be a privilege log. It's just with respect to outside counsel that Attorney Aytch would be seeking this presumptive privilege and she is saying she would not include -- she would not attach a presumptive privilege to communications between outside counsel and the client, the clients, when a third party is present on the communication.

MR. ORENT: Your Honor, I'm actually concerned and I'd like to raise an issue. It sounds to me like the defendants have not reviewed these documents.

Even the case that the defendants cite standing for the proposition that this process, and I can get into distinctions later, but assuming for a moment that there is case law without reference to any of my distinctions that supports the proposition that a party can be relieved of its obligation to log privileged material, there is no case law that I have seen that relieves a defendant from the obligation of having to review. And my concern is it sounds like the defendants have not even reviewed the documents and made a formal determination as, at a document level, what is their obligation regardless of the issue of review -- excuse me, of logging. That is reviewing and making a

determination as to whether something constitutes an attorney/client privilege. So, that's the first item I'd like to highlight because it actually seriously and significantly concerns me that a review has not begun.

Moving beyond that, your Honor, we have agreed in this case to an electronic data production protocol, an ESI protocol. That calls for the production of certain metadata fields. Those identical fields along with a categorization of something as attorney/client privilege or work product are sufficient enough to get us along the way. But that has never been offered to us and that is something that can be computer generated presuming that someone has made the decision affirmatively to not produce a particular document.

Going back to my original concern is that not everything between an attorney and his clients are automatically, particularly when you're talking about a corporate entity, not all communications are subject to an attorney/client privilege. An individual, for example, if legal advice is disseminated throughout the entire company unnecessarily, that privilege doesn't apply. There's a different analysis when it comes to who the privilege applies to, what that privilege is and the scope of it. Additionally with regard to the work product privilege, the work product privilege is not an

absolute privilege.

So, at the outset, and I think we outline this, I have significant concerns as to whether or not this material the defendants are seeking a presumption, that all of this material is going to be privileged without having to make an actual determination. So that's the first point I want to make.

The second point is the concern over the volume here. So up until the TAR production in January we were relying almost entirely on the state court production, and what the defendants have now said here today is that with 150,000 attorney communications that they have made, that their production, that their attorney/client communications are actually greater than the entire production set of six years of litigation in state court. So that's concerning to me.

And then finally we have concerns over the proposed date of 2012 when the first MDL, when the MDL was started a little over a year ago. So we had a number of serious, serious concerns, and the rule is in place, the case law supports creation of a privilege log, and at least as a first pass we are willing to allow just the metadata fields that can be produced along with a description of attorney/client privilege or work product to suffice for the purposes of the gigantic

log. When it gets down to, if there's a meet and confer that occurs, then we would expect that those items that need meet and conferring would get a little bit more attention. But we certainly don't and have never expected and throughout the course of our communications with defendants we've insisted on anything but the metadata that preexists and simply requires running a report to be generated providing the type of communication or document the individuals who were copied on it and the author, the recipient, that sort of typical information and the date.

THE COURT: Okay. Any objection to that just initial production, Attorney Aytch?

MS. AYTCH: So I guess I'm trying to understand what it is, like just setting out in Excel spreadsheet that would still be item-by-item that had to and from? I guess I'm still not understanding what it is that Attorney Orent is saying that he would have expected.

MR. ORENT: We would expect, we would accept a to/from date, title, which is generated as well as a categorization of attorney/client or work product and the document type. All of those are part of the metadata agreed to.

And just one final note, is not all

attorney/client communications are covered by the privilege. It has to be actual legal advice rendered. But for purposes of the privilege log we don't need any more information than those items which are metadata fields that were negotiated and agreed to, and an Excel spreadsheet, presumably if we were actually provided the actual Excel file, would be sufficient. Bates numbers would also be helpful, which is the production ID that goes along with it.

MS. AYTCH: But if it's privileged then it wouldn't have been produced because it's privileged.

MR. ORENT: Well, presumably it was removed from privilege between two pages, and typically how I've seen productions go and I assume that you all have done it the same way is that there's a missing page between and then, for example, you put a slip sheet, you know, and we've seen places in documents that you've produced where there are actions or things of attorney/client privilege where there's a moniker noted and presumably those were recorded somewhere as to what was removed from production that we're not getting, so that if we ever had to have the discussion again, we would get it. So, again, that information should exist.

MS. AYTCH: I understand your point but so that is for the attorney/client privilege information

that does not have a presumptive privilege. Here where we're talking about, you know, outside counsel and local counsel, so us, speaking to the client, is presumptively privileged because more likely than not it is going to legal advice, it is going to our work product and how we would defend these cases, and so the idea that we would nevertheless log all of that when it does have a presumptive privilege under the law because of the just true nature of what we would be discussing in those emails seems onerous and not where, and courts have decided that because it's a presumptive privilege and it would be onerous, that a categorical log of this sort is sufficient.

