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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF RHODE ISLAND

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In re KUGEL MESH HERNIA PATCH * MDL Docket No. 07-1842-ML
 PRODUCTS LIABILITY LITIGATION * JUNE 17, 2008
 * 1:00 P.M.
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* * * * * Providence, RI

BEFORE THE HONORABLE MARY M. LISI, CHIEF JUDGE, AND
THE HONORABLE LINCOLN D. ALMOND, MAGISTRATE JUDGE

(Open Session)

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1 17 JUNE 2008--1:00 P.M.

2 THE COURT: Good afternoon, and welcome to this
3 open-- what we call an open session of the monthly meeting
4 that the Court conducts in the Kugel Mesh Hernia products
5 liability litigation.

6 Counsel had requested that we conduct these open
7 meetings on a regular basis to permit those of you who wish
8 to come in and see first hand what we're talking about and,
9 also, perhaps to conduct other business while you're here an
10 opportunity to do so.

11 I would remind all of you that, in an attempt to
12 keep you fully informed, I know that Mr. Migliori and his
13 band of associate counsel have endeavored to keep all
14 Plaintiffs' attorneys informed of what is transpiring in the
15 case, but in that connection, the Court, as well, posts
16 meeting agendas, minutes, orders, all on our website and,
17 also, if you have access to the Pacer system, you can have
18 access to whatever is being filed, and the case, as you
19 know, is 07-1842. All filings are made in that main case.

20 So if you ever have a question about what's going
21 on or you want copies of something, I would encourage you,
22 before you call the Clerk's office, to check the website,
23 and you may find the answer there.

24 And then, of course, if you require additional
25 information, you are welcome to call my Clerks,

1 Barbara Barletta and John Duhamel. John is standing.
2 They're both very knowledgeable and intimately familiar with
3 all of the filings in the case, and so they can be of great
4 assistance to you, as well.

5 All of you should have, or if you don't have it, we
6 can get you copies of today's meeting agenda. It was
7 posted, as I said, on our website. We have a very short
8 agenda today.

9 I will ask that, if anyone other than lead counsel;
10 that is, Mr. Migliori's group and Mr. Griffis' group, if
11 there's anyone else out there who wishes to address an item
12 that is on the agenda and you have something to say in
13 addition to or different than what is being said by lead
14 counsel, that you please identify yourselves because the
15 other thing we're doing, of course, is having all of these
16 conferences taken down stenographically. And so, to assist
17 our very able Court Reporter, I would ask that you simply
18 identify yourself and perhaps spell your last name so that
19 we get it straight.

20 The first item on today's agenda deals with the
21 document production schedule. As you can well imagine, this
22 has been the subject of many of these conferences, and I'll
23 ask Mr. Migliori, please, to let us know how that is
24 progressing.

25 MR. MIGLIORI: Thank you, Your Honor.

1 On the document production scheduling, I think, to
2 date-- it's probably more appropriate, I guess, for
3 Mr. Griffis to describe-- we have received none, and nor do
4 we have any indication of when rolling production may begin.
5 We learned from the last status conference that the vendor
6 was supposed to be finished completely by the end of this
7 month, June 30th, and we assume that, that is still a good
8 date.

9 Just to point out, though, before I turn this over
10 to Mr. Griffis, there is production that is rolling on the
11 State Court level, and that production is, for our purposes,
12 just as good. We assume that the production on a rolling
13 basis should begin shortly.

14 THE COURT: Obviously, I don't-- where you have the
15 State Court proceeding in tandem with this case, and our
16 attempts, at least I have with Judge Gibney, in trying to
17 coordinate our efforts, hopefully, there's not duplication
18 and there's not a need for duplication of efforts.

19 So, to the extent that you're getting something on
20 the State side, I would imagine that all of you are on the
21 same page in believing that, that satisfies the
22 responsibilities on this side, as well.

23 MR. MIGLIORI: For Plaintiffs, we do.

24 MR. GRIFFIS: Yes, Your Honor, essentially, that's
25 right.

1 THE COURT: Okay.

2 MR. GRIFFIS: The only issue I can think of with
3 regard to State litigation is that there are State Court
4 Plaintiffs who have not yet signed a confidentiality and
5 protective order and, thus, aren't entitled to look at
6 documents. But, other than that, when we make a production
7 of documents, so far, it applies both in Federal and the
8 State Court litigation.

9 THE COURT: Excellent, okay. Can you address the
10 concern that Mr. Migliori raised about-- you had an outside
11 vendor who, I guess, was assisting you with some of this.

12 MR. GRIFFIS: Right. Yes. You asked us at a
13 previous hearing about when our vendor would be done. We
14 told you the end of June. That still looks like a target
15 that's going to be met. And if it isn't met, we're able to
16 review documents anyway, so it doesn't matter. But it looks
17 like they're going to make the end of June.

18 That vendor is BIA. They have 2.5 million
19 documents that they have processed so far, and there are
20 some more in the pipeline coming to them. That number of
21 documents is not the number of documents that will
22 ultimately be produced.

23 That will be reduced by the number of hits that
24 there are when searches are run against certain categories
25 of those documents, the larger categories of documents, and

1 further reduced by our review for relevance because a lot of
2 the hits point at irrelevant documents, given that they're
3 rather broad search terms.

4 In addition to the 282,000 pages that we produced
5 at the outset of this litigation, about which we've spoken
6 to Your Honor a number of times, that was the production
7 using our protocol, we've already produced 200,000 pages in
8 addition to that, applying Plaintiffs' methodology.

9 Those pages were produced in response to sales
10 representative depositions, and they were focused on getting
11 those depositions done. But they came from that production,
12 those 200,000 additional pages.

13 We expect to make our next installment in July, and
14 we estimate that, that will be 50,000-plus documents. The
15 page count would be much higher, but it's difficult to give
16 you that right now, but it's about-- it should be over
17 50,000 documents.

