

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

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF RHODE ISLAND

\* \* \* \* \*

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

\* \* \* \* \* Providence, RI

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

(Open Session)

APPEARANCES:

DONALD A. MIGLIORI, ESQ.  
 VINCENT L. GREENE, ESQ.  
 LEAH J. DONALDSON, ESQ.  
 Motley Rice LLC  
 321 South Main Street  
 Suite 200  
 Providence, RI 02903

KIRBY T. GRIFFIS, ESQ.  
 JOE G. HOLLINGSWORTH, ESQ.  
 Spriggs & Hollingsworth  
 1350 I Street, N.W.  
 Washington, DC 20005

MARK T. NUGENT, ESQ.  
 THOMAS M. ROBINSON, ESQ.  
 Morrison Mahoney LLP  
 10 Weybosset Street  
 Suite 900  
 Providence, RI 02903-7141

1 APPEARANCES (Continued):

2 KATHERINE R. LATIMER, ESQ.  
3 1350 I Street, N.W.  
4 Washington, DC 20005

5 TERESA C. TORISEVA, ESQ.  
6 Wexler Toriseva Wallace LLP  
7 1446 National Road  
8 Wheeling, WV

9 Court Reporter: Debra D. Lajoie, RPR, FCRR, CRI

10  
11 Proceeding reported and produced by computer-aided  
12 stenography  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

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