MR. ORENT: Your Honor, we believe that when someone refuses a document that they typically would click on a single button that indicates attorney/client privilege or work product. But does the defendant have the capability to simply run a report of the metadata fields? The purpose of the privilege and the privilege log process is that it does not in and of itself reveal any of the content, as with the metadata that I'm seeking. Again, particularly when you're talking about a corporate defendant. Defendants are not free to communicate with anyone in the company about any issue and not an expected privilege for any reason, that's not

the purpose for this. And again, it is not clear to me that the defendants have even looked at the documents to make a determination whether or not there is a privilege that applies, whether it is specifically about the rendering of legal advice, that is the legal standard for privilege, and that any of the cases that support not having to log them do not stand for the proposition that you don't even have to look. And that's without getting into any of the distinctions from the cases. And if the Court wishes, I'm happy to discuss each case that are cited in the papers.

THE COURT: Well, I certainly looked at those cases before the hearing today and they have cited two District of Nebraska cases, Eastern District of New York, Northern District of California, and I found mention in a treatise, the Federal Civil Rules handbook that indicated that frankly parties often agree not to log communications with counsel after the litigation is commenced, and then there was a Third Circuit case in 2009, I don't believe defendants cited, the Grider, G-R-I-D-E-R case, which also talks about this notion of a presumptive privilege where we're talking about numerous documents. This presumptive privilege is new to me, but I have read the cases cited by defendants and I would like to hear you briefly tell me why I should

disregard those cases.

MR. ORENT: Absolutely, your Honor.

THE COURT: And again, those cases, those cases were cited in their letter brief and those are cases that I went through, I reviewed before this hearing. You've cited some cases for general principles in a footnote, but you never took on the argument that they're presenting here today, which is this notion of presumptive privilege. And so it makes it somewhat difficult for me as the Court to try to resolve this issue in a way, even though informal, in a way that's consistent with my understanding of the law when I haven't really heard you distinguish the cases they've relied on or give me other cases that would tend to suggest that these cases are outliers. But they do seem, you know, obviously some of them are distinguishable, but it would be helpful to have you tell me why these cases are outliers.

MR. ORENT: Absolutely, your Honor, and I would first start by giving your Honor a citation to Baklid-Kunz versus Halifax Hospital Medical Center, 2012 U.S. District Lexis 158944, November 6, 2012 decision out of Middle District of Florida.

THE COURT: And that's 2012 Lexis. What's the volume number, 2012 15 --

MR. ORENT: 1589 -- 158944.

THE COURT: Okay.

MR. ORENT: So first of all, your Honor, I think that there's -- and that stands for the proposition -- and that court declines to extend such an agreement or an allowance.

But first I want to start with what I think are two very simple cases. The Prism Techs case is a case actually where, let me just make sure I have the three cases and I'm going to confuse them. Okay, so the Prism Techs case is a case where, this is actually, neither party disputes the general rule or the agreement that they don't need to log. That's a case, and if you look at the last page of that opinion, it actually goes on plaintiff argues that the assumption should be equally applied to its communications with counsel before the litigation began. So really they're arguing they've agreed amongst themselves, the parties have already agreed, so the court's not faced with the same issue about whether it's proper or not to not produce a privilege log. So I think that's an important distinction. It's just the court is only concerning itself as to the breadth of the agreement between the parties. That's the first case.

The other two cases actually, the information

that's sought directly from law firms, and I think that that's highly significant. The Dell v. DeCosta case is a document subpoena case, so it's not a party. It's a subpoena to a law firm. And so that was decided, both keeping in mind that this was a non-party and that it was a law firm.

The other case was actually similarly, the Hulley Enterprises against Baker Botts,that again was, that was a law firm that they were seeking discovery from as well. And again here what we're talking about is not a -- there is no burden. So if the Court is looking to balance, really here the question is whether or not where there is no burden to a party it can simply run a report, whether the presumptive rule, which is Rule 26(b) and the case law interpreting 26(b), whether there's a reason to force an exception to that rule. And here on the one hand there is no burden. In fact we've heard that from Ms. Aytch that the metadata is there, presuming that someone has actually read this and none of these cases stand for the proposition that you can ignore and not conduct a privilege review, they're purely logging, so presuming defendants have actually logged their material, someone has already made the decision. And so the production of the metadata is as simple as running a report. That's not present in any

of these cases and I think that that in and of itself would be the sole reason for someone to be relieved of an obligation because of the onerous -- in fact, that's the primary argument that the defendants were relying upon in seeking relief from that, and as I indicated before, we're willing to live with the metadata fields.