18 Our reviewers can-- will then be producing
19 documents on a monthly basis, approximately. They can
20 review 75,000 to 100,000 documents per month, and we'll be
21 producing the responsive documents from within that. The
22 number of documents that they can review is fairly fixed per
23 month, and the number of documents that they produce each
24 month will depend on how many of those are responsive. We
25 expect the statistics will be pretty consistent across--

1 from month to month, but we don't know that yet.

2 THE COURT: At that rate, 75,000 per month, what is
3 your projection for when that review and production will be
4 complete?

5 MR. GRIFFIS: There are several unknowns in that
6 question, but we-- our best estimate-- I knew you would want
7 that answer today-- is six to seven months from today.

8 THE COURT: So by next January?

9 MR. GRIFFIS: That's right.

10 THE COURT: '09?

11 MR. GRIFFIS: Right.

12 THE COURT: Okay. Mr. Migliori?

13 MR. MIGLIORI: Your Honor, I would be accosted
14 leaving this room if I didn't, on behalf of everybody on
15 this side, say that, that is far too long a period of time.

16 We've been at this litigation now, just in this
17 MDL, for a year, and we've been at the litigation now for
18 two years. We've got trial dates, we've got bellwether
19 settlement dates, we've got a lot of work going--

20 THE COURT: When do you have trial dates?

21 MR. MIGLIORI: We have-- in the State Court, there
22 is-- it's actually not a formal date. There's a status
23 conference in July with an expected-- our request was for an
24 October date, and the Court said it will hold October open
25 and review the status of the production in the State Court

1 in July to see whether that's realistic.

2 And understanding that, that could slip, the idea
3 that this production can roll out, when Mr. Griffis says
4 2.5 million documents, he has said in the past anyway that's
5 10,000 pages of documents-- I'm sorry-- 10 million pages of
6 documents, and it just seems like there's an awful lot of
7 work going in to reviewing these documents on our side at a
8 much faster pace, and we're coding for substantive and
9 issue-related issues. We're not just coding to see if it's
10 relevant. And we think that, that's a-- too long a time to
11 get production out. And, frankly, I don't understand--

12 THE COURT: Well, I hear what you're saying in
13 terms of it being too long. What remedy are you seeking?

14 MR. MIGLIORI: I think there should be some
15 requirement that there be a major production with a fixed
16 date in July and that there be an opportunity-- because once
17 we receive these documents, there are going to be issues
18 about privileges, like a self-critical analysis privilege,
19 privileges that are being fought right now in the State
20 Court, and that, if we wait till January, now we're just
21 going to begin at that point looking at a much bigger
22 problem.

23 So I'd like for there to be a production date, say,
24 August 1st of everything that's in your possession, with an
25 understanding that there may be a rolling basis on some

1 other issues. But I just-- to-- I know that we can code
2 with substantive information a lot faster than 100,000 per
3 month. And I just-- I feel like this is-- obviously, we
4 want the information, and we want them to go through it, but
5 we know that, in receiving documents already, that that's
6 just the beginning of this issue because they're going to
7 start raising redaction issues and other issues that we've
8 never had to fight in other litigations. And I just don't
9 want to have that be the beginning of a much longer fight on
10 these logs that we're receiving.

11 And maybe one issue may be, as my brother points
12 out, is actually having a priority of types of documents
13 that maybe we can meet and confer on and say, at least with
14 respect to the hits on these names or these search terms,
15 these be produced within the next two months because the way
16 this process worked is--

17 THE COURT: Well, the problem, Mr. Migliori, not to
18 cut you off, but had you perhaps raised this with defense
19 counsel beforehand, I mean, it's all well and good to raise
20 it in the meeting, but if you wish to make such a
21 suggestion, it sounds like a reasonable suggestion, but I
22 don't think it's fair to Mr. Griffis to hear it for the
23 first time at an open session when he hasn't had an
24 opportunity to address it and to respond to it. It doesn't
25 do me any good because I don't know whether it's doable.

1 MR. MIGLIORI: If I may, Your Honor, and I don't
2 want to get in to a bickering with Mr. Griffis about this,
3 but the reality is this has been the number one item on the
4 agenda for a week. This is the first we're hearing about
5 this projection. We'd like to-- we'd like-- we can meet and
6 confer on the issue--

7 THE COURT: Let me make a suggestion to both sides
8 that the fact that the Court sets an agenda ought to-- at
9 least in my mind, what it means for counsel is that you sit
10 down beforehand and, to the extent that you can discuss the
11 agenda items and resolve whatever the issue is, you ought to
12 be presenting that to the Court as an at least partially
13 resolved issue.

14 For instance, this suggestion that there be some
15 prioritization of the production may or may not be workable,
16 but I think that you need to address it in specifics with
17 Mr. Griffis, who understands what the process is and knows
18 whether or not that is doable.

19 But, frankly, it's a waste of everyone's time to
20 simply ask that this be put on the agenda and then have us
21 all sit around for 20 minutes and talk about, you know, what
22 we'd like and what might be, when it hasn't been thoroughly
23 thrashed out amongst yourselves.

24 So I'll put it on next month's agenda. I will
25 strongly urge counsel to try to develop a protocol that will

1 address the needs of Plaintiffs. Now, I'll tell you just my
2 reaction to six more months. I understand you have a lot of
3 documents. I also understand you have an outside vendor
4 working these things and that you are working from a list of
5 terms that you're utilizing to determine which of these
6 documents may be required to be produced, and then of course
7 you have to do a relevance review.

8 But it seems to me that there might be a better way
9 that would address the needs of the Plaintiffs in this case
10 to get these done quicker and that, frankly, may inure to
11 the benefit of the Defendants because, if you reorganize it
12 in such a fashion that it has a logical progression, they
13 get what they want in a more timely fashion without this
14 side having to expend additional hours to get to that point.

15 So that's your homework assignment for July 15th--
16 I almost said January-- July 15th's meeting, if not sooner.
17 If you can work something out sooner, I would encourage you
18 to do so.

19 MR. MIGLIORI: We'll meet and confer on that
20 immediately.

21 THE COURT: Okay.

22 The next item, ex parte contact with Plaintiffs'
23 treating physicians. I thought we had dealt with this
24 issue.

25 MR. MIGLIORI: We have, Your Honor. And we asked

1 that this be put on the agenda, and here, after we put it on
2 the agenda, the Defendants then filed a motion for
3 clarification, so it's actually a pending motion, but I
4 don't think it needs to be. It's a very simple issue.

5 THE COURT: Is it a pending motion that's ripe?

6 MR. MIGLIORI: No. We just received it yesterday,
7 or I think it was the day before, but it's Defendants'
8 motion for clarification.

9 THE COURT: Why don't we let Mr. Griffis address
10 it.

11 MR. MIGLIORI: Well-- okay.

12 MR. GRIFFIS: The motion isn't ripe in the sense
13 that we filed it a couple of days ago, but our understanding
14 from an e-mail exchange over a month ago with Mr. Migliori
15 was that they would file a motion in time for this to be
16 teed up by full briefing for Your Honor today.

17 Mr. Migliori told me that he intended to just raise
18 it orally, and I wanted there to be some briefing before
19 Your Honor, which is why we filed the motion. We can do it
20 without reference to the paper or with reference to the
21 paper, but--

22 THE COURT: Well, you know, if this is-- this
23 already was the subject of a motion, I think.

24 MR. MIGLIORI: And an order.

25 THE COURT: And an order.

1 MR. GRIFFIS: Right. This is a different issue.

2 THE COURT: Well--

3 MR. GRIFFIS: The issue is whether Magistrate
4 Almond's order and your affirmance of that order that we not
5 be permitted to have substantive ex parte contacts with
6 treating physicians also means that we may not send notices
7 of deposition to them and simultaneously CC the Plaintiffs
8 on them and also means that we may not talk to our own
9 consulting experts, who may have Plaintiffs-- who may have
10 treated Plaintiffs that either have already filed lawsuits
11 or who may file lawsuits in the future.

12 That's what the motion addresses. We believe that
13 we're entitled to those nonsubstantive contacts. We don't
14 think they fall within the definition of ex parte contacts
15 at all.

16 THE COURT: Is there an objection to them sending
17 notices?

18 MR. MIGLIORI: Your Honor, there is, and that's why
19 I asked it be put on the agenda, and I never said it was
20 going to be subject to a motion. This was my agenda item
21 because I have examples of notices being sent out from an
22 Attorney David Thomas at Spriggs & Hollingsworth to the
23 doctors directly, and it says, among other things, the date
24 of the deposition, "Please note that documents/materials
25 that the subpoenas and deposition notices require you to

1 bring to the deposition."

2 Now, if you look at the attachment, Your Honor,
3 there is no mandatory language with the admonitions about
4 rights and obligations, ability to object, anything like
5 that of a third party subpoena. It is the face sheet of the
6 subpoena with a letter from a lawyer saying, "You're
7 required to produce these documents referenced in
8 Exhibit A."

9 We have taken, just like every single deposition
10 ever taken, the position that some of the requested items
11 are beyond the scope, have protections, there are legal
12 rights and remedies. And, quite frankly, we worked so hard
13 to get the scheduling of each one of these doctors by direct
14 contact with our own clients' doctors, we worked so hard to
15 build those relationships.

16 Now they're getting direct letters with orders,
17 you're to bring these documents to the thing, without-- they
18 CC us on them after they've sent them, and in some
19 instances, the lawyers-- the doctors are getting their own
20 lawyers and writing back directly. There's no reference to
21 a protective order in place, there's no reference to the
22 ex parte order in place.

23 This simply should be handled through our office
24 for control. The issue of whether or not they have a
25 consulting expert now who may also be a treating, that's a

1 separate-- we can brief that and argue that.

2 THE COURT: I think that's a separate issue. What
3 I think, at the very least, that you ought to be sending a
4 copy of the notice to counsel at the same time.

5 What I will suggest to you is this: In the
6 interim, while this motion is pending, you're to do nothing.
7 And is this Defendants' motion?

8 MR. GRIFFIS: It is, Your Honor.

9 THE COURT: Mr. Migliori, do you have any problem
10 getting your response in on an abbreviated schedule, because
11 I want it taken care of immediately?

12 MR. MIGLIORI: Not at all. No problem.

13 THE COURT: Okay. How-- the motion was filed on
14 the 12th. How soon can you have your response in?

15 MR. MIGLIORI: If I can have till Tuesday, we'll be
16 fine.

17 THE COURT: Tuesday is the 19th?

18 MR. MIGLIORI: No. The 19th is Thursday.
19 Actually, today is Tuesday, so I can do it by the end of
20 Friday, this Friday, whatever the-- the 20th.

21 THE COURT: All right. And I will ask Magistrate
22 Judge Almond to have you in as soon as that response is in
23 so that we can make an order that respects all the parties
24 involved in this.

25 MR. GRIFFIS: Thank you, Your Honor.

1 THE COURT: Number 3 is settlement discussions. I
2 know that we had ten cases that we had selected early on for
3 fast-track ADR, and I understand from Judge Lovegreen that
4 there have been sessions held in--

5 MR. MIGLIORI: Six.

6 THE COURT: -- six of them thus far, and there are
7 four more scheduled for next week, is it?

8 MR. MIGLIORI: Correct.

9 THE COURT: Okay. And, as I understand it from
10 him, none of those have resulted in a settlement?

11 MR. MIGLIORI: That's correct, Your Honor.

12 THE COURT: Okay. But that both sides have
13 requested to continue with the remaining four cases, is that
14 right?

15 MR. MIGLIORI: We have, yes.

16 MR. GRIFFIS: Yes.

17 THE COURT: And I do know that there is a problem
18 in one of those cases, which is the subject of a motion,
19 which I will take up at another time.