And then finally with regard to the privilege, these privileges are not, and in fact most of these cases I believe deal with attorney/client communications and not with work product specifically, I could be wrong about that, but my recollection was that these were primarily not work product. What we're talking about here is the defendants have also sought to alleviate work product protections which is not an absolute privilege and there's no reason that simply sending something to an attorney or cc'ing an attorney should create a privilege on an otherwise unprivileged document. We're talking about a tremendously large number of documents, again, to contextualize, this is equal to or greater than the entire production of documents over six years in all of the other litigation in the cases out there. So this is not a small sum of documents. So presumably someone would have had to have looked at these. These include any communication with an outside counsel. And the defendants have not said

whether or not that these are just communications directed to or forwarded from.

And finally, your Honor, defendants have actually already produced documents that are non-privilege documents from Akerman firm where there's metadata associating it with the Akerman firm, and those documents on their facial view don't appear to be privilege, worthy of some kind of fallback.

So, with all of those reasons and the lack of a burden there is really no justification that the defendants can put forward to suggest otherwise, other than they just simply don't want to, there's no reason why someone can't run a report of a metadata and produce that. Nothing in the case law deals with a party not wanting to produce a log simply because given a lack of burden.

THE COURT: Attorney Aytch.

MS. AYTCH: There are some factual inaccuracies in there I believe, but to the point about this information being presumptively privileged, and I also want to clarify that the defendants are not contending that they would not do a privilege log. There would still be a privilege log, as you noted, of anything privileged that was prior to the litigation of anything that there's a third party on, on any

communication between the client and counsel not dealing with this litigation. We're particularly talking about the case law, and as your Honor had mentioned, generally the agreement between the parties that this subcategory of documents would not be logged because it is presumptively privileged. With Akerman and its local counsel would be talking to Atrium and the other defendants about with regard to defending this litigation is definitely in the nature of an attorney/client privilege. The document that I may be creating and submitting or asking the counsel to give to me definitely was in the nature of work product production.

So, I still don't hear where counsel has overcome the presumptive privilege of this just in order to have a log follow these subset of documents. There would still be a privilege log but with regard to his subset of documents, whether it's a presumptive privilege while we are talking to Atrium about the defense of this litigation or not logging the tens of thousands of documents and emails that that will constitute.

THE COURT: Anything further, Attorney Orent?

MR. ORENT: Well, again, I mean, your Honor, just to sort of rehash.

THE COURT: You don't need to rehash. You don't need to rehash. Do you have anything further that you want to respond to? She was fairly brief. Do you have any response?

MR. ORENT: Your Honor, I guess that the way Attorney Aytch raises the issue is she is seeking, she is framing this issue as though we are trying to rebut the presumptive privilege, but again, that's not what the issue is here. There's an ordinary requirement to produce a privilege log under Rule 26(b), so we don't have to rebut the privilege to get a log. That's the ordinary standard default rule. It is the defendant that is seeking a request to be relieved of their obligation to produce a log of those communications, a log which they already have the capability of making without burden. And that is the single most important thing. So the test is not whether we've overcome a privilege. The test is simply whether the defendants have justified their decision to not produce a privilege log when they can without significant cost to them.

And that, your Honor, is in sum and substance the entirety of this.

I would add, your Honor, we would be willing to live with a scenario where their general counsel's communications would not be logged if they were strictly

between their general counsel and outside litigation counsel. But where there is unfettered lists of people or third people who the privilege may or may not apply to even if they are corporate hires, we're not willing to live with that.

THE COURT: Okay. Anything further, Attorney Aytch?

MS. AYTCH: As to that last point, your Honor, I appreciate plaintiffs' offer, but we wouldn't -- we couldn't limit it just to general counsel. In defending this litigation and trying to obtain the information, you know, we have to speak to key personnel in manufacturing, key personnel in R and D, and that's all with the key personnel of the client, so that offer, while appreciated, would not get to what it is the issue that we're litigating here.

THE COURT: Okay. All right. So I think I have enough to give you an informal ruling here. Again, to the extent you want to formally litigate this I'll give you to Monday to let us know, Monday at the close of business.

The rule, if you just start with the rule, which is a good place to start in my view, Rule 26, and I'm reading the section of the rule, let me get there, (b)(5)(A) says when a party withholds information

otherwise discoverable by claiming that the information is privileged or subject to protection as trial preparation material, the party must, and then subsections (i) and (2), lay out the requirement of a privilege log.

So the rule uses the language must. I do think there has been an understanding of counsel and agreements of parties in cases where they agree that there will be a presumptive privilege applied for outside counsel communications with a client, and it appears as though there is litigation around that question and courts at least recognize that counsel parties themselves reach agreements to that effect, but the rule itself which frankly would be what I would be relying on here requires that the privilege log be produced.