20 Part B of that one is a selection of the next ten
21 cases, and these are product failures beyond ring breaks.
22 Mr. Migliori, tell me what you mean by that, and tell me
23 whether you've discussed this with Mr. Griffis.

24 MR. MIGLIORI: Only in the exchange of the agenda.
25 And I think, quite frankly, I think that's one of those

1 issues that you could meet and confer on, but there would be
2 no agreement voluntarily by the Defendants to continue with
3 ten more cases.

4 We would like to begin the process, raise it today,
5 maybe deal with it again in July, going beyond these cases
6 because the Defendants, in our view, continue to suggest
7 that the only cases that are there are the ones that break
8 at the weld. This whole redefinition of the MDL, the same
9 issues keep coming back.

10 And even in the ten cases that are currently before
11 the Magistrate Judge Lovegreen, there are issues about what
12 caused the break and whether or not that should have been
13 part of this group or not. And to just isolate the one type
14 of failure, which is one component part of the litigation--

15 THE COURT: There was a reason why we did it that
16 way, as you well know. Let me make a suggestion to you
17 because what I don't want to have happen is that we have
18 this amorphous, it's sort of-- we have ring breaks and then
19 we have everything else.

20 We had the ring break cases because those were,
21 even Defendants agreed, part of the MDL at the time that we
22 needed to identify these cases early on.

23 We now have included additional cases beyond ring
24 breaks, and we went through that exercise, I recall. Those
25 of you who are the big group here weren't there, but I

1 actually had counsel produce to the Court samples of the
2 patches so that I could understand what we're all talking
3 about and, as a result of that exercise, define the MDL in
4 terms of which of the patches were involved.

5 So what I would suggest that you do, Mr. Migliori,
6 for the July 15th meeting is this, that you identify, as we
7 did, by referring to the patches themselves and then
8 identify the alleged defect.

9 MR. MIGLIORI: Okay.

10 THE COURT: That way, it's something that I can
11 understand what you're talking about, instead of this
12 amorphous sort of everying else, and I think counsel for the
13 Defendants will at least then understand which of those
14 cases you would like to next address as a representative
15 sample. And that way, Mr. Kirby won't come in with a
16 knee-jerk reaction and say no to everything.

17 MR. MIGLIORI: Well, we will, Your Honor, and just
18 to--

19 THE COURT: I know that he does that all the time
20 anyway.

21 MR. MIGLIORI: All the time.

22 THE COURT: No. But 90% of the time that he does,
23 you know, maybe we can get him to back off that.

24 MR. MIGLIORI: And I just want to make this point,
25 as well, Your Honor, because one of the ways-- if we have

1 three, four or six months waiting for the liability
2 production, one of the things that did prove true with these
3 bellwether ADR cases was that it was productive time. We
4 did get to focus with sales representatives and doctors and
5 get some work done in the meantime.

6 So my purpose here, and taking the Court's
7 instruction, I'll get an appropriate list with alleged
8 defects, but my purpose here is to not lose valuable time
9 where we could be doing something else while we're waiting
10 for this massive production, as well.

11 THE COURT: And I understand that working up these
12 ten cases was very intensive work on both sides' parts. So
13 I'm not suggesting, Mr. Griffis, and I don't want you to
14 leave here today thinking that, by July 15, we will have
15 identified the next ten and that you're going to go forward
16 on those next ten, but I think, in order for us to even
17 entertain the subject, we-- you and I, and Mr. Migliori,
18 too, needs to know precisely what it is that he's talking
19 about, which cases.

20 MR. GRIFFIS: Your Honor, Mr. Migliori has somewhat
21 incorrectly anticipated my reaction to this proposal. We
22 have no problem with the selection of ten additional cases.
23 We disagree that they should be product failures beyond ring
24 break cases.

25 We thought that the process of working up the cases

1 that were selected by the Plaintiffs for early neutral
2 evaluation was a tremendously valuable one. We're working
3 through that discovery process, and we believe that
4 continuing that process with ten more ring break cases would
5 also be extremely valuable.

6 We also thought that the mediation today, I can't
7 say any more than this sentence without violating the
8 Court's rules on confidentiality, but we thought that the
9 early neutral evaluation that we have received to date was
10 extremely valuable and illuminating.

11 We believe, as Mr. Migliori said, that this-- the
12 core of this case is about ring break cases. That is the
13 way we are looking at it. Now, we have gotten a lot of
14 valuable information from the process of working up these
15 ten cases, and, as Your Honor conceived it initially, this
16 was to be early neutral evaluation, which we could then
17 apply the principles of to other cases.

18 In order to do that, we need to know what the
19 universe of ring break cases is, so what I would ask--

20 THE COURT: Well, let me just interrupt you for one
21 second, Mr. Griffis, because we have had many, many
22 discussions early on-- we're a year in to this now-- as to
23 precisely what the contours of this MDL are. And I recall
24 very distinctly those early conversations we had where your
25 side was taking the position that these are just ring break

1 cases that are included within the MDL. The Plaintiffs had
2 a much more expansive view.

3 And in reading over those orders of the MDL, it was
4 very clear to me that they were not limiting this MDL to
5 just ring break cases.

6 MR. GRIFFIS: Yes, Your Honor.

7 THE COURT: That was the purpose of the exercise we
8 went through where you provided a very, very helpful
9 tutorial to me, just showing me these things so that we
10 could figure out how they work and how they fail.

11 So, with all of that in mind, I would encourage you
12 to start thinking beyond ring break because we're well
13 beyond that now.

14 MR. GRIFFIS: When I say, Your Honor, that we
15 believe that this litigation is about ring breaks, I'm not
16 referring to Your Honor's rulings about the scope of the
17 MDL, which I fully understand and appreciate.

18 There's no question that the MDL encompasses cases
19 beyond ring break cases, and I don't mean to dispute that in
20 any way. I'm talking about our assessment of case
21 valuation. We believe that there will be a very large
22 majority of cases in this litigation where Plaintiffs'
23 theories are so broad, that they would encompass hundreds of
24 thousands to millions of products that have been implanted
25 in patients for decades.

1 And I'm not going to get in to detail about the
2 causation arguments that have been foreshadowed by-- in
3 discussions with Plaintiffs' counsel, but it would expand
4 the scope of the cases that we're looking at to the point
5 where we're not able to coherently address things, and I
6 think it would diffuse everyone's attention.

7 THE COURT: Well, that's why I've suggested to
8 Mr. Migliori that he try to define the universe of what he's
9 talking about by describing in excruciating detail, if he
10 needs to, the type of failure that he's talking about, so
11 that you can understand it. Right now, you're responding to
12 this sort of-- I understand what your problem is. You've
13 got, is it now over 700 separate--

14 MR. MIGLIORI: 750. Yes, Your Honor.

15 THE COURT: -- cases filed, and you have the gamut
16 of claims, some of which are indecipherable on the face of
17 the complaint, some of which are much more specific.

18 So I think that, right now, if we're going to go
19 down this road, in the very first instance, Plaintiffs'
20 counsel needs to identify with some specificity precisely
21 what sort of failures they're talking about so that you can
22 know whether it's in or it's out, and then you can make an
23 intelligent response. Right now, I don't think you can,
24 other than to say you'll wait to see what you get from them.

25 MR. GRIFFIS: Well, my other-- my requests are

1 separable. There's-- one was that we focus on ring break
2 cases for the next ten cases that we work up, and Your Honor
3 is saying that--

4 THE COURT: Why do we need to do that when we've
5 already done ten?

6 MR. GRIFFIS: Because I think-- I can't answer that
7 question, Your Honor, without--

8 THE COURT: They were representative.

9 MR. GRIFFIS: I can't answer that question,
10 Your Honor, without violating the alternative dispute
11 resolution plan. I suppose we'll be briefing that issue and
12 discussing it.

13 THE COURT: Well, before you brief it, why don't
14 you save it for next month's meeting, and we can do an
15 in-camera review.

16 MR. GRIFFIS: But my request is this with regard to
17 the ring break evaluation that we've done and are in the
18 process of continuing to do next week that we think was very
19 valuable, we need to know what universe of cases that
20 valuable information applies to, and so our request is the
21 Plaintiffs provide us with the list of cases that they
22 believe, Plaintiffs' counsel believes and represents and
23 will be fighting as ring break cases.

24 THE COURT: But that's a different issue. That's a
25 different issue, and that doesn't answer the question of why

1 you want to do another ten ring break cases. So I think, at
2 the very least, you need to talk together with Mr. Migliori,
3 and if it would be helpful, at next month's meeting, why
4 don't we address this issue again of whether or not we can
5 identify ten additional cases that would be fast-tracked for
6 purposes of ADR evaluation and then to talk about a schedule
7 of those. But I don't think we can resolve this today.

8 MR. GRIFFIS: All right, Your Honor. Thank you.

9 MR. MIGLIORI: Your Honor, just so the record's
10 clear, we'll produce the list within two weeks with a
11 description of defect--

12 THE COURT: Yeah, I think he's asking really for
13 two kinds of lists.

14 MR. MIGLIORI: I was just referring to your list
15 that you had asked for, which was a list of cases that we
16 propose with certain types of detailed description of
17 failure.

18 We have a good sense these cases will continue to
19 mediate, even though they haven't been resolved, so we've
20 got ten good wide-spectrum, young-old, wide-spectrum cases
21 now to get an understanding of the ring break issue. This
22 would be to focus on other permeations of the dual-mesh
23 technology with rings. And we'll be glad to do that within
24 two weeks. We'll meet and confer before the 15th.

25 With respect to the question of really getting back

1 to their position and trying to give them all the
2 information about the cases they see have value, the ring
3 breaks, the way they define it, they have the Plaintiff
4 factory process, and that's been ongoing from the beginning,
5 so I think they have that. And, if they don't, they have
6 the process of deficiency letters to address it, so I don't
7 think that that's so much an issue.

8 THE COURT: But I think what he's looking for from
9 you in this next go-around is a more specific description of
10 the type of failure that you're talking about, and unless
11 you define that for him, he's really at a disadvantage, and
12 I understand that.

13 MR. MIGLIORI: It won't be a surprise to him.
14 We've been talking about it for months now in our theory.
15 They don't agree with it, but we will do it explicitly and
16 in writing.

17 THE COURT: And then you need to share that with me
18 because--

19 MR. MIGLIORI: We will.

20 THE COURT: -- I'm not part of those discussions.
21 That's why I say I think the perfect time to do that is
22 July 15 in an in-camera session. So for those of you who
23 are here today, don't look for any discussion about that in
24 the public documents.

25 Moving on to Item No. 4, I hope-- I had intended to

1 send to counsel a request by Mr. Morowitz, who is a member
2 of the Rhode Island Bar, who apparently has been in a
3 terrible accident and requested excusal for the next six
4 months, he had several cases that are part of the MDL. Did
5 you all get that?

6 MR. GRIFFIS: No, Your Honor.

7 THE COURT: You didn't get that?

8 MR. MIGLIORI: I don't think we received it,
9 Your Honor, because we would have passed it on. But I can
10 tell you that--

11 THE COURT: I thought we sent it out.

12 MR. MIGLIORI: -- we've actually promised him in
13 another litigation in the State Court that we'll protect his
14 interests wherever we can and have absolutely no problem
15 with this.

16 THE COURT: Okay. Mr. Griffis, we will get you a
17 list of the cases that he's on.

18 MR. GRIFFIS: All right.

19 THE COURT: Yeah, because I don't think you can
20 access his excusal through the electronic system, but we'll
21 get that to you.