So frankly, Attorney Orent stating the default rule which is, you know, they don't have to rebut some sort of presumptive privilege, obviously the issue of burden and proportionality is a concern in any discovery dispute, but as far as I see it, informally my ruling would be that defendants would need to produce a privilege log with the metadata fields, the Excel spreadsheet sheet type log that Attorney Orent described which would have essentially the type of document email,

for instance, the names of people on the communication, the date and perhaps Bates numbers as well, that that seemed, that type of metadata can be produced without significant cost and burden. The metadata appears to be something that could be accessed and then you would simply run the report, and plaintiffs have indicated they will live with the minimum metadata fields I just described, and they make the good point that work product is not an absolute privilege in any event.

So, on an informal basis I'm not persuaded to apply the presumptive privilege here and I do think that defendants should produce this log as described by Attorney Orent. It seems as though that contains a reasonable amount of information under these circumstances. So, that's my informal ruling on the privilege log issue.

And I think now we've gone through the entire agenda. Am I correct about that or have I missed an item?

MR. ORENT: You are correct, your Honor. Just as a housekeeping item, I wanted to add an agreement that the parties had reached relating to the timing of the production of documents that were subject to the defendants' agreement to produce to us related to those requests for production. And it's my understanding that

as far as items not previously ordered to be produced but those that were agreed to prior to today, that those would be produced within two weeks, and then that anything that was a result of this hearing would be rolled out shortly thereafter, and I just wanted to memorialize that for the record, and if defendants want to add anything, I'll open it up to them.

THE COURT: Okay. Attorney Aytch?

MS. AYTCH: We don't have anything to add, your Honor.

THE COURT: Okay. All right. I will -- I'm going to think about how we do these, especially when you have legitimate and sometimes I think very significant discovery disputes, it seems to me that counsel should be meeting and conferring after, closer to the time of the status conference and even after you've had an opportunity to look at each others' letter briefs, that's number one. Because it seems to me that you were discovering information that you didn't know, really basic information during this hearing. And then I think the letter briefs themselves could be made more -- could be more helpful to the Court I think if the parties were to meet and confer about those letter briefs and if you were given more time, frankly, to frame the issues and perhaps even just respond to one

another's arguments. And believe me, I spent a lot of time preparing and reading what you submit to me. I don't -- I haven't, in preparing for this today, haven't gone much beyond what you've told me in your letter briefs or what you've cited in those briefs. I've certainly read what you've given me. But ultimately that is I think insufficient in many instances to give you an educated response to these disputes.

So, I'm going to think about this letter briefing process and see if I can come up with a process that might work better than just simply having you both send at the same time your positions. It seems to me it would be better if you each had an opportunity to review the positions and then you could fashion a response, and then I would see something that would be I think more informative. But I'll think about that. I'd ask counsel to think about that too. And if you could propose a new procedure that you think would give me more information, put the argument in front of me in a way that makes it clear to me what it is, with respect to several of these the scope of the argument wasn't even clear, so I think we could improve upon that process which ultimately is going to help you and help you move this case along, and that's really what I'd like to do, is make these status conferences helpful to

the parties so you can continue litigating, you know, continue your discovery and not have to litigate matters and spend money filing lengthy briefs and essentially waiting for the Court to issue a written decision.

So, I'm very happy to try to continue helping informally resolve these, but I do think we might want to perfect our process. And if you would give that some thought before our next status conference, I'd be grateful. I will certainly think about it as well. And I know you're going to brief I think at least one issue, and so I will try to get you a decision as quickly as I can on that. And then if you decide to brief any of the other issues that I've informally resolved for you, so be it, we'll set up a briefing schedule very quickly after you let me know.

Okay, so I think with that I think we are done. And what I'll do is just get out a very short order that will just summarize what I decided or did not decide today informally or otherwise, and I will allow counsel the opportunity obviously to review the transcript so you can make what I think will be a limited redaction. It will probably just be a couple of pages of the transcript where Attorney Orent and Attorney Aytch describe that merger document.

So, I think there's nothing more to cover

today. Anything, Attorney Aytch?

MS. AYTCH: No, your Honor, thank you.

THE COURT: Attorney Orent?

MR. ORENT: Nothing further, your Honor, thank you.

THE COURT: Okay. Excellent. Well, court is adjourned.

(Status conference concluded at 4:25 p.m.)

C E R T I F I C A T E

I, Sandra L. Bailey, 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: 3/15/2018

SANDRA L. BAILEY, LCR, CM, CRR
LICENSED COURT REPORTER, NO. 15
STATE OF NEW HAMPSHIRE

I certify that the foregoing is a true and correct copy of the transcript originally filed with the Clerk of Court on March 15, 2018, and incorporating redactions of personal identifiers requested by the following attorney of record, Pierre Chabot, Esq., in accordance with Judicial Conference policy. Redacted characters appear as a "black box" in the original transcript and blank lines in the copies.

/s/ Sandra L. Bailey
SANDRA L. BAILEY, LCR, CM, CRR