22 And, Mr. Migliori, you said you didn't get it? I
23 thought we had sent it out to you.

24 MR. MIGLIORI: We didn't. Leo would be the first
25 to know, and I don't think we did.

1 THE COURT: Okay. Barbara, would you be sure to
2 send a copy of Mr. Morowitz's request for excusal because
3 that contains the cases that he has entered an appearance on
4 that are part of the MDL. There is one additional one that
5 is not a part of the MDL, and you can ignore that. But I
6 wanted to make sure that both sides knew what his status is,
7 and you may even want to-- I think it was just his secretary
8 who is keeping the office open these days, so you may want
9 to just check with her to see what his situation is.

10 MR. MIGLIORI: We've been in contact with his
11 office and with his national counsel because he's got
12 several cases in both systems.

13 THE COURT: Okay.

14 MR. GRIFFIS: I just wanted to add one thing for
15 the record about the last item, Your Honor.

16 THE COURT: I'm sorry. Go ahead.

17 MR. GRIFFIS: We'll also meet and confer with
18 Mr. Migliori about our request for a list of the cases that
19 the Plaintiffs' counsel believe are ring break cases because
20 we don't believe the Plaintiff fact sheets adequately
21 address that.

22 THE COURT: Okay. Well--

23 MR. GRIFFIS: But we'll have that ready for you for
24 next time.

25 THE COURT: Well, I mean, I don't think it's-- if

1 you can't figure it out from the fact sheets, I think we
2 were hoping that you could, but if you can't, then I don't
3 think it should take very much for Mr. Migliori to put
4 together that list for you.

5 MR. MIGLIORI: I'm not sure. More beyond the
6 direct question, is this a ring break, I can answer. But
7 I'll pursue whatever deficiencies he feels--

8 THE COURT: I think he wants a list, alphabetized.

9 MR. MIGLIORI: We'll get that.

10 THE COURT: Right?

11 MR. GRIFFIS: That would be nice, yes, Your Honor.

12 THE COURT: Okay.

13 The next item, Item No. 5, is something that
14 occurred in a case that Magistrate Judge Almond dealt with,
15 and I've asked him to address that this afternoon.

16 MAGISTRATE JUDGE ALMOND: I'll start out by saying
17 this is a fairly minor issue, but I thought I would get it
18 out there on the table. The case management order, as I
19 understand it, allows counsel to contact the Court during a
20 deposition, even an out-of-state deposition, if there's some
21 dispute.

22 And I did receive a call, Mr. Griffis, you were
23 part of that back on May 30th. It had to do with the
24 dispute over the scope of questioning of a treating
25 physician at a deposition out in Missouri. The substance of

1 the dispute is not my issue. We discussed it. I don't know
2 if I was helpful or not helpful, but I didn't hear from them
3 about it again, so I would assume it's a dead issue.

4 The issue I have is the attorney who was on the
5 Plaintiffs' side on the phone, I didn't know who that was,
6 and as the call came in and he argued the matter on the
7 phone, I had not-- I wasn't familiar with him, and I hadn't
8 seen his name on any pleadings, so I got on the computer,
9 and he had-- he was not appeared-- had not appeared in the
10 main case, the 1842, and he had not appeared in the
11 underlying case, the Missouri case, the Edgar case.

12 Then I looked further, and I went on your firm's
13 website, Mr. Migliori, and I saw who he was, and so we
14 proceeded with the conversation, and I didn't bring the
15 issue up. But I wasn't really comfortable not knowing who
16 he was or not having him entered an appearance.

17 And the issue was he was apparently, or somebody at
18 the deposition, I assume there were attorneys on the ground
19 in Missouri who were entered in that case, and I understand
20 that they don't have to enter here if they're entered in
21 that case.

22 But they weren't on the phone. And it was
23 involving a request-- there were some instructions, I
24 believe, for the deponent not to answer questions, which, as
25 you know, could result in further motion practice or

1 requests for sanctions. So I really wasn't comfortable
2 hearing argument, and essentially your associate was making
3 an oral motion, in effect, to restrict the questioning at
4 the deposition. And if he was wrong or I were wrong and it
5 resulted in a later request for sanctions, I'm just not
6 comfortable.

7 MR. MIGLIORI: Sure.

8 MAGISTRATE JUDGE ALMOND: So I wanted-- if you
9 could address the protocol of who I might expect to hear
10 from, and my preference, to have people who are actually
11 entered, it's not a big deal to enter in a case, but to have
12 people who are actually formally entered and within the
13 Court system who are going to be participating.

14 MR. MIGLIORI: All right. And I appreciate that.
15 And for the-- the attorney is Vincent Greene. He's an
16 associate of my office. He's involved in every one of these
17 cases intimately.

18 And maybe some of the confusion comes from the fact
19 that there is a separate practice and procedure order that
20 allowed for representation beyond the case of people from
21 the lead-- leadership because of the global issues involved;
22 that is, there is an order that says that there can be four
23 attorneys present at each deposition because this is an MDL
24 and there may be common issues.

25 And, in this instance, the common issue, the

1 substantive issue, was a treating physician in a particular
2 case where that treating physician was also retained as an
3 expert in materials relating to the total litigation. So
4 the leadership--

5 MAGISTRATE JUDGE ALMOND: Which practice and
6 procedure order is that?

7 MR. MIGLIORI: We can get you the number. It was
8 subsequent to the CML. And Leah will probably get it before
9 I finish.

10 MAGISTRATE JUDGE ALMOND: But my concern then would
11 be, if I don't know who these people are and they're not
12 admitted to practice-- say I get somebody on-- I doubt this
13 is going to happen, but say I get somebody on the phone who
14 engages in inappropriate behavior at the deposition and
15 inappropriate behavior with me on the telephone and I don't
16 know who they are--

17 MR. MIGLIORI: Sure.

18 MAGISTRATE JUDGE ALMOND: -- they're out in the
19 field, if they're not admitted to practice before this
20 Court, if they're not admitted to practice to the Bar of
21 this Court or entered in any of our cases, am I going to
22 have to search the Internet to try to find out who this
23 person is to take action?

24 MR. MIGLIORI: He is--

25 MAGISTRATE JUDGE ALMOND: No, I'm not talking about

1 him.

2 MR. MIGLIORI: Just for the record, but he is a
3 member of this Bar and all that.

4 MAGISTRATE JUDGE ALMOND: He has been in this Court
5 before, and I've subsequently found that out, so that his
6 participation is not the issue. I'm just raising the issue
7 more generally.

8 MR. MIGLIORI: We can put another procedure in, if
9 you like, that we identify on the record particular people
10 that may be covering. But we were acting pursuant to this
11 Plaintiffs' Steering Committee ability to choose four people
12 to attend the deposition, and we tried to limit it just so
13 it wouldn't get out of control.

14 And for the Court's benefit, it could have gotten
15 even worse from the Court's perspective because the
16 Defendants have been cross-noticing every deposition with
17 every single State Court case, and lawyers who are not
18 admitted here were showing up to defend their individual
19 clients' interests.

20 In the State Court, we had that practice
21 terminated; that is, they can't be cross-noticed. So when a
22 deposition takes place in these cases, they are MDL cases,
23 we will not send anybody who is not admitted to practice
24 here or pro-hoc'd in to this case. We make that affirmation
25 now.

1 If there is a procedure of actually formally filing
2 an appearance in the MDL as PSC members, we'd be glad to do
3 that, or we can just simply provide the Court a list of the
4 people that are on the PSC beyond the firm names, which I
5 think the order just lists the name of each firm.

6 But there is a list of about 30 or 40 people beyond
7 what's in this room today, people working very hard to get
8 documents coded, to cover depositions and the like. We'll
9 do whatever the Court-- we respect the Court's concern.

10 MAGISTRATE JUDGE ALMOND: Well, I don't want to be
11 hypertechnical and require you to amend practice orders. If
12 you could send me, outside the docket, a list of people and
13 firm names who may be in this position so that--

14 MR. MIGLIORI: Sure.

15 MAGISTRATE JUDGE ALMOND: It's very difficult, as
16 you can imagine, to get off the bench and open up your lunch
17 bag and get a call from a deposition and then to not know
18 who the people are, in addition to having no notice of what
19 the issue is, it's a little unnerving. So if you could give
20 me a list of-- I assume there's a smaller group on the
21 defense side, and if you're there, I'd know who you are.

22 But it's just not comforting to not know who the
23 person is. So if you could provide me with a list of who I
24 might be hearing from, that would I think address the issue
25 for now.

1 MR. MIGLIORI: We'll organize a deposition coverage
2 list and keep it updated for you regularly.

3 MAGISTRATE JUDGE ALMOND: All right. I appreciate
4 that.

5 THE COURT: And in the unlikely event that
6 Magistrate Judge Almond is not available and I am, please
7 send me this-- a copy of the same list.

8 MR. MIGLIORI: Of course.

9 MR. GRIFFIS: Your Honor, I just want to note that
10 we do intend to file a motion with regard to that
11 deposition. We didn't want to do so because it was one of
12 the cases that was queued up for-- as part of this early
13 neutral evaluation and we didn't want to file motions in to
14 that process, so we have held off doing so, but we do intend
15 to file one.

16 THE COURT: Okay. Next item, there is a pending
17 motions list. I notice that there is only one which is
18 recently ripe, and that's the one, Defendants' motion to
19 dismiss Count IV of that first amended consolidated class
20 action complaint.

21 Would it be helpful to counsel if I were to
22 schedule that for argument on the 15th so that we can take
23 care of it the same day that you're going to be here for the
24 meeting?

25 MR. MIGLIORI: Yes.

1 MR. GRIFFIS: That would be fine, Your Honor.

2 THE COURT: Would that be helpful?

3 MR. MIGLIORI: Very much, Your Honor.

4 THE COURT: Okay. Barbara, please remind me to
5 look at the calendar, and we'll set that up for that date.

6 And with respect to any of these others, it looks
7 like none of them are fully briefed, but if any of those
8 fall in to that category of having been fully briefed before
9 the 15th and it gives you enough notice, we'll try to do the
10 same thing.

11 MR. GRIFFIS: Your Honor, with regard to the third
12 item on the amended-- you probably received--

13 THE COURT: The motion to show cause?

14 MR. GRIFFIS: -- an initial list and an amended
15 list, yes. With regard to the motion to show cause, that is
16 fully briefed. There were-- we filed a motion in six cases
17 to show cause why cases should not be dismissed for failure
18 to provide a Plaintiff fact sheet, and the time expired for
19 reply in five of those cases, and they are due to be
20 dismissed.

21 As to the sixth one, the Plaintiffs did file a
22 response saying that we didn't give you a Plaintiff fact
23 sheet for Mr. Ramos because he wasn't available until now,
24 and we filed a reply saying that, that wasn't sufficient
25 disclosure to the Court of the grounds for the Court to be

1 able to evaluate whether there was excusable neglect or
2 inexcusable neglect with regard to that case.

3 THE COURT: So, other than Ramos--

4 MR. GRIFFIS: The others are due to be dismissed.

5 THE COURT: -- there's been no response?

6 MR. GRIFFIS: That's right.

7 MR. MIGLIORI: If I may, Your Honor, given the
8 remedy being sought, we have tried to liaise with all of
9 these firms and individuals, I would ask that we set them
10 for hearing on the 15th, and it would give us a chance, as
11 liaison counsel, to reach out and make sure they realize the
12 consequence of the lack of filing.

13 THE COURT: Why don't we do that, Barbara. Again,
14 we'll get you a time on that. It won't immediately precede
15 this. I think you'll probably want to go have some lunch,
16 so we'll check the schedule and see what works.

17 MR. MIGLIORI: Great. Thank you.

18 MR. GRIFFIS: Thank you, Your Honor.

19 THE COURT: Okay. And this is very helpful, so
20 thank you for producing it and keeping it up to date so that
21 I have a pretty handy device to know what's pending.

22 Other than to set forth the date of the next
23 conference, that really is the end of today's agenda. I
24 don't want to cut off any of our visiting attendees, so if
25 there are any matters that you would like to address, please

1 let me know now.

2 Seeing no hands, I take it everyone is happy.
3 That's an unusual circumstance. Is there anything else you
4 had?

5 MAGISTRATE JUDGE ALMOND: Yeah, just a scheduling
6 issue. On the motion you've asked me to handle on the
7 ex parte contacts, you said you were going to respond to
8 that by Friday.

9 MR. MIGLIORI: We will.

10 MAGISTRATE JUDGE ALMOND: Are you going to want an
11 opportunity to reply to that, Mr. Griffis?

12 MR. GRIFFIS: I expect so. We can do so by
13 Wednesday.

14 MAGISTRATE JUDGE ALMOND: And do you-- I'll hear
15 from both sides on this. Do you feel the need to come in to
16 argue this? Can it wait till the 15th, or-- I don't want to
17 cause you unnecessary travel.

18 MR. MIGLIORI: Most of these-- in fact, all of
19 these were incident to the bellwether process, and those
20 depositions are in the can, if you will, so we don't--
21 there's nothing pending. And the Court's order, as I
22 understand it, is that there will be no such contact until
23 this is ruled on. There are no scheduled depositions for it
24 to apply to, so my feeling is the 15th is fine, or we could
25 even let you know in anticipation of the 15th whether we'd

1 be comfortable resting on the papers.

2 MR. GRIFFIS: It's an early neutral evaluation
3 process, not a bellwether process.

4 THE COURT: I'm glad to see that you all agree on
5 so much.

6 MR. GRIFFIS: Yes. Mr. Migliori's occasionally
7 reasonable, and then I agree with him.

8 With regard to the issue of not issuing notices of
9 deposition, I think Mr. Migliori's exactly right, there
10 aren't any depositions that are pending, and so--

11 MAGISTRATE JUDGE ALMOND: So then why-- my question
12 is: Why should you run around in circles and submit
13 something by Friday and next Wednesday if you don't want to
14 argue it until the 15th?

15 THE COURT: Because I thought they had things
16 pending.

17 MR. MIGLIORI: She asked if we could do it
18 expedited.

19 MAGISTRATE JUDGE ALMOND: No, no. I know. I'm not
20 questioning the Chief Judge.

21 THE COURT: Well, then use the usual--

22 MR. GRIFFIS: But Your Honor's-- we do intend to
23 keep talking to our consulting experts in the interim, and
24 we don't understand ourselves to be under a bar from doing
25 that. It's something that we've been doing all along, and

1 we intend to continue to do so because any order to the
2 contrary would shut us off from having experts.

3 MR. MIGLIORI: If I may, Your Honor, if we could
4 have-- I'm okay with that if we can have the names of these
5 particular experts, no other information, but I'd like to at
6 least know which of our clients have direct communications
7 now with Defendants.

8 MR. GRIFFIS: We shouldn't have to disclose the
9 names of consulting experts.

10 THE COURT: I knew that we were going to be able to
11 resolve this. That issue does need to be addressed very
12 quickly. And has that issue been briefed from your side?

13 MR. MIGLIORI: No. We just got that two days ago.
14 So that's why I would like to keep this expedited. I'd like
15 a stay to apply to that contact for now because we've got
16 now seven months of waiting for product. They don't need to
17 consult in the next month.

18 THE COURT: But I think, at the very least, we need
19 to resolve this issue regarding the consulting experts. If
20 the Defendants are not willing to give up the names so that
21 the Plaintiffs can know who it is that we're talking about,
22 then we'll have to have Judge Almond resolve this by way of
23 an order.

24 MR. GRIFFIS: What we are willing to do is agree
25 not to speak to consulting experts about any particular

1 person whom they treated, which is what we do anyway.

2 THE COURT: I don't think that's going to work,
3 Mr. Griffis.

4 MR. GRIFFIS: All right.

5 THE COURT: So the Court will intervene and give
6 you an order that you may or may not like, but, in any
7 event, you'll know what the marching orders are.

8 MAGISTRATE JUDGE ALMOND: And so stay on that
9 schedule of Friday-Wednesday, and let me know if you intend
10 to rest on the papers or you want an argument, and I can try
11 to get an argument scheduled as soon as possible.

12 MR. MIGLIORI: We'll receive the papers on
13 Wednesday, and we'll let you know on Thursday whether we
14 think argument's necessary. And, in the meantime, just for
15 clarification, there is to be no contact with consulting for
16 this two-week interim?

17 THE COURT: Until there's an order from the Court,
18 right.

19 MR. MIGLIORI: Okay. Thank you, Your Honor.

20 THE COURT: Was there anything else that you wanted
21 to raise? All right. Well, for those of you who came from
22 afar, have a safe trip back, and we'll see you-- we're going
23 to do these, I think, every third meeting we decided would
24 be an open meeting, so perhaps in September will be the next
25 time we'll have-- September or October. I'm not sure. In

1 any event, it'll be posted on the website, and you can keep
2 touch with counsel who will know what's going on.

3 Thank you very much.

4 MR. MIGLIORI: Thank you, Your Honor.

5 MR. GRIFFIS: Thank you, Your Honor.

6 (Court was concluded at 1:55 p.m.)
7
8

9 C E R T I F I C A T I O N
10
11

12 I, Debra D. Lajoie, RPR-RMR-FCRR-CRI, do hereby
13 certify that the foregoing pages are a true and accurate
14 transcript of my stenographic notes in the above-entitled
15 case.
16
17
18

19 /s/ Debra D. Lajoie
20
21

22 7/15/08
23
24
25

Debra D. Lajoie, RPR-RMR-FCRR-CRI